HANS-BREDOW-INSTITUT
for Media Research at the University of Hamburg

EMR

Executive Summary
Study on Co-Regulation Measures in the Media Sector

Study for the European Commission, Directorate Information Society and Media
Unit A1 Audiovisual and Media Policies

Tender DG EAC 03/04

Objective and methodology

The European Commission, General Directorate "Information society and media" has issued the study in December 2005 in connection with the revision of the television without frontiers directive. However, the background of the study is even broader and can be described as a change of former industry societies into so-called information societies. The role of the state and supranational institutions like the European Union might accordingly need to be redefined. Co-regulation is regarded by many as a means to achieve better regulation, to cope with the increasing risk of failure of traditional co-regulatory concepts and to hand back responsibility to society where it seems appropriate. In the "Interinstitutional Agreement on Better Lawmaking" the European Parliament, Council and Commission agree on co-regulation as an alternative method of regulation.

The study includes analysis on press, broadcasting, online and mobile services, film and interactive games; the inclusion of all those kinds of media does not indicate that they should be regulated in a similar way or that there is similar latitude for member states or the EU institutions to regulate them. These were only the areas that were examined for the existence of co-regulatory approaches. Within these areas, the following regulatory objectives are included for examination:

- Protection of minors and human dignity
- Advertising
- Quality, effects, diversity of private media
- Annex: Access, setting of standards.

Co-regulatory systems in Europe and selected non-European countries have been identified in three steps:

1. Overview of all regulatory activities for all media services within the scope of the study and for all included policy objectives.
2. Elimination of all systems where no co-existence of state and non-state regulation could be found for the respective media and policy objective.

3. Development of a working definition of co-regulation and applying this definition to the remaining regulatory systems.

Correspondents of the EMR network provided two reports each, one on the media system of the respective country as such and a second one on those systems, where according to the first report a co-existence of state and non-state regulation could be found. All reports have been published on the projects web page for transparency and as a means of quality insurance.

The impact assessment of co-regulatory systems in place rested on two pillars; the assessment of documents and an expert survey (conducted autumn 2005). The questionnaire for the survey was divided into a general part mainly asking about the fulfilment of process objectives (transparency, clearness, openness) and other common objectives of a regulatory system and a specific part developed to assess the actual functioning of the system. It had been constructed for contesting the assessment of experts (internal and external ones including representatives of consumer groups) in different perspectives on the systems. Therefore, not the assessment as such builds the ground for the evaluation of a given system but the existence of significant coherences and incoherencies in the answers.

Understanding co-regulation

The analysis of studies already done shows that approaches based on different theoretical backgrounds and methodologies agree on the assumption that under specific conditions traditional forms of regulation face severe and systematic enforcement problems. Co-regulation is seen by many as a way to react to some of the challenges of traditional regulation such as coping with the speed of technological, economical and social changes and the problem of decentralized knowledge in the information societies.

Furthermore, regulatory theory teaches that the development path of regulation matters. Debates on a national and European level from time to time suffer from misunderstandings in that regard since there are different starting points for co-regulation.

Within the understanding of the study, co-regulation is a specific combination of state and non-state regulation. Other forms of combining state- and non-state regulatory activities are singled out as well as systems without any state involvement (pure self-regulation). However, if a regulatory system is classified as co-regulation under this study this does not mean that it is per se more effective in achieving an objective than a self-regulatory system.

Based on analysis of studies already done the study develops the following definition of co-regulation:

The non-state component of the regulatory systems includes:	**With regard to the link between a non-state regulatory system and state regulation one can speak of co-regulation if the following criteria are met:**
• the creation of specific organisations, rules or processes • to influence decisions by persons or, in the case of organisations, decisions by or within such entities • as long as this is performed – at least partly – by or within the organisations or parts of society whose members are addressees of the (non-state) regulation	• The system is established to achieve public policy goals targeted at social processes. • There is a legal connection between the non-state regulatory system and the state regulation (however, the use of non-state regulation need not necessarily be mentioned in acts of parliament). • The state leaves discretionary power to a non-state regulatory system. • The state uses regulatory resources to influence the outcome of the regulatory process (to guarantee the fulfilment of the regulatory goals).

The application of the definition given above leads to the inclusion of the following approaches:

Member States of the European Union:

- Austria: Protection of minors in movies
- France: Advertising regulation
- Germany: Protection of minors in broadcasting, internet services, movies and video games, advertising regulation in broadcasting
- Greece: Advertising regulation in broadcasting
- Italy: Protection of minors in television, internet services and mobile services, pharmaceutical advertising regulation, TV sales regulation
- Netherlands: Protection of minors, advertising regulation in broadcasting
- Portugal: Broadcasting protocol (including advertising rules)
- Slovenia: Protection of minors in broadcasting, advertising regulation
- United Kingdom: Protection of minors in mobile services, advertising regulation in broadcasting

Selected non-European countries

- Australia: Protection of minors in broadcasting and Internet services
- Canada: Programme ethics and protection of minors in broadcasting
- Malaysia: Protection of minors (and other objectives) in the media
- South Africa: Protection of minors (and other objectives) in broadcasting

Models of Co-Regulation

In the Member States co-regulatory approaches can mainly be found when it comes to the protection of minors and to the protection of consumers by means of advertising rules. However, there are quite different models that fall under the term of "co-regulation".

E.g., approaches that aim to protect minors from having access to content that may be harmful to them or may impair their developments differ with regard to the inclusion of non-state regulation: In some Member States non-state bodies were founded that rate content before it is offered to the public (like in Germany, Austria). In other Member States, the rating is done by the companies themselves based on codes, agreements or coding forms developed by non-state organisations (like in the Netherlands, United Kingdom, Italy, Slovenia). In some of these Member States it is also the task of non-state organisations to enforce compliance with the codes etc. (like in the Netherlands, United Kingdom).

When it comes to the protection of consumers by means of advertising rules non-state bodies set codes and enforce compliance with these codes (like in the United Kingdom, the Netherlands, Greece). In some Member States, non-state organisations offer a "pre-clearance" of advertisements before these advertisements are published (like in France).

The co-regulatory approaches that can be found within the Member States also differ with regard to the connection between state regulation and non-state regulation. While in some approaches non-state regulation is mentioned in the state act, there are many other forms of legal connections like Ministerial decrees, contracts, authority guidelines, letters etc.

There are also different ways for the state to influence the non-state regulatory process in order to guarantee the fulfilment of the regulatory objectives: certification of non-state organisations or codes, appointment of members of non-state organisations and financing of non-state organisations are instruments that are used in many Member States.

Implementation

For the creation of co-regulatory measures in the Member States in order to implement a directive's requirement, the analysis leads to the following conclusions:

- Any regulation in states bound to the European Convention of Human Rights (ECHR) has the obligation to avoid infringement of basic rights protected under the ECHR, especially Art. 10 (1) ECHR which protects all types of media communication. However, according to the study's outcome the requirements as regards clarity and binding nature of rules do not go beyond the limitations under EC Law. Specific obligations for co-regulatory measures under ECHR are only to observe if the system's objective is designed for protecting basic rights, which are protected by the Convention.
- According to art. 249 para. 3 EC, a directive is binding as to the result to be achieved, but leaves to the national authorities the choice of form and methods. Therefore, combinations of state and non-state regulation are not excluded. However, consistent with the jurisdiction of the European Court of Justice (ECJ) there are certain requirements that have to be met:
    - There has to be a full application in a clear and precise manner; it has to be transparent for everybody bound by the regulation as to what it requires. Since many of the assessed systems lack transparency, special attention should be put on this point in future.
    - The directive has to be transposed in an effective and binding manner. This does not mean that a complete transformation in state law is required; the Court has held that, to quote an example, agreements between the state and a private actor may suffice. Therefore, contracting-out types of co-regulation fulfil this requirement without any doubt. However, a binding legal framework is required; leaving the matter to complete self-regulation would not meet this requirement.
- Co-regulatory settings might infringe the freedom to provide services under art. 49 EC. Even collective rules of associations fall within the scope of art. 49 EC when they exert similar effect as state regulation. However, the media policy objectives of safeguarding diversity, protection of minors or consumer protection might constitute justifications of restrictions. In any case, systems have to be open to companies residing in other Member States without any unjustified restrictions.
- The non-state-regulatory part of co-regulation might under certain circumstances distort or restrict competition. Well-established companies can – to quote an example – enter into agreements within a co-regulatory framework, which might hinder the market entry of competitors.
    - The ECJ regards some types of agreements as state law and not as private rule making if the scope for private entities is rather limited. This is not the case with co-regulation under our definition. Therefore, art. 81 EC is, as a rule, applicable.
    - However, the ECJ decided that anti-competitive agreements do not infringe art. 81 para. 1 EC if they are part of a broader framework that aims at improving, securing or enabling competition in the respective branch of the industry. This might be the case with co-regulatory systems assessed in the study. Furthermore, there is the possibility that the provision may be declared inapplicable under para. 3.
    - In any case, systems constituted by an agreement within the industry are likely to be regarded as anti-competitive if they are not open to competitors.

The analysis does not provide a complete picture of restrictions to co-regulation under national law. However, it transpires that there are no fundamental restrictions in Member States regarding this alternative form of regulation. Nevertheless, in some Member States there are debates concerning the legal classification of co-regulatory bodies under constitutional law, about safeguarding democratic legitimacy and about matters of competition law.

Impact Assessment

The assessment of the co-regulatory models in place leads to some general findings which at the same time can be interpreted as recommendation for designing an effective model:

- Sufficient incentives for the industry to participate: A co-regulatory system without sufficient incentives will most likely be ineffective. According to both the theoretical findings and the empirical impact assessment, an incentive that is effective as a rule is a pending regulatory intervention by the state itself into the respective sector.
- Proportional and deterrent means to enforce regulation: On the one hand, non-state organisations must have effective sanctions at their disposal. On the other, co-regulation needs backstop powers to be effective. Even experts from self-regulatory bodies involved in co-regulation state that the state regulator in the background is necessary for a co-regulatory system to work properly.

Our findings suggest that systems in which the state regulator certifies codes or organisations (or where the state regulators are empowered to contract out) allow for effective backstop powers and therefore enforcement of rules.

As impact relies to a great extend on aspects like regulatory culture and experience with alternative forms of regulation it does not come as a surprise that systems in Member States, which have gained such experience rate relatively high in the assessment.

Even systems, which rank high according to our analysis, are often subject to general criticism by representatives of consumer or parents associations. This might be due to their role as watchdogs, but also points to the fact that the decision to in- or exclude interest groups is a vital one when regulation is not completely in the hands of the national state but to some extend entrusted to private governance structures.

Some findings concern the two main objectives for the fulfilment of which co-regulation is already used by some states:

- **Protection of minors:**

  As far as effectiveness is concerned, systems like NICAM in the Netherlands show high ratings in the impact assessment. At the same time, the process objectives are mainly considered as granted. The empirical base is not broad enough to nominate best practice; however, NICAM is certainly a role model worth considering. Even though the systems were rather recently established, the German broadcasting and internet regulation scheme gets a positive rating as well. However, deficits regarding transparency are mentioned. Moreover, the German example shows that a similar system will work differently for different types of media (broadcasting and online services). As a well-established system the German film regulation gets high ratings as well.

- **Advertising regulation:**

  When it comes to advertising regulations, contracting-out seems to lead to a highly effective system as the British advertising regulation obtained a high rating in the assessment. The contracting-out-approach seems to be appropriate, because there is a clear division of work between state regulator and non-state regulators.

  Another highly effective approach is the advertising regulation in France. However, the systems are not comparable since the French approach establishes a mandatory pre-clearance and the legal connection between state and non-state regulation is rather slight.

Based on the findings of the study there is no reason to assume that co-regulatory models as defined within this study are generally insufficient to implement European directives (neither with regard to the effectiveness of regulation nor legal requirements). However, certain requirements like openness and transparency have to be fulfilled to make sure that co-regulation reaches the same standards as traditional regulation when it comes to democratic values. In addition, it has to be mentioned that almost no co-regulatory approach is sufficient or insufficient to guarantee effectiveness as such. It all

depends on the concrete adjustments within the chosen approach. The study gives hints to positive adjustments. Nevertheless, regular evaluation of each system is vital.

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in co-operation with the EMR