

A two year study has found that the practice and effectiveness of industry self-policing varies widely across Europe.

Co-Regulation in European Media and Internet Sectors

The PCMLP (Programme on Comparative Media Law and Policy) at Oxford University recently completed a two-and-a-half year empirical investigation into regulatory change with its final report for DG Information Society, the IAPCODE (Internet Action Plan Codes of Conduct) study of May 2004. This article outlines the main findings and research questions answered and explored by the Report.

PCMLP adopted an overtly empirical and applied methodology to the IAPCODE project, recognizing that co- and self-regulation result from institutional settlements and negotiations between various stakeholders (corporate, government and viewers/consumers). By tunneling down from legislation and regulation into self-regulatory codes of conduct voluntarily agreed by

industry, and supervised by user groups and regulators, PCMLP was able to build a substantial capacity for analysis of such codes, and therefore the real commitments agreed to by actors. After the policy debates, and consequent concrete codes agreed to, PCMLP recognized a vital further empirical investigative stage – into codes in action, the real enforcement behaviour of self-regulated actors. It was here that the real differences between shades of regulation was seen, in the development of the practice and culture of compliance with voluntary self-regulation by actors. Over the period 2002-4, across media sectors and national borders, the PCMLP investigation uncovered huge variety in regulatory effectiveness, and therefore real-life examples of regulation that varied from more-or-less state-sanctioned and indeed required regula-

tion that was closer to command-and-control than even co-regulation, across varieties of co-regulation, to an almost pure form of self-regulation.

CO-REGULATION OF THE MEDIA IN EUROPE

Legal and regulatory certainty is a pre-requisite for a vibrant, innovative and economically strong EU multimedia industry. Effective content regulation is necessary to protect the public interest in cultural and linguistic diversity, rights to information, protection of minors and human dignity and consumer protection in such areas as advertising and tel-sales. The European Commission recognizes that co-regulation can be used as a means to implement objectives set by

For more information about this study see www.selfregulation.info

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Directives and has outlined in the White Paper on European Governance a set of conditions under which it will consider the use of co-regulation. Co-regulation is a pragmatic response to the common perception that regulatory frameworks must quickly adapt and continually be optimized to maintain relevance and effectiveness to rapidly evolving markets.

European debate led to a Recommendation on co-regulation in 1998 that continues to serve as the Commission's policy towards Internet content regulation.¹ Further Commission legal instruments including the E-Commerce Directive of 2000 have maintained the co-regulatory approach to new media regulation laid out in the 1998 Recommendation². The European Commission states: "Whereas in traditional broadcasting (analog or digital) the individual broadcaster is easily identifiable, it is difficult and sometimes impossible to identify the source of content on the Internet. Access to harmful and illegal content is easy and can even occur without intent. In addition, the volume of information in the Internet is massive in comparison to broadcasting."³ The European Commission has readdressed co-regulation of the media in 2004:

The Recommendation on the protection of minors has a cross-media approach and emphasizes the cross-border exchange of best practices and the development of coregulatory and self-regulatory mechanisms. (emphasis in original).

It explains how best to achieve the regulatory goals:

A co-regulatory approach may be more flexible, adaptable and effective than straight forward regulation and legislation... Co-

regulation implies however, from the Commission's point of view, an appropriate level of involvement by the public authorities.

End-user tools such as filtering or the famous 'V-chip', imposing rules on children's use of computer games and the World Wide Web, and reporting inappropriate or illegal content to hotlines established by Internet companies have had only limited success.

Responsive regulation reflects a more complex dynamic interaction of state and market, a break with more stable previous arrangements.

There are markets for regional and/or national television, radio, newspapers, telecoms, satellite and cable pay-TV, all recognized in case law. The use of data-compression and increases in cost-effective bandwidth such as Digital Subscriber Lines (DSL) allows more and better point-to-point delivery⁴. In this environment flexibility of regulatory frameworks will be of paramount importance to ensure that regulators meet the current and future needs of the market place and maintain the confidence of consumers through the protection of public interests. The dynamic development of the sector and its regulatory landscape, lacks clarity as to the nature of the co-regulatory/self-regulatory approaches taken, the areas where they are applied, consistency with public interest objectives, impact on the single

market and ultimately, effectiveness in achieving regulatory objectives.

THEORETICAL AND METHODOLOGICAL FRAMEWORK –WHAT IS CO-REGULATION?

Co-regulation expresses a form of regulation which is neither state command-and-control regulation in its bureaucratic central or IRA (Independent Regulatory Agency) specialized functions⁵, but is also not 'pure' self-regulation as observed in industry-led standard setting. The state, and stakeholder groups including consumers, are stated to explicitly form part of the institutional setting for regulation. Co-regulation constitutes multiple stakeholders, and this inclusiveness results in greater legitimacy claims. However, direct government involvement including sanctioning powers may result in the gains of reflexive regulation – speed of response, dynamism, international cooperation between ISPs and others – being lost. It is clearly a finely balanced concept, a middle way between state regulation and 'pure' industry self-regulation. Ayres and Braithwaite state:

Practical people who are concerned with outcomes seek to understand the intricacies of interplays between state regulation and private orderings... administrative and regulatory practice is in a state of flux in which responsive regulatory innovations are politically feasible.

Responsive regulation reflects a more complex dynamic interaction of state and market, a break with more stable previous arrangements. Teubner states: "European conceptions of law as "moving away from the idea of direct

societal guidance through a politically instrumentalised law ... Instead, reflexive law tends to rely on procedural norms that regulate processes, organisation, and the distribution of rights and competencies"⁶. This applies to other globalising phenomena than digital TV and the Internet, for

encompasses a range of different regulatory phenomena, which have in common the fact that the regulatory regime is made up of a complex interaction of general legislation and a self-regulatory body. The following table illustrates the range of possible co-regulatory architecture, and therefore

WHAT CAN BE LEARNT FROM EXISTING STUDIES?

There have been many studies of self- and co-regulation in the media sector since Bodewyn's pioneering 1988 study of advertising⁸, notably those of PCMLP, (www.selfregulation.info), of PCMLP faculty and associates independently

Example of code	Demand for code from	Code drafters	Code enforcers	Sanctions
Video Standards Council (UK)	Industry/public	Industry with public representation	Industry board with public involvement	Civil penalties for improper video rental
ICTIS (UK)	Industry/public	Industry	Industry/public board with recourse to Ofcom	Fines, with backup powers via Ofcom to telecoms providers
Italian Internet Service Providers Association	Industry/Government	Government	Industry	Industry (exclusion from industry association)

Table 1: Possible Co-regulatory Architectures

instance financial and environmental law, where negative externalities are highlighted for public concern. In advertising co-regulation, protection of minors and consideration of broadcast regulation's extension to new media including the Internet and 3G/UMTS mobile phones, co-regulation is a vitally important concept to define, refine and examine against a rigorous methodological template.

Price and Verhulst assert the limits of both government and private action in this sphere, and assert the interdependence of both – there is little purity in self-regulation without at least a lurking government threat to intervene where market actors prove unable to agree. They draw on empirical studies of advertising and newspaper regulation, demonstrating that in areas of speech, the Internet included, government preference in liberal democracies is for co-regulation⁷.

The term 'co-regulation'

potential complexity.

The varying interests of actors result in different incentives to cooperate or attempt unilateral actions at the various points of the value chain. Without regulation responsive to both the single European market and the need for constitutional protection of freedom of expression and protection of minors at national levels, co- and self-regulatory measures cannot be sufficiently responsive to economic and cultural environments to be self-sustaining.

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and with collaborators, of Braithwaite and collaborators in Australia and the United States, while shorter country- or sector-specific contributions have been published in the past five years in IRIS.

Schulz and Held have investigated co-regulation in the German context, specifically in the case of protection of minors⁹. In their view, self-regulation in Anglo-American debate is concerned with "reconciliation of private interests" whereas their formulation – regulated self-regulation¹⁰ – is indirect state regulation based on constitutional principles. It is the combination of "intentional self-regulation" – the actions of market actors, whether in social or economic settings – with the state sanction in reserve which results in self-regulation which is 'regulated' by the possibility of state intervention. At the Birmingham 'Assizes Audio-visuals' in 1998, the formulation used was: "Self-regulation

that fits in with a legal framework or has a basis laid down in law".

The term 'co-regulation' also gives a sense of the joint responsibilities of market actors and state, in the activity under investigation. It has been used by the UK's telecom regulator to suggest a state role in setting

with reporting requirements), but could involve the setting of an international standard, as increasingly occurs in accountancy, for instance. At a minimum, dedicated budgetary and personnel resources, with activity reports, would be required to demonstrate regulatory commitment. The

trated in the application of the 1997 Telecoms Act and 1992 Broadcasting Services Act, where four types of regulatory scheme can be identified:

However, there are clearly nuanced approaches that industry can take, in choosing the menu of 'regulated self-regulation' to adopt.

The vital lessons from co-regulatory studies are:

- Consistency of methodology is vital for comparative data capture to be accurate, between sectors as well as national examples. This depends on consistency of approach between researchers;

- Iterating and modifying the template can only be conducted prior to the study, by taking test cases to pilot the methodology;

- Co-regulation is a moving target – the national and sectoral templates for co-regulation have to be modified following each survey in order to encompass the different and dynamic practices of co-regulation in each geography and sector examined. This makes continued experience of designing and implementing co-regulatory surveys essential – law in books is of little assistance in so informal and dynamic a field;

- It is essential in surveys to conduct field research in as short a time as possible, for the reasons outlined above. How-

Regulatory type	State role
1. Intentional or 'Pure' Self-regulation	No state IRA involvement
2. Industry Codes	Registered with the state IRA
3. Industry Standards	Mandatory codes set in the absence of pan-industry code agreement
4. Command-and-control	Set by state IRA pre-empting attempts at self-regulatory action

Table 2: Four Types of Regulatory Scheme

objectives which market actors must then organize to achieve – with the threat of statutory powers invoked in the absence of market self-regulation¹¹. However, co-regulation is used in such a wide variety of circumstances that its specific meaning must be seen in the national, sectoral and temporal context in which it is used.

Schulz and Held suggest that 'regulated self-regulation' can be any of these categories: co-regulation, intentional self-regulation, or a third category – 'audited self-regulation'. Independent audit of self-regulation is a U.S. concept of using an independent standard or professional body to audit a self-regulatory organization or individual company according to pre-set standards. In the case of ISPs, audited self-regulation might involve at least a standard being set that an audit firm could certify organizations against (or at least that organizations could self-certify

German concept of regulated self-regulation gives the state a role when basic constitutional rights need to be upheld: "The extent of possible delegation [to self-regulation] depends ... on the relevance ... in terms of basic rights".

Co-regulation in the European context must also be proportional to the aims of the legal instrument, as well as conforming to the competition law of the European Union. Enforcement is the ultimate responsibility ('the safety net') of the state. In Schulz and Held's case study, Australia, practical self-regulation is illus-

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ever, in order to comprehend the dynamics of co-regulation, it is also important to cultivate excellent research links with market actors, regulators and civil society organizations. This type of network can only be maintained, developed and employed using constant research and development. PCMLP has developed such networks over an eight-year continuous period.

DOES CO-REGULATION DELIVER THE EXPECTED RESULTS?

As outlined above, the PCMLP project has researched in the fifteen pre-2004 Member States in the areas of: broadcast co- and self-regulation; mobile telephony and child protection; Internet self-regulation; computer games and video cassette ratings schema; print news media self-regulation. Based on the www.selfregulation.info report and other prior work, we can offer some tentative initial hypotheses. Three options suggest themselves:

1. Adopting best practice in self-regulatory approaches taken from the US and potentially UK models;

2. Developing and extending a sophisticated version of co-regulation such as that found in Australia or Germany, with

a pan-sectoral focus.

3. Extending either practice to a pan-European role, as in the Internet sector, where INHOPE, EuroISPA or IFSE have adopted a successful model (for details see main IAPCODE report). However, the role of free speech, cultural diversity and the enforceability of such regimes remain problematic.

These three options are in addition to nation-specific and sector-specific status quo options, which one might term Option 0.

In considering the range of self-regulatory solutions across Europe, it is necessary to reflect on exactly why there is a range of responses, and whether it is possible to conceive of a European model of media co-regulation:

- What is the most important national factor with regard to co-regulation, and what are the barriers to international cooperation?

- Is it legal and constitutional and the implications for co-regulation or rather the differences in cultural content standards?

- Is it rather a more complex set of factors relating to institutional political economy?

To place this survey in the context of country-level differ-

ences and EU-wide changes that impact on member states in contrasting ways, the level of analysis must be useful for:

- understanding co-regulation on the national level,
- for policymaking that is concerned with coordinating national media approaches across sectors, and
- for evaluating prospects for convergence in practices on the EU level.

There are difficulties in assessing changing political cultures. Cultural as well as economically rational motivations differentiate state and market actors. Pan-European options present further complexity: multilateral solutions may therefore be theoretical solutions to intractable real-world problems. Yet, when co-regulation is put into practice this is often first done on the national level, and here attention to economic governance, political culture, civil society and institutions in general may make a crucial distinction in assessing which co-regulatory schemes succeed and which fail.

Codes of conduct, in order to be legitimate, credible, transparent and effective need to include clear and workable procedures for review and amendment of the code. Ide-

The Dutch cross-media classification system



Source:: Kijkwijzer

ally this should include some input from the adjudication body. The most effective and skilled code operators take the following issues into account when revising their codes:

- the convergence of national, regulatory and corporate cultures;
- the changing nature of the relationship between government and industry;
- the evolving technological architecture that underwrites self-regulation;
- the further development of standards, Codes, and rules; and
- the growth and change of cultural norms and of public understanding surrounding self-regulation.
- third party consultation or audit.

RECOMMENDATIONS

We make recommendations which specifically can help the effective development of media Codes of Conduct, and co-regulation of Internet content. Our key finding is that technological progress brings about change and co-regulation can respond more rapidly and efficiently than state regulation. There is no universally acceptable recipe for successful co-regulation, as regimes must be adjusted to the needs of each

The Commission and Council of Europe should develop clear benchmarks for acceptable levels of transparency, accountability and due process

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sector and other circumstances (technological change, changes in policy to respond to changes in technology, a country's legal system, case law of European courts, and so on). To illustrate, broadcasting is an area in which technological progress brought complexity and the increase of co-regulation responds in part to policy changes prompted by those technological changes. The European monopolistic broadcasting model which developed with radio, maintained for television, was first challenged by commercial terrestrial services. Further pluralism brought about first by cable and satellite, and then digital technologies including the Internet, forced changes in the regulatory environment and public authorities increasingly delegated the power to regulate to market actors. The trend is towards continued delegation (with regulatory authority audit of the resources, procedures, transparency, stakeholder participation and market effect of the self-regulatory scheme adopted).

KEY RECOMMENDATION:

Adequate resourcing is the key to successful co-regulation. Policy on co-regulation must take a broader view of the sustainability, effectiveness and impact on free speech of self-regulatory codes and institutions. We recommend applying an auditing procedure for establishing co-regu-

latory institutions and codes. Notwithstanding the centrality of speech freedoms in constitutions, this regulatory audit burden is a minimal price to pay for effective co-regulation in the public interest.

FUTURE TRENDS IN CO-REGULATION:

Significant economies of scale are likely to be realized through functional integration of certain key aspects of the content regulation value chain horizontally across sectors and across EU Member States. Computer games rating by IFSE has illustrated the potential for developing a common pan-European ratings structure. Germany (KJM) and the Netherlands (NICAM) operate a cross-media rating and labeling scheme. In a situation of increasing cross border trade within the EU, this trend is set to continue. Although the legislative role of the European institutions in the media sectors is currently limited (prior to ratification of the EU Constitution), several recommendations can be made. And it is likely that in a single market context, there will be a significant self-interest on the part of industry in co-regulation. More research and development, benchmarking and technical assistance in disseminating best practice between Member States is clearly essential to assist industry bodies in the exploitation of economies of

scale and scope in co-regulation across the various converging media sectors in the single market, and to ensure greater effectiveness of co-regulation.

The general trend is towards an expansion of scope of co-regulation, often at the expense of statutory regulation. IRAs such as Ofcom in the UK are exploring the possibility of 'sunsetting' particular regulations in the event that co-regulatory alternatives can be found.

Where there is a clear industry interest in co-regulation to improve market penetration, or to head off threats of statutory regulation, there are adequate market incentives for resources to be allocated to co-regulatory activities. However the calculation of enlightened self interest required is vulnerable to changing personnel and market structures such that co-regulatory institutions, where they do not have access to compulsory funding, will not enjoy the funding necessary to meet standard requirements of transparency, accountability and due process.

A wide variety of models of co-regulatory tools exist. Some of these are based on adequate standards of transparency, inclusion, due process, resources and so forth, and some clearly are not. As a result there is concern with the development of codes that insufficient standards apply to both law enforcement/child protection and protection of freedom of expression rights. If these mechanisms are improperly structured we can expect public harm to result in the medium term. The European Commission and Council of Europe should develop and publish clear benchmarks for acceptable levels of trans-

parency, accountability and due process and appeal, particularly with regard to communications regulation that may impact upon freedom of expression. Co-regulatory institutions should follow the guidelines for transparency and access to information that are followed by public and government bodies according

to international best practice. At the very least, self-regulators should provide summaries of complaints by clause of code of conduct, numbers of adjudications, findings of adjudications on their website. Failure to conform to these standards of transparency should be viewed as a failure of co-regulation.



Notes

1. *Communication COM(97) 487, 16.10.97; Council Recommendation 98/560/EC OJ L 270, 7.10.1998*

2. *See further Directive 2002/58/EC OJ L 201, 31.7.2002; Directive 2000/31/EC OJ L 178, 17.7.2000*

3. *See Second Evaluation Report COM (2003) 776 final of 12 December at p6*

4. *See Marsden, C. Video over IP: the challenges of standardization – towards the next generation Internet [2003] Chapter 8 in Noam E., et al (eds) Internet Television*

5. *Baldwin, R. et al (1998) Socio-Legal Reader on Regulation, at 3 explain that "At its simplest, regulation refers to the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with these rules."*

6. *Teubner G. 'The Transformation of Law in the Welfare State' in Teubner, G. (ed.), Dilemmas of Law in the Welfare State (Berlin: W. de*

Gruyter, 1986), at 8

7. *Price, M. and Verhulst, S. (2000) 'In search of the self: charting the course of self-regulation on the Internet in a global environment', Chapter 3 in Marsden, C. (ed) Regulating the Global Information Society; Price, M. (1995) Television, The Public Sphere and National Identity Oxford: Oxford University Press*

8. *Boddewyn J. J. (1988) Advertising Self-regulation and Outside Participation. See also Bollinger, Lee C. (1976) "Freedom of the Press and Public Access: Toward a Theory of Partial Regulation", 75 Michigan Law Review 1*

9. *Schulz and Held (2001) Regulated Self-Regulation as a Form of Modern Government*

10. *See Hoffman-Reim, W. (1996) Regulating Media*

11. *See OFCOM (2004) Consultation Document 'Criteria for Transferring Functions to co-Regulatory Bodies' <http://www.ofcom.org.uk/consultations/past/co-reg/?a=87101>*

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