

TERMS OF REFERENCE

Tender no. DG EAC 03/04

STUDY ON CO-REGULATORY MEASURES IN THE MEDIA SECTOR

Contracting Authority: European Commission

1. BACKGROUND INFORMATION

The Commission *White Paper European Governance*¹ proposes opening up the policy-making process on a general level in order to get more people and organisations involved in shaping and delivering EU policy. The Paper already outlines conditions for the use of co-regulation to this end: co-regulation implies that a framework of overall objectives, basic rights, enforcement and appeal mechanisms, and conditions for monitoring compliance is established in legislation. It should be used only where it clearly adds value and serves the general interest. In any case it should not be used in situations where rules need to apply in a uniform way in every Member State. In addition, the resulting co-operation must be compatible with European competition rules and the rules agreed must be sufficiently visible so that people are aware of the rules that apply and the rights they enjoy. However, where co-regulation fails to deliver the desired results or where certain private actors do not commit to the agreed rules, it will always remain possible for public authorities to intervene by establishing the necessary rules.

Co-regulation aims at combining the advantage of the predictability and binding nature of legislation and the more flexible self-regulatory approach. The advantage for the regulator is that stakeholders can contribute expertise of a kind that is beyond the normal reach of public authorities and which it would not be efficient for public authorities to try to recruit directly. Co-regulation therefore could have an especially important role in regulating electronic media beyond television. This is already reflected in the European Commission Communication on Audiovisual Policy of 1999,² which states that regulators should take into account the degree to which an individual user can exercise choice and control over the content received. The Community can best manage the changes taking place by building on its existing instruments and principles and, where appropriate, through promoting initiatives for self-regulation.

¹ European Governance – A White Paper, COM (2001) 428 final.

² Communication from the Commission to the Council, The European Parliament, The Economic and Social Committee and the Committee of the Regions – Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age, COM (1999) 657 final.

Community law is to a great degree open to co-regulation, as is confirmed by ECJ case law. Firstly, because directives allow Member States to choose the form and method of meeting their obligations. In this respect, co-regulation could be an appropriate means of achieving the aims of a given directive. Secondly, because Member States are free to regulate in cases where there is no Community provision³. With regard to the TVWF directive, this would be the case for notions such as “children’s programmes” (Article 11(5) of the directive) or “pornography” (Article 22 of the directive). Member States already have put in place rating systems for audiovisual products, which have never been challenged on account of incompatibility with Community Law in general or the TVWF directive⁴ in particular.

The Fourth Application Report [COM(2002)778], in its Annex, addressed co-regulation as an important issue to be discussed during the public consultation in 2003. As a result of the contributions received from the various parties, the Commission, in its Communication on the future of European regulatory audiovisual policy [COM(2003)784], came to the conclusion that terms such as self-regulation, self-control or co-regulation are used in different ways in the Member States. Regulatory models called “self-regulation” in one Member State would be clearly defined as “co-regulation” in others. A great number of the examples given showed the large extent to which co-regulatory models are already applied in the present framework. They seem to be especially successful for the application of rules on advertising and the protection of minors.

Given the terminological problems many stakeholders still have with these terms, they require further clarification. The Commission considers that the White Paper on European Governance and the Better Legislation Action Plan already provide the key elements for the present discussion. The contributions to the consultation process show that co-regulatory models have been established in a number of Member States without conflicting with the Directive. But they also show that many stakeholders think self-regulation is not an appropriate solution for achieving all the policy objectives in the Directive.

2. CONTRACT OBJECTIVES & EXPECTED RESULTS

2.1. Overall objectives

In its Communication on the future of regulatory audiovisual policy [COM(2003)784], the Commission stated its intention to launch a study of co-regulatory measures in the media sector. *This analysis should provide a complete picture of the co-regulatory measures taken to date in this sector in Member States and acceding countries as well as of the research already done.* The objective of this contract is to provide to decision makers on European level a comprehensive analysis of how co-regulation works in the media sector.

⁴ The **Council Recommendation on the Protection of Minors and Human Dignity** 1998 could be seen as a first step to establish a self-regulation framework for audiovisual and information services.

2.2. Specific objective

The study should indicate the areas in which these measures mainly apply, their effect and their consistency with public interest objectives. In this context, it must also examine how best to ensure that the development of national co- and self-regulatory models does not disturb the functioning of the single market by re-fragmenting the markets.

2.3. Results to be achieved by the Contractor

The contractor will deliver a report (consisting of an interim report and a final report) as the result of his research. The research will be divided in five main parts:

1. Theoretical and methodical framework – “What is co-regulation?”

The Communication on the future of European regulatory audiovisual policy noted the terminological and conceptual difficulties in relation to the concept of co-regulation. A preliminary task for the study will be to create a theoretical and methodical framework, based on the White Paper on European Governance, to analyse the different national models, which reflect diverse political traditions and legal cultures. This first analysis will compare the models and will evaluate them with a view of building a consistent terminology for the study.

2. Analyses of studies already done – “What can one learn from existing studies in analysing co-regulation?”

This first analysis will have to be based on a great number of studies that already has been carried out to scrutinise the different national co-regulatory measures and the way in which public authorities interact with private stakeholders. The study should evaluate the work that already has been done in individual Member States and accession countries. The Commission especially points to the research project carried out by Oxford University on self-regulation (www.selfregulation.info). The results of this work will lead to a set of criteria for assessing the efficiency and impact of co-regulatory instruments, and will also guide the contractor in choosing the right methodological approach for the continuation of this study.

3. Stocktaking - “How does co-regulation actually work?”

The core part of the study will consist of a complete picture of the *co-regulatory measures taken to date in 25 EU Member States* in respect of audiovisual content. On the basis of the theoretical and methodical framework developed, the contractor will determine which concepts are to be included in the research and according to which criteria. Co-regulatory models concerning television advertising and the protection of minors in the media (including on-line services) will in any event have to be covered. Wherever possible and

meaningful, the study should show how co-regulation evolved with a view to assessing possible future developments. The country reports should follow a clear and coherent analytical approach to permit comparability. The stocktaking has to cover all EU Member States (25) and an adequate number of particularly significant non-European examples.

The contractor is responsible for ensuring that his analysis is based on coherent criteria. The following elements should be included for all media:

- the legal bases of the *co-regulatory measures taken*
- concepts and instruments for the interaction between public and private regulation
- the areas subject to co-regulation
- actors (private and public) involved in the co-regulation process, their organisation, functioning, resources, etc.
- the implementation and actual functioning of co-regulation, including sanctions where appropriate.

4. Impact assessment – “Does co-regulation deliver the expected results?”

To answer the question whether co-regulation can be effectively used and, if so, in which areas and in what form, empirical data will be of decisive importance. The study will have to collect and evaluate the results of surveys already undertaken in the different countries. The aim is to show to which extent public policy objectives have been met and whether co-regulation has led to negative side-effects.

Besides this theoretical work, the contractor will have to conduct his own field research to validate his theoretical findings. He will have to propose and justify a representative sample of Member States and models to be analysed and the methods he considers appropriate (statistical methods, expert interviews, questionnaires, etc.).

5. Options for further development - “What should the future look like?”

Based on the results of part 3 and 4, the contractor is expected to describe options for a possible further development of the co-regulatory systems analysed. These suggestions have to take into consideration both the specific system of Community law and the legal and cultural traditions of the Member States. It should be especially envisaged to identify best practice examples in relation to the adequate level of detail domestic regulation should contain, staffing requirements and funding issues for co-regulatory bodies, concerns about representation and effectiveness of sanctions.

3. SCOPE OF THE WORK

3.1. General

3.1.1. Project description

The consultant will have to establish an international project team that has to have the necessary expertise to analyse the different regulatory systems in different states and is able to execute the scientific analysis and field research necessary to draw up the reports.

3.1.2. Geographical area to be covered

25 EU Member states and three representative examples of non-EU countries to be proposed by the contractor.

3.2. Specific activities

The contractor will have to:

- participate at a kick off meeting with the Commission (see 3.3.1. under)
- draft an interim report covering the question 1,2 and 3 as mentioned under point 2.3
- meet the Contact Committee to discuss the work plan ⁵
- meet the Commission to discuss the draft interim report (see 3.3.1. under)
- organise a first Seminar with interested parties to discuss the interim report
- organise field research as requested in question four of point 2.3.
- meet the Commission to discuss the draft final report (see 3.3.1. under)
- organise a second Seminar with interested parties⁶ to present the draft final report for validation (with app. 200 participants)
- present a final report in three edited versions (EN, DE, FR).

In his work the contractor will refer to the following documents:

⁵ See Article 23a of the "Television without Frontiers" Council Directive 89/552/EEC of 3 October 1989, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997

⁶ The terms « interested parties » covers industrial representatives (broadcasters, producers, distributors, ...), consumer representatives and representative of Member States and regulators.

White Paper on Governance

http://europa.eu.int/comm/governance/index_en.htm

Communication on the future of European audiovisual regulatory policy

http://europa.eu.int/comm/avpolicy/legis/docof_en.htm

3.3. Project management

3.3.1. Responsible body

The responsible body within the European Commission is Directorate-General Education and Culture, Unit C/1 “Audiovisual Policy”.

3.3.2. Facilities to be provided by the Contracting Authority and/or other parties

The Commission will provide the premises for the seminar to discuss the interim report and the draft final report. Invitations to the seminars will be sent out by the consultant under the guidance of the Commission.

4. LOGISTICS AND TIMING

4.1. Location

Contractor own facilities

4.2. Commencement date & period of execution

The indicative intended commencement date is November 2004 and the period of execution of the contract will be 12 months. The contract enters into force after signature of the contract by both parties.

4.3. Time Schedule

Signature of contract	
Signature + 0,5 months	kick off meeting
Signature + 4 months	meeting to review the draft interim report
Signature + 5 months	seminar with interested parties to present interim report
Signature + 10 months	meeting to review the draft final report
Signature + 11 months	seminar with interested parties to present draft final report
Signature + 12 months	final report

5. REQUIREMENTS

5.1. Personnel

5.1.1. Overall requirements

The Tenderer remains free to propose any allocation of resources which they believe will best achieve the desired results.

The staff will include at least a team manager and a senior legal consultant and a senior social scientist.

5.1.2. Key experts

All experts who have a crucial role in implementing the contract are referred to as key experts. The profiles of the key experts for this contract are set out below. It is necessary for each of these profiles to correspond to a single individual. Role may be divided between two or more experts if the contractor believes that this will be the most effective way of achieving the desired results. It is necessary that the team proposed by the Contractor should have all the skills and experience described below:

Key expert 1: Team Leader

Qualifications and skills

Legal expert or social scientist with appropriated university degree and management skills

Professional experience

Experience in international research cooperation with multidisciplinary teams, at least one project of comparable size as project leader

Key expert 2: Senior legal expert

Qualifications and skills

University degree of one of the Member States

Professional experience

Proven experience in comparative law, research experience on regulatory systems

Key expert 3: Senior Social scientist

Qualifications and skills

University degree in social sciences in one of the Member States

Professional experience

Proven research experience in social sciences and statistical methods

5.1.3. Other experts

Additional input will be required from local experts in Member State with important co-regulatory models.

5.2. Facilities to be provided by the Contractor

The Contractor shall ensure that experts are adequately supported and equipped. In particular, he shall ensure that there is sufficient administrative, secretarial and interpreting provision to enable experts to concentrate on their primary responsibilities.

6. REPORTS

6.1. Reporting requirements

Each draft report will be submitted in 1 original and 4 paper copies in English and by e-mail (MS Word compatible) to the correspondent official (whose name will be communicated by the Contracting Authority).

The Commission will comment on the draft reports within 60 days. In the absence of observations from the Commission within the deadline, the draft reports will be considered as being approved.

Within 20 days of receiving the Commission's observations, the Contractor will submit new draft reports taking full account of these observations, either by following them precisely, or by explaining clearly why he did not. Should the Commission still not consider the reports acceptable, the Contractor will be invited to amend them until the Commission is satisfied.

After approval by the Commission, the final version of the reports will be submitted in 1 original and 4 copies and by e-mail to the correspondent official in three language version (EN, DE, FR), proof read by native speakers and ready to be published on the Commission's web site. Annexes containing legal texts etc. may be added in the original language but accompanied by a summary in EN/DE/FR.

The contractor will also provide the approved version of the final report on 5 CD-ROMs (MS Word compatible and HTML formats) and a PowerPoint compatible presentation of the results of the study and of the interim report.

6.2. Interim report

The interim report must be submitted within 5 months after the date of signature of the contract by the last of the two parties to sign. The report must include at least the following:

- complete information on the progress achieved towards the results specified in section 2.3 (especially question 1, 2 and 3).
- problems encountered, solutions found or proposed, and impact on future work
- justification of the countries selected by the contractor for empirical analysis as foreseen in point 2.3., question 4
- detailed proposal for the organisation of the workshop described in point 3.2.2
- detailed time schedule and methodology for the completion of the work

6.3. Final report

The final report must be submitted within 12 months after the date of signature of the contract by the last of the two parties to sign. The report must include at least the following:

- an executive summary, not exceeding 5 pages, suitable for presentation to the general public.
- a final report answering the questions posed at 2.3, including the necessary annexes AND in respect with the steps described in point 3.2.2.
- necessary annexes