COMMUNITY OF PRACTICE FOR BETTER SELF- AND CO-REGULATION
7th PLENARY MEETING

SYNTHESIS OF THE PLENARY | 24 June 2016

Nicole DEWANDRE, Advisor for societal issues, DG CONNECT, European Commission, welcomed participants on behalf of David RINGROSE, Acting Director, DG CONNECT, who was unavoidably detained by other business.

Welcoming remarks were then given by Bernd DITTMANN, Member of the European Economic and Social Committee (EESC); Managing Director, European Affairs Division, Federation of German Industries (BDI); Chief Executive, BDI/BDA, German Business Representation; Representative of the EESC at the REFIT platform. He spoke of the EESC’s support for the CoP’s activities to define minimum standards for SRCR. The EESC sees the wide scope for the application of SRCR, stressing the importance of transparency, effective monitoring and the recognition of public authorities.

➤ Results of the CoP Stakeholders Survey

Nicole DEWANDRE, presented the results of the CoP stakeholder survey, carried out between March and May 2016. It was the ideal moment to undertake a stakeholder survey since after the landing of the BR Package in May 2015, which firmly anchors SRCR, the question was “What is next?”. Input from the survey came in the form of an online survey for plenary and online platform participants; semi-structured interviews with the Steering Committee, speakers and active stakeholders; focus groups with DGs CONNECT, DEVCO, ENER, GROW, JUST, MOVE, SANTE; and facts and figures. The main findings of the survey are:

- The CoP and its objectives are still relevant
- The impact of the CoP is recognised and its work should be pursued
- Improvements for the way forward include repositioning the CoP more centrally within the EC, enhancing EC’s commitment and understanding, diversifying the membership and explore the possibility of Working Groups to discuss specific issues.

Mona BJORKLUND – Head of Impact Assessment Unit, Secretariat-General, European Commission, acted as a discussant for this topic. She noted that the CoP plays a crucial role in bridging the gap between theoretical concepts and what is implemented practically on the ground. Referring to the survey conclusions that "CoP has made a difference in the regulatory landscape", she confirmed the mainstreaming of SRCR in the Better regulation agenda. While the relevant tools are now in place to consider SRCR in the policy process, it is time to move
on to the implementation phase. She referred to the increased political focus given to "future-proof" and innovation-friendly regulation, as promoted by the Dutch Presidency and the new Slovak Presidency, where alternative forms of regulation are part of the debate. Apart from considering SRCR in impact assessments, better monitoring and ex-post evaluation processes of how SRCR works in practice are also key, as well as stakeholder engagement. On the latter, she referred to the increased opportunities provided for stakeholder input through Commission roadmaps, open consultations, as well as the Lighten the Load website, and the REFIT platform.

In response to questions from the floor, Nicole DEWANDRE noted the importance of working together and changing mindsets to further the understanding and mainstreaming of SRCR. Also, given the achievements of the CoP in the past year, it is necessary to rethink the architecture of the CoP in order to avoid duplication with other fora and improve synergies with them. These are key questions to be addressed over the summer.

➢ One Year into the Regulatory Scrutiny Board Experience

Anne BUCHER, Chair of the Regulatory Scrutiny Board, Secretariat-General, European Commission, presented a review of the state of play of the Regulatory Scrutiny Board (RSB), introduced by the BR agenda. The RSB is well positioned to provide a cross-cutting view of different aspects of how regulation is designed, how it is working in practice, where there is overlapping regulation, and provide coherence in how approaches are defined and impacts on the ground are measured. Improvements are required regarding evaluations, as these are not always conceived in the original project and rely on evidence that is difficult to collect. Impact Assessments tend to be more homogenous across the different sectors, although they are not without their challenges. The RSB has little experience of SRCR to this point, however the Principles provide a strong mandate to look at this systematically. One question the RSB has for the CoP is what other guidelines could be given to consider when SRCR is the best option?

Patrick VON BRAUNMUHL, Managing Director of Selbstregulierung Informationswirtschaft (SRIW), acted as discussant. He suggested that the CoP, together with Secretariat General should work together to define different scenarios, differentiate self- and co-regulation concepts, in which cases such specific instruments should be used and how Codes of Conducts can facilitate implementation. A key issue is the discussion on the relationship between hard and soft law and how to provide better links between both.

In response to questions from the floor, Anne BUCHER noted that the RSB was finding that impact assessments tended to conclude that non-intervention was more challenging, and perhaps more costly than legal intervention and that successful SRCR for EU initiatives were backed by well-identified national compliance authorities with competence enshrined in EU legislation.

Nicole DEWANDRE added that, as mentioned in the BR Toolbox, SRCR is more likely to succeed when the industry's interests are aligned with the policy objective to be achieved.
SRCR in the Audiovisual Media Services Directive (AVMSD)

Lorena BOIX ALONSO, Head of converging Media and Content Unit, DG CONNECT, European Commission, presented an update on the revised Audiovisual Media Services Directive (AVMSD) proposal, which strengthens the role of SRCR. There are also new provisions that foresee the possibility for the Commission to facilitate union codes when appropriate. She also provided details of the study on the effectiveness of the Directive’s provisions on the protection of minors and audiovisual commercial communications. The study found that in terms of legal compliance, all systems are in accordance with the law; however, the lack of formal objectives is a shortcoming and as a result it is difficult to have an appropriate monitoring mechanism.

Discussant Oliver GRAY, Senior Expert Advisor European Advertising Standards Alliance (EASA), noted the more elaborate and explicit references to SRCR and the direct references to CoP as good examples for other areas such as the digital single market. There may, however, be some confusion regarding the use of terms such as EU Codes and Co-Regulation as a means of legal obligation and the lack of precise definitions. He also enquired concerning the nature of the involvement of the European Regulators Group for Audiovisual Media Services (ERGA) and whether they would take guidance from the CoP.

Following questions from the floor, Lorena BOIX ALONSO confirmed that most of the provisions of the AVMSD proposal provide for minimum harmonisation. The proposal does not dictate to Member States how they should implement the SRCR, but sets a number of criteria of good SRCR. She confirmed that ERGA’s opinions are not binding and the principle of country of origin is maintained, with the possibility of applying for a derogation.

Memorandum of Understanding to Fight Against Intellectual Property Rights Misappropriation

Jean BERGEVIN, Head of Intellectual Property and Fight against Counterfeiting Unit, DG GROW, presented the Memorandum of Understanding against the on-line sale of counterfeit products. With the recent report of the OECD/EUIPO showing that 5% of imports to the EU are counterfeit and that over 600 product categories are affected, the economic scale of the commercial scale IPR infringements problem was becoming evident although political focus was still primarily focussed on piracy which was a relatively small part of the economic problem. After a Commission evaluation of the previous 2011 MoU the Commission had concluded to tie in the revised MoU with the Principles and codes worked on by the CoP. The process has been more transparent, clear objectives and KPIs have been introduced (although this required many detailed and lengthy discussions due to the implementation costs that result for the signatories). Some 20 signatories signed the new MoU on 21st June.

Linda SENDEN, Professor of EU Law at Utrecht University, was the discussant and questioned the extent to which the new MoU squares with the CoP principles on transparency, participation and openness, the MoU itself not being clear about how it was developed, who was involved, in particular user/consumer representatives; has participation and openness been
ensured to the fullest extent possible and how does that reflect in the actual balancing of interests and the self-regulatory enforcement system as designed? She noted also that there is a specific section on user perspective, addressing the foremost role of consumers in enforcing IPR – she questioned whether this is realistic.

After questions from the floor, Jean BERGEVIN noted the need to look at the entire value chain when considering enforcement issues, as counterfeit goods can emanate from the same supplier as authentic products or can enter at any point (upstream or downstream) in the distribution chain of a good or services. Consumers can be misled to buy defective IP infringing products but one has to recognise that certain consumers also knowingly buy such products notably in the music, film and luxury/high-end market categories. The EUIPO Observatory on IPR infringements has provided very detailed surveys to show how consumer behaviour towards IP infringing products actually looks like. There was also a discussion around advertising, where brands often buy a "profile" for a particular consumer and do not know exactly where their adverts are appearing. There needs to be a greater connection between commercial directors and compliance departments to tackle this issue. The Commission announced that it was beginning work to develop new MoUs to fight commercial scale IP infringing behaviour with advertising agencies, payment service providers and transport service suppliers (shipping lines and express/postal services).

- **SRCR in the EU Policy Approach to Online Platforms**

Eric PETERS, Deputy Head of Digital Single Market Unit, DG Connect, gave a presentation on SRCR in the EU Policy Approach to online platforms. He explained how the aims of the Digital Single Market – providing more integrated networks, products and services, stood on three pillars: access, environment and economy and society. These were split into sixteen actions to be implemented this year. Several aspects are particularly relevant to discuss in terms of SRCR, including the online platform as a new business species and the pace of change, the liability regime with incentives to invest in voluntary measures and the development of key principles and a clear reference to SCRC in the platform text. However, there are a number of challenges, such as the need to find the right partners to make decisions legitimate in an evolving sector.

Discussant Chris MARSDEN, Professor of Internet Law at the University of Sussex, noted how reluctance due to technical ignorance to regulate these platforms in the beginning now means we are attempting to regulate multi-sided giants. He also emphasised the point that the technology is not mystifying to computer scientists, and encouraged regulators to engage with technical experts and researchers. There is a need to act more quickly, as these platforms are constantly evolving.

In response to questions from the floor, Eric PETERS agreed that the capacity and understanding of public authorities needed to increase. It is also necessary to foster a greater willingness in Europe, which hosts just 4% of the world’s online platforms. In terms of responsibility, this issue boils down to data and the mitigation of risk.
Codes of Conduct Under the General Data Protection Regulation

Irina VASILIU, Data Protection Reform Sector, Data Protection Unit, DG JUST, presented an overview of the provisions for drafting Codes of Conduct and monitoring their implementation under the recently adopted General Data Protection Regulation (GDPR). The GDPR as the existing Directive 95/46/EC has the double objective of protecting personal data while ensuring that the free flow of personal data within the Union. The aim of the revision of the EU data protection rules was to provide an updated framework for data processing, a framework which is in keeping with the key principles of Directive 95/46/EC while bringing forward additional legal certainty, reinforcing rights for data subjects and providing clearer obligations for those processing data. From a fundamental rights perspective, codes of conduct and certification mechanism are seen as “market driven tools for application” of the GDPR. Approved codes of conduct may be used as an element to demonstrate compliance with the obligations of the controller under the GDPR.

David MARTIN RUIZ, European Consumer Organisation (BEUC) acted as a discussant, in place of his colleague Ursula PACHL. He noted that in terms of Codes of Conduct, the GDPR is a good step in the right direction. More accountability is borne by business, but in return they can more easily explain their actions to consumers. To ensure Codes are successful it is necessary to have guidelines on implementation, monitoring and consequences for non-compliance, as well as ensuring the involvement of all relevant stakeholders in the development of the Code. It was suggested that this last point should be improved, rather than being treated as a tick-box exercise. The key point, from his perspective was that compliance must be demonstrated, not assumed due to the existence of a Code of Conduct.

After questions from the floor, Irina VASILIU indicated to those present that both the Art 29 Working Party and the Commission were organising events on the implementation of the GDPR on the 26 and 27 July respectively.

Nicole DEWANDRE concluded proceedings by reiterating the successes of the CoP and thanking all members and speakers. The preliminary date for the next meeting is 24th November, when the focus will be on formulating clear messages to promote the work of the CoP and evaluating its architecture.