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Wolfgang Schulz / Thorsten Held

Regulated Self-Regulation as a Form of Modern Government

Study commissioned by the German Federal Commissioner for Cultural and Media Affairs

Interim Report (October 2001)

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see http://www.hans-bredow-insitut.de

MODULE A: CONCEPT AND THEORETICAL FRAMEWORK

I. Introduction

Traditional governmental regulatory concepts are seen as an obstacle to a country's economic development, especially in rapidly-changing industries. On the other hand, industry itself needs regulation in certain cases (e.g. when it comes to opening markets or hindering the abuse of essential facilities). Regulation is required, furthermore, in order to attain specific goals that remain valid in the information society (such as safeguarding diversity of content and protecting minors in broadcasting). In our observation, many states lean towards simple answers to such problems. Some fields of regulation are completely handed over to industry self-regulation, whilst others remain subject to traditional governmental regulation. Although concepts of „Regulated Self-Regulation“ are well known in principle, there is still a lack of theoretical analysis, as well as of reports of experience made with these concepts in different countries as well as in different fields of regulation. Could this concept be seen as the "middle road" to follow for regulators in the information society?

This study aims to collate the available information in order to identify and analyse the various tools that can be used in „Regulated Self-Regulation“, and thus to create a "tool box" from which lawmakers can benefit in a first step to solve the above-mentioned regulatory dilemma.

II. The concept of "Regulated Self-Regulation"

1. Exposure in Europe

In Europe, there has been some exposure to indirect regulation similar to the models which can be found in those countries upholding Anglo-American law systems.[1] In order to set up a tool box suitable not only for Anglo-American types of regulation, but also for all European countries, we have based our study on the more open framework of "Regulated Self-Regulation" to describe the above-mentioned ways indirect governmental influence can be exerted on self-regulation.

The concept of "regulated self-regulation" is partly based upon the Anglo-American concept of "regulation". However the German debate focuses on the achievement of goals, such as constitutional principles, rather than on reconciliation of private interests. Wolfgang Hoffmann-Riem, now a judge at the German Constitutional Court, has introduced the term "Regulated Self-Regulation" to the German legal debate.[2] According to this concept, the role of the state has to move away from hierarchical control to a modulation of processes going on within society.[3]

2. Transformation of the state and new modes of regulation

On analysing the necessity of new forms of regulation, the changes in society and the decreasing role played by the State have to be taken into account. Enforcing regulation by state law to support objectives which are in public interest has become more and more ineffective.[4] For one thing, it is becoming more and more difficult to attain these goals,

and for another the undesirable side-effects of regulation (i.e. stopping the progress of the specific branch of industry) are able to cancel out the benefits of regulation.

In political and legal science this process and the reactions of the state have been analysed and different models have been developed that cannot be described in this paper.

In this context it is said that the "sovereign state" is already changing to a "corporate bargaining state". The administrative role is now more than ever to moderate and mediate rather than to control.[5] When the state makes increasing use of private organisations to ensure public welfare, it is referred to as an "activating state".[6]

The changes in the role of the state have led to a discussion of possible modes of regulation.[7] All together the following modes of regulation can be distinguished:

a. **Command-and-control regulation** (in German: "imperative Steuerung"): Here, the State lays down a set of rules to be followed by the subjects of regulation, as well as prohibitions that they must adhere to, thus ensuring that the objectives of regulation are fulfilled.

b. **Self-regulation** ("Selbstregulierung"): Here, the State refrains from interfering with a process because it assumes that social processes will lead to a result which will achieve the objectives of regulation all on its own. Private arrangements are made without any interference by the state.[8] In this concept "the market" is regarded as a form of self-regulation.[9] A specific form of self-regulation can be described as follows: different players[10] agree to rules regulating their activities and they define and enact codes of conduct ("intentional self-regulation").[11] This study focuses on self-regulation by economic players. Nevertheless, "self"-regulation may also include the participation of third parties (i.e. besides the state and industry) in the process of regulating.

c. To make use of the advantages of both self-regulation as well as of command-and-control regulation, and to avoid the drawbacks of both of these modes of regulation, these modes have been combined in some areas. An example of such a combination is the law on the media and on telecommunications. To achieve the objectives of regulation, self-regulation is supported by traditional, imperative instruments. Additionally, flexible, evolutionary elements provide a supplement to traditional, imperative regulation. The state structures the frame to enable self-regulation. It intervenes if the objectives are not met by self-regulation, or if there are undesirable side-effects.[12] For example, regulation of self-regulation of the market is seen as necessary whenever there are market failures for specific goods, such as negative externalities.[13] How this type of regulation can be named is still somewhat controversial. In this paper the term **"regulated self-regulation"** is used.

3. The term "Regulated Self-Regulation"

As terminology varies from one scientific discipline to another, and also from state to state,[14] the term "Regulated Self-Regulation" needs further explanation: When it comes to self-regulation that is combined with laws set out by the state, different terms are used in the political discussion as well as in the scientific discussion:

- "Regulated Self-Regulation"
- "Co-regulation"
- "Audited Self-Regulation
- "Self-regulation"

Besides "Regulated Self-Regulation" the terms "co-regulation", "audited self-regulation" and "self-regulation" can be found. As mentioned before, the type of regulation examined here has to be distinguished from "pure self-regulation", that is processes of self-regulation where the State has no role to play. That is why the term "self-regulation" does not describe this type of regulation precisely. The term "co-regulation" also has its drawbacks for it seems to be used in different ways. Some use it just to describe a special aspect of the aforementioned type of regulation, that is to say co-operation between state supervision agencies and self-regulatory bodies, also known as the "partnership between the public authorities and the industry"[15] or the "sharing of responsibilities through agreements between public and private partners".[16] In the British Communications White Paper, however, co-regulation seems to be used in a broader context,: that is to "*indicate situations in which the regulator would be actively involved in securing that an acceptable and effective solution is achieved. The regulator may for example set objectives which are to be achieved, or provide support for the sanctions available, while still leaving space for self-regulatory initiatives by industry, taking due account of the interests and views of other stakeholders, to meet the objectives in the most efficient way. The regulator will in any such case have scope to impose more formal regulation if the response of industry is ineffective or not forthcoming in a sufficiently timely manner.*" [17] The UK's telecoms regulator OFTEL calls it "co-regulation", when the state is "encouraging progress and providing assistance in areas where the market is not delivering desired outcomes".[18] "Audited self-regulation" is found in the American debate but not in the European arena as yet.

In this study the term "Regulated Self-Regulation" therefore includes all the abovementioned forms of regulation. In accordance with the Birmingham Audiovisual Conference, this study defines "Regulated Self-Regulation" as "self-regulation that fits in with a legal framework or has a basis laid down in law".[19] The term may be somewhat awkward in itself, but it describes precisely what is meant, focusing on the instruments the state can apply to regulate a self-regulatory process.

4. Further research needed on "regulatory choice"

Quite a lot of theoretical and conceptual work has been done in order to analyse the above-mentioned scope of regulation. However, this has not led to the results being afforded a sufficiently systematic structure to enable lawmakers to find suitable regulation concepts fulfilling a variety of purposes.

There is still no regulatory choice theory serving as a framework for players in the regulatory arena to select the suitable concept and the respective instruments for each regulatory issue concerned.[20] To get to know the ins and outs of different concepts and instruments, it can – apart from theoretical analysis – be helpful to find out how other countries set about the matter of regulated self-regulation. It goes without saying that

any effort to learn from other countries has to take into account the different legal systems, methods and traditions as well as the cultural characteristics of the states. However, every state faces the same challenges in its transition to the information society. Thus, in this study both theoretical analysis and case studies will be used.

A regulatory choice theory has to give consideration both to the factors which determine the feasibility, and to the normative limits. The latter are first of all set by the constitutional framework and European law. For instance, the extent of possible delegation to self-regulation depends – according to German Constitutional Law – on the relevance of the material in question in terms of basic rights. There are limitations of delegation in other countries too.[21] At European level one has to examine the degree to which self-regulation suffices to implement the conditions of a directive dealing with this matter, and how it can be ensured that the framework set by the directives is not exceeded.[22] An additional matter of concern in designing a programme of regulated self-regulation is anti-trust law.[23]

These normative restrictions lead to a distinction being made between three types of fields of regulation (in a pilot, in fact all instruments of a concept should be examined and different substantive requirements are possible). Firstly, matters which can not be subject to self-regulation (e.g. programming which must be prohibited in broadcasting for constitutional reasons of the protection of human dignity or the protection of children against *extremely* dangerous content), secondly, matters in consideration of which Parliament can choose whether to use command-and-control-regulation or regulated self-regulation (e.g. youth protection with the exception of protection against *extremely* dangerous content), and finally matters which cannot be subject to state regulation at all, and hence are subject only to voluntary self-regulation (such as matters of good taste in television programmes).

This study is restricted to an investigation of the factual side, namely the effectiveness of regulatory concepts. The normative issues can only be dealt with if concepts which have already been worked out exist for a specific regulatory field. **The study has already taken into consideration the openness of the concept for instruments which are intended for instance to ensure conformity of the results of self-regulation with directives.** Implementation would otherwise be virtually impossible, especially in the field of media and telecommunication where these European requirements play an important role.

III. Research programme

This study attempts to identify and analyse tools of regulated self-regulation using the field of Media Law as an example. Further areas will be included later in the study. Besides a theoretical and conceptual exploration, the study investigates practices in other countries as to the concept of regulated self-regulation. The points of interest are the working order of specific tools, as well as their interaction and their context (characteristics of the sector, significance of the regulatory objectives, etc.).

The purpose of the study is **to create a (makeshift) "tool box"- a "manual" - for law giving bodies to select the suitable concept and the respective instruments for each regulatory issue concerned**. It goes without saying that this study can not yet work out the missing regulatory choice theory, nor can it present definitive results on the feasibility of concept or instruments. It has to work with proxies in order to put proposals forward at this stage of the research.

The main questions to be set are as follows:

- Under which circumstances, and in which sectors, can the industry be trusted to regulate itself?
- In which way can a sector of the industry be regulated to enhance the interests of the players (especially the economic enterprises) to achieve the regulatory objectives?
- How can this form of self-regulation be effectively regulated, in other words, how can the overall regulatory objectives be protected?
- How can the state enforce self-regulation by administering the tools mentioned above?

Based on theoretical and conceptual exploration, foreign models of regulated self- regulation are to be analysed. An important part of this examination is a case study concerning Australia. By analysing the regulatory framework of Australia, we have tried to compile the background information needed to perform expert interviews. Besides that, concepts from other countries will be taken into account.

IV. Sketch of the theoretical framework

Since the sixties there has been an ongoing debate on political regulation of society, in various academic disciplines, as well as in politics and industry.[24] This Chapter provides a brief overview on the findings of the academic survey to the extent that they are relevant to our study.

1. Reasons for the Failure of traditional regulatory concepts

Legal and political-science studies to date have focused on the **failure of traditional regulatory concepts** rather than on the advantages of „Regulated Self-Regulation“.[25] Nevertheless, one can learn from the findings how to find the areas in which new con-

cepts may be of assistance. These studies have pinpointed the following reasons for the failure of traditional regulatory concepts:

1. traditional regulation, such as "command-and-control regulation" **ignores the interests of its objects** and as a result resistance may be evoked rather than co-operation,
2. the regulating state shows a **knowledge gap** which is on the increase[26];
3. in modern societies, **information** has become the most important "finite resource", and in effect may also become an important "regulatory resource" (key word "information society"), which is not at the privileged disposal of the state, in contrast to the resource "power".
4. Globalisation enhances the possibility of **international "forum shopping"** to evade national regulations in force.
5. Traditional regulation does not seem to **stimulate creative activities** effectively. Initiatives, innovation and commitment can not be imposed by law.[27]
6. According to "system theory", regulation is an attempt to intervene in **autonomous social systems** which follow their own internal operating codes. It is near to impossible for the political system to control these operations directly.[28]
7. Finally, traditional regulation tends to operate **on an item-by-item basis only, and not in a process-orientated manner**, which would be desirable for complex regulatory tasks. If the state wants to influence the outcome of a process, it has to act before a trajectory has been laid out ("preventive state").[29]

2. Tools appropriate to a concept of regulated self-regulation

„Regulated Self-Regulation“ appears to be able to help overcome some of the above-mentioned obstacles of traditional regulation. For example, the interests of the objects of regulation (1.) are not to be ignored, but indeed form an essential part of this regulatory concept. By using self-regulatory elements, information-gathering turns out to be easier, mainly because the players on the regulatory field (such as economic enterprises) required knowledge in their fields of regulation and are informed at first hand of ongoing developments (2) and so on.[30]

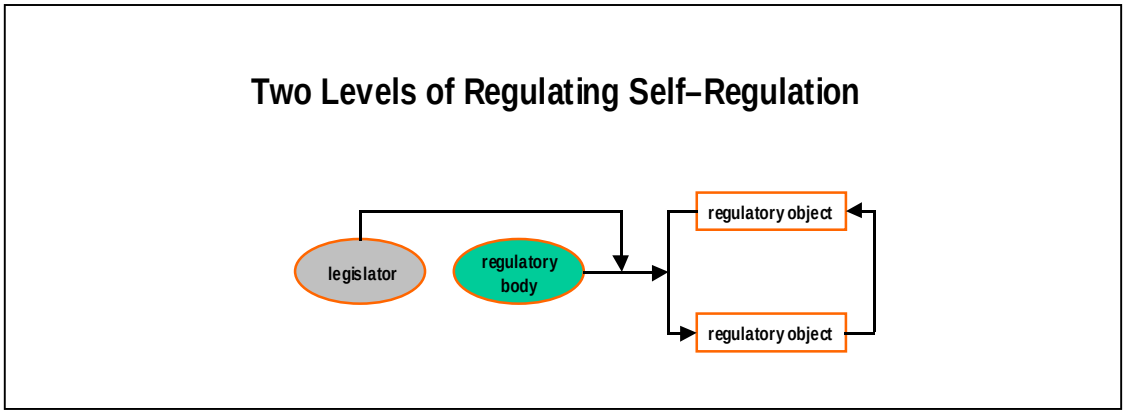
We use theoretical framework developed by the varieties of the theory of political regulation in order to describe different regulatory instruments. Accordingly, the state can use various techniques to modulate the process of self-regulation, such as:[31]

- Creating structural safeguards
- Setting out a framework
- Stimulating processes
- Creating and subsequently supporting players (supervisory bodies, etc.)
- Moderating and supervising

In view of the interaction of private and state control there are different types of tools which play an important role in any concept of regulated self-regulation, such as:

- The way of defining the tasks
- The structuring of the self-regulatory body (members, procedures)
- Sunset clauses, evaluation
- The imposition of effective sanctions
- The links to state regulation
- Ensuring co-operation between state authorities and self-regulatory bodies
- Providing second-line regulation (state regulation as a "safety net")

These forms of indirect regulation are based on the use of decentralised knowledge, and are regulated by a player who has been obliged to guarantee the accomplishment of the set objectives. Therefore, the **regulation of self-regulation normally consists of two levels of governmental regulation**, firstly, a statutory framework, and over and above that the conduct of the regulatory body (rules, orders) exerting a direct influence on the self-regulation process.



[1] See *EMR* (ed.), Television and New Media in Europe - Legislation, Liberalisation, Self-Regulation, Saarbrücken 2001.

[2] E.g. *Wolfgang Hoffmann-Rie*m: Multimedia-Politik vor neuen Herausforderungen, Rundfunk und Fernsehen 1995, 125 pp.; *Wolfgang Hoffmann-Riem*, Regulating Media, New York/London 1996, 326.

[3] *Wolfgang Schulz*, Regulierte Selbstregulierung im Telekommunikationsrecht, Die Verwaltung, Sonderheft "Regulierte Selbstregulierung" 2001.

[4] *Dieter Grimm* (Ed.): Wachsende Staatsaufgaben – sinkende Steuerungsfähigkeit des Rechts, Baden-Baden 1990, 69 pp.; *Udo DiFabio*, Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher-Selbstregulierung und staatlicher Steuerung, VVDStRL 56 (1997) 235, 239 pp.; *Renate Mayntz*, New Challenges to Governance Theory, European University Institute, Jean Monnet Chair Paper RSC No 98/50, 1998; *Fritz Scharpf*, Governing in Europe, London 1999.

[5] *Gunnar-Folke Schuppe*rt, Das Konzept der regulierten Selbstregulierung als Bestandteil einer als Regelungswissenschaft verstandenen Rechtswissenschaft, Die Verwaltung, Sonderheft „Regulierte Selbstregulierung" 2001

[6] Ibd.

[7] Scope of the regulatory process is split up into objectives, subjects, objects, modes (e.g. hierarchy, market, networks), media (power, money, information) and tools (e.g. regulative programmes, incentives, payments, communicative programmes); *Otfried Jarre*n/*Pattrick Donge*s, Medienregulierung durch die Gesellschaft, 45 pp.

[8] The regulation of the press in Germany in an example of pure self-regulation. *Verena A.-M. Wiedema*nn, Die zehn Todsünden der freiwilligen Presse-Selbstkontrolle, Rundfunk und Fernsehen ; 42(1994), 82 pp.; *Verena A.-M. Wiedema*nn, Dem Presserat die Zähne schärfen, in: Ingrid Hamm (Ed.), Verantwortung im freien Medienmarkt : internationale Perspektiven zur Wahrung professioneller Standards, Güterloh 1996, 93 pp.; A comparison of the regulation of the press in different countries can be found at Verena A.-M. Wiedemann, Freiwillige Selbstkontrolle der Presse - Eine länderübergreifende Untersuchung. Gütersloh 1992; see also *Angela J. Campbell,*Self-Regulation and the Media, Federal Communications Law Journal, Vol. 51, 711 pp

[9] There are different definitions, see *Douglas C. Michae*l, Federal Agency Use of audited Self-Regulation as a regulatory Technique, Administrative law Review 1995 (1), 171 pp.

[10] We use the term "player" as in political science to describe persons or any entities, who or which act in a regulatory process, such as industry bodies, interest groups, regulators etc.

[11] According to *Wolfgang Hoffmann-Riem/ Wolfgang Schulz/ Thorsten Hel*d: Konvergenz und Regulierung. Optionen für rechtliche Regelungen und Aufsichtsstrukturen im Bereich Information, Kommunikation und Medien. Baden-Baden 2000, 50 pp. this can be called „Selbstkontrolle" in German terminology.

[12] *Wolfgang Schulz*, Regulierte Selbstregulierung im Telekommunikationsrecht, Die Verwaltung, Sonderheft „Regulierte Selbstregulierung" 2001.

[13] Market failures in the field of broadcasting are explained in the Davies-Report, Annex viii, http://news.bbc.co.uk/hi/english/static/bbc_funding_review/annex8.pdf (complete report: http://news.bbc.co.uk/hi/english/static/bbc_funding_review/reviewco.pdf). See also Chapter 5.3 of the British Communications White Paper, http://www.communicationswhitepaper.gov.uk/by_chapter/ch5/5_3.htm.

[14] *Jörg Ukro*w, Die Selbstkontrolle im Medienbereich in Europa, München/Berlin 2000, 19 pp. According to Ukrow „Selbstregulierung" means that the private players set the rules themselves. If the private self regulatory bodies just control the compliance of the rules Ukrow calls it „Selbstkontrolle", *Jörg Ukro*w, Die Selbstkontrolle im Medienbereich in Europa, München/Berlin 2000, 22.

[15] Speech by Marcelino Oreja, Member of the European Commission at the Seminar on Self-regulation in the Media, Saarbrücken, 19-21 April 1999; http://europa.eu.int/comm/avpolicy/legis/key_doc/saarbruck_en.htm.

[16] Speech by Erkki Liikanen, Member of the European Commission, „eEurope: Evolution or Revolution?"; http://europa.eu.int/ISPO/docs/services/docs/2000/April/speech_00_151_en.doc.

[17] http://www.communicationswhitepaper.gov.uk/by_chapter/ch8/8_11.htm.

[18] OFTEL, The benefits of self and co-regulation to consumers and industry, July 2001, Chapter; http://www.oftel.gov.uk/publications/about_oftel/2001/self0701.htm#chapter1.

[19] http://europa.eu.int/comm/avpolicy/legis/key_doc/saarbruck_en.htm.

[20] Criteria have to be found for solving the problem of how to choose the right instruments to achieve special objectives in a special constellation of players.

[21] *Douglas C. Michae*l, Federal Agency Use of audited Self-Regulation as a regulatory Technique, Administrative law Review 1995 (1), 195 p.

[22] *Jörg Ukro*w, Die Selbstkontrolle im Medienbereich in Europa, München/Berlin 2000, 38 pp.

[23] *Douglas C. Michae*l, Federal Agency Use of audited Self-Regulation as a regulatory Technique, Administrative law Review 1995 (1), 198 pp.

[24] See *Renate Mayntz*, New Challenges to Governance Theory, European University Institute, Jean Monnet Chair Paper RSC No 98/50, 1998; *Fritz Scharp*f, Governing in Europe, London 1999; *Douglas C. Michael*, Federal Agency Use of audited Self-Regulation as a regulatory Technique, Administrative law Review 1995 (1), 171 pp.

[25] In this direction: *Douglas C. Michae*l, Federal Agency Use of audited Self-Regulation as a regulatory Technique, Administrative law Review 1995 (1), 181 pp.

[26] *Jörg Ukro*w, Die Selbstkontrolle im Medienbereich in Europa, München/Berlin 2000, 10 pp.

[27] *Renate Mayntz*, Politische Steuerung 1987, S. 98.

[28] Therefore it is impossible for the political system to control the operations of these systems directly, *Renate Mayntz/ Fritz W. Scharpf* (ed.): Gesellschaftliche Selbstregelung und politische Steuerung. Frankfurt am Main [et al.] 1995.

[29] *Gunnar-Folke Schuppe*rt, Das Konzept der regulierten Selbstregulierung als Bestandteil einer als Regelungswissenschaft verstandenen Rechtswissenschaft, Die Verwaltung, Sonderheft „Regulierte Selbstregulierung" 2001.

[30] This concept leads to more flexibility, acceptance and co-operation; *Jörg Ukro*w, Die Selbstkontrolle im Medienbereich in Europa, München/Berlin 2000, 14 pp.

[31] *Jens-Peter Schneider*, Die Verwaltung, Sonderheft „Regulierte Selbstregulierung" 2001.

MODULE B: CASE STUDY "AUSTRALIA"[1]

I. Overview

A general shift to self-regulation was observed in the area of broadcasting and telecommunication in the nineties of the past century in Australia. With the 1997 Telecommunications Act and the 1992 Broadcasting Services Act, a **combination of regulation by the state and self-regulation** was established and later on re-modulated and re-shaped. All the experts consulted in preparing this study agreed on the assumption that – possibly after the general election in 2001 – the "pendulum will swing back" to more regulation, meaning that the core of the concept will be left as it is now, but more state regulatory elements will be brought to bear. This concept **is called "co-regulation"** in the academic debate in Australia. As this concept corresponds to the concept of „Regulated Self-Regulation“, or can be at least seen as a part of it, and furthermore, to avoid the abovementioned problems related to the terms, we have used the term "Australian approach to regulation" for this concept.

While the core of the concept is the same, the structure of the Australian regulatory concept differs for a variety of sectors of industry, namely broadcasting, telecommunication and online service-providers.

II. Procedure followed in the study

The study is based on an analysis of documents (acts, codes, standards, explanatory notes, other documents) and interviews done with 18 experts[2] in the area of broadcasting and telecommunication, carried out in June 2001. The statements made by the experts were used to both interpret documents and to evaluate the experience made in Australia so far.

Aims of the expert interviews were in particular as follows:

- Identifying the legal framework affecting the work of the experts' institutions
- Describing the concept of „Regulated Self-Regulation“, and moreover its position between pure self-regulation and command-and-control regulation
- Understanding
    - Relations between self-regulation organisations and state bodies
    - Co-operation between the different non-state bodies
    - Tools used to encourage the creation of so-called “industry codes”
    - Sanctions available in cases of breaches of industry codes
    - Actions to be taken in cases of failure of an industry code or complete lack of such a code
    - Ways and means of gathering information needed by the state regulatory bodies
    - Evaluation of these industry codes , the work of the state regulatory bodies and the respective acts
- Rating the system of „Regulated Self-Regulation“: Which benefits are there, what

are the drawbacks, which are the main factors to ensure that „Regulated Self-Regulation“ works effectively? For which regulatory objectives is the concept of „Regulated Self-Regulation“ suited?

In the following part of the report there is firstly a description of the system of „Regulated Self-Regulation“ as it is operated in Australia (co-regulation) and secondly, the evaluation of this system based on statements of the Australian experts.

III. Description of the Australian approach to media regulation

The Australian approach is characterised by confidence, in view of certain regulatory objectives, in the effectiveness of so-called industry codes. In these codes industry has laid down its own rules to which enterprises must adhere in view of the regulatory objectives targeted. So, the **Australian regulatory concept is not merely a state regulation with a few self-regulatory elements, but relies on self-regulation as far as possible**. However, there are various tools at the disposal of the regulator to secure the regulatory objectives, such as in the case of failure of industry codes. So the option of state regulation as a safety net remains ("Nothing has been given away" as an Australian expert said.).

1. General regulatory framework

In contradistinction to the situation in Germany, the Constitution has no significant influence on the regulatory framework applying to broadcasting, online services and telecommunications. The Australian Constitution does not contain a Bill of Rights. It provides few written guarantees of individual rights (e.g. freedom of religion in S. 116). Freedom of speech is not guaranteed by the Constitution.[3]

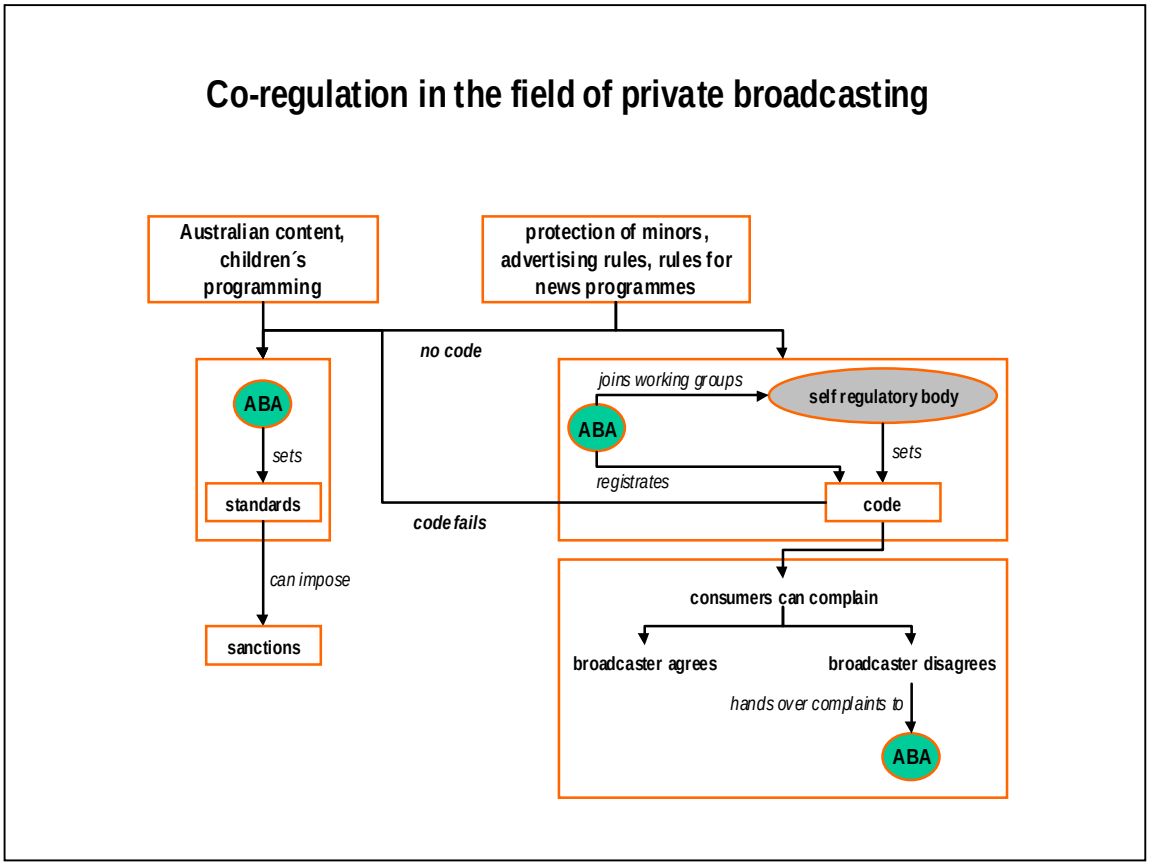
All the experts we asked confirmed our assumption that four different types of regulation can be identified:

1. **Pure self-regulation**	e.g. agreements reached between enterprises with no state involvement
2. **Industry codes**	which are registered by the supervisory body
3. **Industry standards**	which are set by by the supervisory body when a code fails
4. **Command-and-control-regulation**	by industry standards set by supervisory body without the prior possibility of the industry to set a code, and by the acts themselves

The main governmental supervisory bodies in the fields of broadcasting, online services and telecommunications are the Australian Broadcasting Authority (ABA), the Australian Competition and Consumer Commission (ACCC) and the Australian Communications Authority (ACA). The ABA is the broadcasting regulator for radio and television. Its focus is on the content of broadcasts, in contrast to the ACA, which focuses on supervising the carriage of broadcast signals. The ACA was formed in 1997 as a result of

the merger of Spectrum Management Agency (SMA) with Australian Telecommunications Authority (AUSTEL). The ACA regulates consumer and technical matters in the telecommunications area and manages radio communications. The ACCC is the competition regulator for all industries, especially for the telecommunications industry. In the field of telecommunications, it took over these tasks from AUSTEL on 1 July 1997. Its major functions are administration of the new telecommunications access regime, and regulation of anti-competitive conduct. There is a system of cross-membership that ensures the exchange of information between the three regulatory agencies ABA, ACA and ACCC. Members of one supervisory body are associate members of the other institutions.
The department responsible for this field at state level first and foremost is the Department of Communications, Information Technology and the Arts.[4]

2. *The Australian approach in the field of broadcasting*[5]



There are at present two public service broadcasters operating nation-wide in Australia, namely ABC and SBS. The study does not focus on the regulatory framework for public service broadcasters, different in many areas than that applying to private broadcasters. The ABA and the SBS are not included in the regulatory system dealt with here, but set their codes of practice independently, and these are not registered by the ABA. The ABA has no power to enforce sanctions on the public service broadcasters. In the case of a breach of codes, the ABC has to simply report to Parliament.

As far as private broadcasters are concerned, the Broadcasting Services Act primarily sets the framework for regulation. Apart from the fact that private broadcasters have to act in line with the 1974 Trade Practices Act and the 1992 Radiocommunications Act

which outlines the system of spectrum allocation. In some fields the regulators have the authorisation to lay down supplementary rules.

Parallel to the legal structure lies the structure of the governmental supervisory bodies. ABA plays the major role when it comes to supervising private broadcasting in accordance with the Broadcasting Services Act. The ACCC is responsible for the enforcement of the Trade Practices Act and the ACA for problems of spectrum allocation. As the ABA reports to the government Department of Communications, Information Technology and the Arts, this department, too, is part of the supervisory structure.

In accordance with the Broadcasting Services Act, a different regulatory system applies to different objectives. No self-regulation elements are provided for some fields, such as Australian content and programmes for children, so that the ABA has to set standards from the outset in these areas (see type 3 or 4 of the above lists). For other fields, such as the protection of minors, advertising and news programmes, the industry can set codes applies (type 2), so that here the system of so-called co-regulation is applied. In the following paragraph we will explain the system in detail.

The Broadcasting Services Act states that self-regulation has to be used as far as possible (Sec. 4). Additionally, the act specifies the objectives industry codes may refer. In accordance with Section 123 (2) these include *"methods of ensuring the protection of children (a), methods of classifying programs (b), promoting accuracy and fairness in news (c), preventing the broadcasting of programs that mislead the audience or use or involve the process known as subliminal perception (d), broadcasting time devoted to advertising (e), handling complaints (f) and kinds of sponsorship announcements (g)."* For some objectives industry codes may not be issued (Section 122).

Where the Broadcasting Services Act opens the possibility of industry code-making, the power of the ABA remains to set an industry standard if

(i.) there is a failure of code (section 125 (1)) or

(ii.) the industry is not able or willing to make a code (section 125 (2)).

Industry bodies play a major role in the process of code-making; they represent parts of the industry involved and serve as a platform for negotiations. In the field of commercial broadcasting in Australia there are the "Federation of Australian Commercial Television Stations (FACTS)", the "Federation of Australian Radio Broadcasters (FARB)", the "Australian Subscription Television and Radio Association (ASTRA)" and the "Community Broadcasting Association of Australia (CBAA)". Their codes have to be registered by the ABA. Registration, which is one of the key instruments for regulating the self-regulatory process, depends on meeting the preconditions set out in the Broadcasting Services Act. These include especially procedural rules. The Act also contains content-related instructions for codes, such as that in the field of the protection of minors, the classification of the Office of Film and Literature Classification must be taken into account. When a code has been registered by the ABA, all participants of the industry have to act according to the code.

For commercial television there is the example of the "Commercial Television Industry Code of Practice" developed by FACTS covering the following matters:

- classification of programmes and programme promotions with regard to the protection of minors (each broadcast day is divided into classification zones)
- standards for news and current affairs programmes (especially fairness and accuracy)
- time occupied by non-programme matters (largely advertising)
- classification and placement of commercials
- handling of complaints.

Besides the above-mentioned registration of the codes, there are some formal and informal ways to influence industry self-regulation. The key point of the Australian approach are viewer complaints. The system of dealing with complaints is incorporated in the regulatory system. Consumers and interested groups can complain to the broadcaster itself. If the broadcaster comes to the conclusion that the complaint is justified, it remedies it. Otherwise it has to hand it over to the ABA which then examines the case. Breaches of the code can lead to the ABA concluding that an industry code has failed in certain areas, and that an industry standard is required. This possibility may lead to co-operation among broadcasters when it comes to complaints.

However, breach of code does not give the ABA the possibility to apply sanctions on an individual broadcaster. This is restricted to infringements of industry standards or licence conditions. If a code is breached by a company repeatedly, the ABA may impose a condition on the licence. In that case, further violation would evoke sanctions. Thus the ABA has means to single out and control "black sheep" directly without revoking the possibility of self-regulation in this area completely.

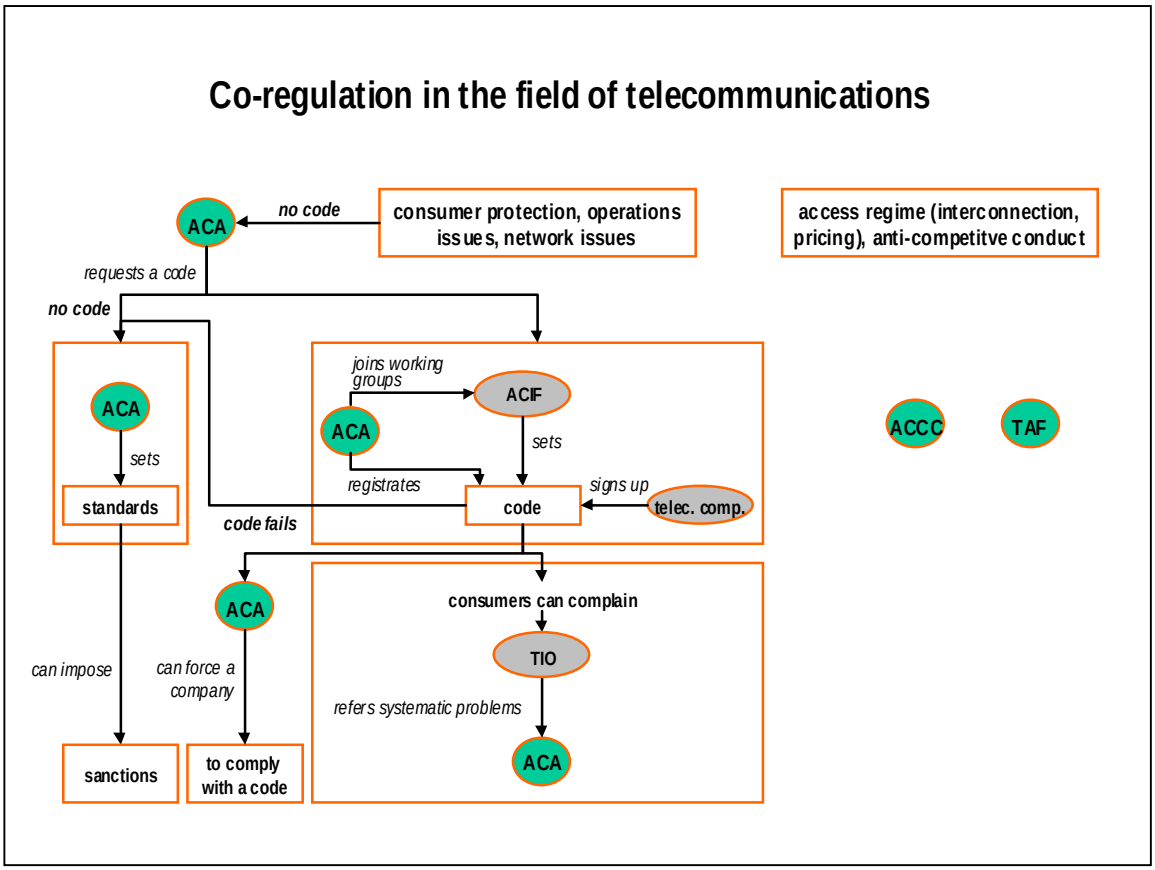
Furthermore, the ABA is informally involved in the code-making process, that is to say by attending working committees or by gathering information, e.g. by commissioning research.

There is no ground for formal governmental interference with this special regulatory process. According to section 128 of the Broadcasting Services Act, the two chambers of the Parliament may add to a code. However, the experts agree that this is mainly a theoretical possibility.

"People just ask what suits us best in this area"

Australian Expert asked for the reasons why special kinds of regulation are used in broadcasting and telecommunications

3. The Australian approach in the Field of Telecommunications



Up to 1991, the telecommunication system was characterised by a monopoly of Telecom (now Telstra), which was then in the first stage of liberalisation, being replaced by an oligopoly of Telstra and the private provider Optus for fixed-line telephony, and Telstra, Optus and Vodaphone in mobile telephony. The 1997 Telecommunications Act led to a complete liberalisation of the telecommunications market. While this Act deals especially with matters of consumer protection and technical issues, the Trade Practices Act contains specific provisions on telecommunications serving to safeguard competition; this also includes regulation of prices.

Governmental supervisory bodies in this field are the ACA, acting to implement the Telecommunications Act[6], and the ACCC, which is responsible for supervision as regards provisions on competition in accordance with the Trade Practices Act. Like the broadcasting sector, industry bodies play a key role in the code-making process. Industry bodies and associations that represent sections of the telecommunications industry can develop industry codes. The main industry body is the "Australian Communications Industry Forum" (ACIF). The members also include an association representing the interests of companies which are customers of the telecommunications enterprises ("Australian Telecommunications Users' Group", ATUG), the "Service Providers Industry Association" (SPAN) and the consumer protection association "Consumers' Telecommunications Network". Sanctions such as in case of infringements of a code are imposed by an "Independent Complaints Investigator" (ICI) created specially for this purpose. The

Telecommunications Access Forum (TAF) has been established for matters concerned with interconnection.[7]

In contradistinction to the broadcasting system, the codes developed by the bodies of the telecommunications industry are only binding on enterprises which have signed up for the codes.

Industry codes can be developed on any matter which relates to a telecommunications activity, which is defined very widely in section 109 of the Telecommunications Act. ACIF has the primary responsibility for developing technical, operational and consumer protection codes.

Codes have to be registered by the ACA. If the ACA considers that the code meets the stipulated criteria, it is obliged to include the code in a Register of Industry Codes (section 117). The criteria that a code must meet include:

- enterprises within the sector of industry for which the code was issued were invited to participate in the drafting of the codes
- a draft of the code was published and members of the public were invited to make a submission
- the ACCC was consulted
- at least one body or association that represents the interests of consumers has been consulted.

Once the code is registered, the ACA can direct any enterprise from this sector which breaches the code to comply with it, whether it is a voluntary code signatory or not.

The ACA can also recognise the failure of a code or the lack of a code and set an industry standard in this field. Additionally, the Telecommunications Act empowers the ACA to request a code if necessary (section 118). When it comes to the more informal tools of regulating the self-regulation, one can mention the active role ACA representatives play in the different working committees of ACIF for example.

Like in the broadcasting sector, the regulatory system in the telecommunications sector is largely based on complaints from the consumers. The industry formed the **Telecommunications Industry Ombudsman (TIO)** to deal with complaints.[8] The TIO may refer systemic problems, identified through complaints which have been received, to the ACA and the ACCC. The TIO is established under *Part 6 of the Telecommunications (Consumer Protection and Service Standards)* Act 1999. All "eligible carriage service providers" (which supply a standard telephone service, a mobile service or a service that enables end users to access the Internet) must join and comply with the TIO scheme.

The ACCC administers the telecommunications-specific self-regulation regime for facilitating access to the networks of carriers.[9] The "Telecommunications Access Forum" (TAF) takes part in the development, implementation and evaluation of matters concerned with access. In the Trade Practices Act, the rules of interaction between the ACCC and the TAF have been laid down (Part XIC, Sec. 152BG pp.).

The TAF submits a draft TAF telecommunications access code to the ACCC for approval. The content of this draft must set out some model terms and conditions under which access may be required (section 152 BD). Then, if the TAF gives the ACCC a

draft, the Commission must approve the draft or reject it and has to notify its decision. The approved draft becomes the "approved TAF Telecommunications Access Code" (section 152 BE).

The existing TAF Telecommunications Access Code was generated by the Australian Access Forum. The Forum took on the role of the TAF, which had been planned at this time, but did not yet exist.

If the ACCC rejects the draft TAF code, or if no code exists and TAF dies not comply with the request to issue a code, the ACCC makes a telecommunications access code (section 152BJ). Even this code must set out terms and conditions for access. Like in approving a TAF code, the ACCC has to call for public submissions in drafting the code, and must consult the ACA. An ACCC code is effective in the sense as if it were approved as a TAF code.

The Minister also plays an important role. Under the Telecommunications Act, he/she has the authorisation to determine[10] whether a specified facility is a network unit for the purposes of the Telecommunications Act, and whether a specific network unit or the use of such a network unit is subject to licence (section 51). Furthermore, the Minister lays down conditions of carrier licences (section 63) and may determine that a specified egible definition provision does not apply in relation to a specified carriage service or person (section 95).

The Trade Practices Act gives the Minister authorisation to declare whether a particular standard, prepared or approved by the Standards Association of Australia, is a consumer product safety standard or a consumer product information standard as defined by the Act (section 65E). Moreover, the Minister has to implement principles dealing with price regulation and conditions relating to the standard access obligation (section 152CH).

4. The Australian approach in the field of Internet services

At the end of the last century, like in most other industrialised states, a debate also took place in Australia on whether the content of online services could or should be regulated, especially in view of content harmful to minors. Here too, Australia has adopted a concept in line with co-regulation. It led in 1999 to an amendment of the Broadcasting Services Act dealing with Internet service providers (ISPs) in section 8 (Part 1). Parts of this amendment have been criticised by some experts, however, they do agree that all in all the regulation of ISPs can be seen as a success of the Australian approach, mainly because the industry reacted effectively in creating a code within just a few months.
The structure of Internet regulation follows the model of broadcasting regulation. Seen from the governmental side, the ABA is responsible. The industry body which creates the codes is the IIA (Internet Industry Association).

In this system, complaints play an even more important role than in the broadcasting and telecommunications sectors: In contradistinction to regulation of broadcasting, consumers can complain to the ABA directly. If it is illegal Australian content to which the complaint refers, the ABA issues a so-called "take-down notice" to the ISP. If it is foreign content, the ABA informs the institution which is responsible for updating the databases for Internet filter systems. In the industry code the ISPs have agreed on implementing such user filter software, thus offering the software to the consumers and informing them

on how to use it. Studies are being carried out on behalf of the ABA relating to all-year use of this software and possibilities created to allow parents to familiarise themselves with it.

IV. Experience gained with regard to the Australian approach

1. Shared views

Firstly, we will report statements made by the experts on the abovementioned regulatory system which are uncontroversial. In general, all the experts agreed that the shift to so-called co-regulation was a positive move which on the whole improved the effectiveness of regulation in view of the objectives of the acts. On the other hand, the experts shared the view that at least in some fields, or for some objectives, the shift to self-regulation went too far.

It is seen as an advantage of the Australian approach that the state can not only achieve the objectives set equally well, but also more effectively than in the case of command-and-control regulation. It is also cheaper for the state to use this type of regulation. On the other hand, the costs have increased where industry is concerned in comparison to command-and-control regulation.

When interviewed on the key factors that make this regulatory system work, the experts agreed on the point that totally contradicting interests on the part of the enterprises in this field hinder the integration of self-regulatory elements into the regulation concept. In this context the work of TAF is mentioned as a negative example. In the field of interconnection this type of regulation was regarded as a failure of the Australian approach.[11] Overlapping interests among enterprises and – if intended by the regulation – of enterprises with public interest (e.g. the consumer perspective) are essential for this type of regulation to work properly. This does not seem to be the case as far as interconnection is concerned.

Additionally, the experts consider that a significant role is played by how the industry is structured. Different industries form different cultures which made it (for example) difficult for ACIF to incorporate ISPs in their work.

Even representatives of industry bodies confirmed that self-regulation only works if there is a threat of state intervention, such as in the shape of industry standards in case of failure of a code or sanctions imposed on enterprises that have infringed a rule (the so-called "heavy stick in the background"). Being aware of this is essential for negotiating when drawing up codes within the industry bodies. On the other hand, it is important in supporting self-regulation that the regulator cannot use the "heavy stick" until it has converted a breach by a licensee into a licence obligation. This means that the regulator can only intervene after clarifying the obligation.

Furthermore, according to these experts the definition of the fields of regulation is an important component of the Australian model. That is to say it seems be impossible to create a compiled self-regulatory system for both content (broadcasting) and infrastructure (telecommunications) as well.

Shared views: Main factors of the Australian approach:

- Overlapping interests among the enterprises
- Adequate structure and "culture" of the industry
- "Heavy stick in the background"
- Appropriate definition of the fields of regulation

2. Additional statements

The following points were mentioned by the majority of the experts, or by some of them, but emphasised very strongly:
The Australian approach is widely seen as beneficial mainly because of its **flexibility to adapt to changes in the regulated area**, especially to new programme formats in the field of broadcasting. If there are any complaints about new types of programmes (for example "Big Brother" has recently started in Australia) the ABA can request that its codes should contain conditions to deal with the specific problems of the programme format. Some experts however consider it to be a disadvantage for different codes to exist for the same objectives. For example, the codes relevant to the protection of minors against harmful content differ in some points for no specific reason whatever (codes for FreeTV, PayTV, regional broadcasting, Internet broadcasting, public service broadcasting).

Some experts emphasised that the Australian approach is useful because the public interest which the government is to serve is not unambiguous. This process of co-regulation provides the opportunity to **define and form interest**. Additionally, they focused on the aspect of participation on the part of the industry, which leads to greater acceptance of the outcome of the regulatory process.

This type of regulation differs in its efficiency from the **objectives** intended to be achieved thereby. Thus, the protection of minors in the field of commercial television is seen as a field where the Australian approach functions effectively. Other objectives have to be dealt with under traditional command-and-control regulation.

"Don't let co-regulation become a lifestyle"

Australian Expert

Among the points some experts mentioned as important is the **reputation of the self-regulatory bodies** and the key figures representing them. It is seen as an advantage by some experts to find people who have had prior work experience in this specific area, i.e. in working for a supervisory body or in the respective industry involved. In view of this ACIF is seen as an industry body with a high reputation.

Another point of interest is the **proximity-distance-regulation** between the governmental regulatory body and the players in the field of self-regulation. The advantages of representatives of a governmental supervisory body in the self-regulatory process can outweigh the disadvantages by "capturing" the representatives of the regulator. Once they have participated in code-making it may be hard for the supervisory body not to register the code. At the same time, the presence of representatives of the supervisory bodies can hinder a frank discussion.

Furthermore, this type of regulation should identify and use the **incentives** needed in order to get the participants of the industry to co-operate. If there are not sufficient incentives, regulation can generate advantages itself, for instance by establishing the code as a "brand".

Some experts considered it to be a vital tool of co-regulation for Parliament to structure the **process of setting codes**. Some experts said that the Acts should lay down even more detailed requirements for the code-making process.

Many experts state that **evaluation** is an essential link where effective performance of the regulatory process is concerned. However, the present evaluation mechanisms are seen as insufficient in some ways. Even though there is normally a revision of an act at certain intervals, this provision is not mandatory as to industry codes. So some of the experts opt for a form of regulation which defines evaluation criteria, appointed time to carry out evaluation and so on.

The system being largely **complaint-based** is seen as a weak point of the Australian approach by the experts. They point out that there is no "culture of complaining" in Australia. Besides that, the so-called "cash-for-comment" case[12] has shown that you can not rely entirely on complaints to discover breaches of a code. No listener could have known that the journalists were taking money for their comments.

Additionally, the experts stated views on the issue of **how detailed the codes** should be. On the one hand, the flexibility of the regulation has to be secured, whilst on the other hand it is the precise task of the code to give concrete form to the generally-worded Acts. In the opinion of some experts the "cash-for-comment" case revealed that the commercial radio codes had not contained sufficiently precise rules which applied to that case.

The **"cash-for-comment" case**, which all the experts still remember vividly, has led some experts to conclude that there should be additional tools for implementation of the codes in the individual companies. The requirements set out in the codes would have to be amended into compulsory **clauses of employment contracts for journalists**. Moreover, they suggest making **further training courses** mandatory to ensure that the content of the rules is really explicit to the employees, and can for instance influence the production of a TV show.

Another point mentioned by the experts was the degree of **juridification**. The Australian approach is seen as a way to "keep lawyers and courts out of the game". On the other hand, this regulatory process can be used as a smoke screen or for delaying tactics by a strong player to avoid legal action. So any regulatory concept should, according to that, clearly define the points where the participants of the process can choose a legal approach.

This type of regulation needs players who can participate in negotiations and give voice to specific interests, attitudes and perspectives. For some issues it seems unlikely that interest groups will emerge specifically to deal with them. For these issues it can be an interesting way to build a **network of different interest groups** which are not focused on specific issues. CTN can serve as an example of such a player, who is able to represent different consumer groups in the field of telecommunication, such as rural populations, the disabled, the elderly. Although the different groups show special interest just at

certain points and at certain times when it comes to telecommunication services, CTN can operate on a permanent level. It serves as a foothold in matters such as knowledge, experience and reputation.

Finally, the **information-gathering powers** of the regulator and the public were rated by some experts as important but presently insufficient in Australia. One expert even implied that the whole co-regulatory system was largely established to keep the public out of the process of regulation. He demanded a publicly-funded organisation to be incorporated into the system. Alternatively, the supervisory authority could be placed under an obligation to provide more information to the public whilst the codes were being drafted.

Additional statements: Main factors of the Australian approach

- Characteristics of the objectives to be achieved by virtue of regulation
- Proximity-distance-regulation between the governmental supervisory body and the self-regulation organisations
- Reputation of the self-regulatory organisations and the key persons working at these institutions
- Incentives for participation by the industry
- Structuring of the process of setting codes
- Implementing the codes in the companies (e.g. staff further training programmes)
- Optimum degree of detail of the code
- Control not only based on complaints
- Degree of "juridification"
- Information gathering powers

3. Ins and outs of the Australian co-regulatory system

Summing up the ins and outs, we have learned from the documents and, in the first place, from the expert interviews, one can say that the Australian approach shapes an interesting culture, particularly in relation to the "regulatory culture" quite different from the way in which regulation is dealt with in Europe. Personally, the following elements were particularly remarkable:

- Especially in the field of broadcasting the approach has the effect of determining the responsibility to the industry. When new programme formats emerge, the governmental supervisory body can make sure that the self-regulatory body deals with the problems caused by this format – such as with regard to the protection of minors. So a process starts which regardless of the specific result (e.g. a new code) can stimulate the awareness of the problem in the industry involved.
- The level of protection of public interest seems to be at least as high as in countries where traditional command-and-control regulation dominates. The FACTS Code of Practice includes criteria for the classification of programming similar to the standards enacted by the State Media Authorities in Germany. Unlike for example the Code of Conduct of the German Multimedia Self-Regulatory Body FSM, which in some fields does not reach the level of protection which is laid

down in the law itself, the industry codes in Australia provide a high level of protection. However, we can not judge on the basis of the survey whether there are any deficits in executing the rules.

- Regulated co-regulation can obviously be much faster than traditional regulation. In Europe the problem of so-called value-added services is well-known. Some online services employed a special programme to surreptitiously disconnect users from their Internet access provider and reconnect them to another provider that demand high prices. In some cases this programme changes the dial-up settings on the computer permanently. From then on the user will be connected to a value-added service each time he establishes an Internet connection – having the most unpleasant effects on his phone bill. This problem has according to our knowledge not yet been solved in Germany. The system in Australia has led to an obligation of providers in an industry code which says that the consumer is to be notified in case of such a redirection of his dialer.[13]
- The expert interviews have however also shown that the Australian approach has not put an end to all of our regulatory problems. It is sometimes used by strong enterprises to delay decisions; there is a certain unwillingness to include the public to the process, etc. Nevertheless, there have been so many suggestions which have been made by the experts on how to improve the system that we have chosen it as a basis for our first recommendations.

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[1] We are especially grateful to Professor Mark Armstrong, Network Insight Group, RMIT University, Sidney, who generously supported our work and cross-checked this case study for accuracy. Of course the responsibility for all errors remains entirely our own.

[2] Ms Johanna Plante and Ms Raiche Holly, ACIF, Ms Helen Campbell, CTN, Mr Giles Tanner, ABA, Ms Rosemary Sinclair, ATUG, Mr Phil Singleton, SPAN, Ms Julie Flynn, FACTS, Ms Deena Shiff, Testra, Dr Robert Horton, ACA, Mr Derek Francis, CWO, Mr Peter James, Allens Arthur Robinson Law Firm, Ms Julie Eisenberg, SBS, Mr Paul Marx, Marx Lawyers, Ms Debra Richards, ASTRA, John Corker, Communications Law Centre, Mr Angus Henderson, Gilbert & Tobin, Professor Mark Armstrong and David Mitchell, Network Insight Group.

[3] For more details see *W. Hoffmann-Rie*m, Regulating Media, New York/London 1996, 223.

[4] In view of converging technology there is a debate taking place in Australia,as to whether the three supervisory authorities or at least two of them should merge. Although the experts were not explicitly asked in the context of this project about merging the supervisory authorities, some of them made statements concerning this matter and came to different conclusions.

[5] *Mark Armstron*g, Das Rundfunksystem Australiens, in: Hans-Bredow-Institut (ed.), Internationales Handbuch für Hörfunk und Fernsehen 2000/2001, S. 699; *M. Armstrong/., Lindsay/R. Waterso*n, Media Law in Australia, Oxford 1995.

[6] See for the functions: *Productivity Commissio*n, Telecommunications Competition Regulation, Draft Report, page 3.7, http://www.pc.gov.au/inquiry/telecommunications/draftreport/index.html.

[7] *Productivity Commissio*n, Telecommunications Competition Regulation, Draft Report, page 3.7, pages 9.16 p.p., http://www.pc.gov.au/inquiry/telecommunications/draftreport/index.html.

[8] *Productivity Commissio*n, Telecommunications Competition Regulation, Draft Report, page 3.7, http://www.pc.gov.au/inquiry/telecommunications/draftreport/index.html.

[9] *Productivity Commissio*n, Telecommunications Competition Regulation, Draft Report, page 3.6, http://www.pc.gov.au/inquiry/telecommunications/draftreport/index.html.

[10] See for more details *Productivity Commissio*n, Telecommunications Competition Regulation, Draft Report, pages 9.15 p.p., http://www.pc.gov.au/inquiry/telecommunications/draftreport/index.html.

[11] See *Productivity Commissio*n, Telecommunications Competition Regulation, Draft Report, page 9.18, http://www.pc.gov.au/inquiry/telecommunications/draftreport/index.html; the commission recommends to abolish the TAF.

[12] John Laws caused the biggest scandal in broadcasting when it was revealed that he had signed secret endorsement deals with enterprises for either making positive comments about products from these enterprises on air. (See http://www.aba.gov.au/what/investigate/commercial_radio).

[13] In this case it was none of the above-mentioned regulatory bodies but the Telephone Information Service Standards Council (TISSC) which issued the code; for the code see http:/www.tissc.com.au/practice.html.

MODULE C: TOOL-BOX OF REGULATED SELF-REGULATION

The following part of the interim report offers an insight as to the first findings worked out on the basis of theoretical analysis, and the case study in Australia. This part is still "work in progress" so there may be changes made depending on any new findings, for example, in analysing the experience made in countries other than Australia. That is why in this step, the "tool box" the project is to create is filled with instruments found in Australia.

I. Objectives of regulation and characteristics of the areas where regulated self-regulation could be introduced

There are at least two points to be kept in mind when thinking about areas where „Regulated Self-Regulation“ may serve as an alternative to traditional command-and-control regulation. Firstly, the **objectives which are to be achieved** in this area, and secondly, the **characteristics of the field**, such as the structure of the industry, existing interest groups which may play a role in forming public interest in this area, the "culture" which has been developed in this area and so on.

The findings of this study suggest that in view of the objectives set, the advantages of „Regulated Self-Regulation“ are especially high if the following conditions are to be found:

- The objective is not so fundamental that the public insists on having traditional command-and-control regulation. For example, ensuring Australian content was taken out of the self-regulatory system in Australia for this reason.
- In view of this objective, the interests of the different participants of the industry are not totally contradictory, but do overlap to some extent. These conflicting interests are seen as the cause of the failure of self-regulation in the field of inter-connection in Australia.
- For the specific objective the unfortunate conditions for traditional command-and-control regulation can be found, such as:
  - fast changing and complex structures in the field of regulation (for example media content)
  - information-gathering problems for governmental supervisory bodies
  - legal obstacles for governmental regulation, e.g. constitutional limitation of state interference in programming.
  - The objective in itself generates the idea of having different views on a matter.

Furthermore, the structure and culture of the industry plays an important role whenever „Regulated Self-Regulation“ as a concept is chosen. Though we did not find any type of industry structure which has obstructed self-regulation completely, there are some conditions that can be seen as advantages to such a concept. Some industry bodies have already created a "culture" of co-operation among the enterprises which can be used as a basis for self-regulation. A positive attitude to regulation as such on the part of the enterprises may be seen as an advantage, too, but the self-regulation of Internet service providers in Australia may serve as an example of an industry which is not used to being

regulated at all, and nevertheless co-operating in regulation.
As objectives and areas for self-regulation according to these criteria the protection of minors as far as broadcasting or Internet content is concerned can be seen as a field where the concept is promising. Additionally, matters of consumer protection in the field of broadcasting as well as telecommunications can be seen as another positive example of this concept.

II. Regulatory concept

1. What to consider when laying out the concept of regulated self-regulation

The concept of „Regulated Self-Regulation" has to be seen in the context of the overall regulatory framework. The theoretical analysis as well as the case study led to the conclusion that there are certain requirements to be fulfilled in the regulatory framework to make „Regulated Self-Regulation" workable. The main points concern the supervisory body acting in this field, and the relation between command-and-control regulation and „Regulated Self-Regulation" which is established by the legal framework.

Regulation in the sense defined above is a complex process where tools have to be adjusted quickly to new situations; information has to be gathered constantly and different interests and views have to be considered. Furthermore, it is not a matter of piece-by-piece intervention in various stages but of a long-term process. Considering this, regulation has to use – and mostly uses in practice – a two-staged type of regulation. The regulatory framework is outlined in an act enforced by Parliament, (1st level), and a regulatory body is empowered to regulate the specific processes (2nd level). This seems to be essential as to regulating self-regulation as well. The regulatory bodies play a major role in view of different tasks: to moderate processes of self-regulation and to ensure that the legal objectives are achieved in the case of the failure of self-regulation.

2. Tasks and structure of the self-regulatory organisations

a) Defining a specific function for self-regulation

Likewise, the findings of the study suggest that self-regulation has to have a specific function within the regulatory framework. The lawmakers have to make clear which main objectives of self-regulation are of paramount importance. Self-regulatory organisations obviously need a clearly-defined area of responsibility and adequate time to gain experience in this field to highlight the potential of self-regulation. Only then can the potential of self-regulation be revealed. This has to be kept in mind when defining the scope of self-regulation.

b) Defining the structure of the self-regulatory organisations

The Australian example shows above all that the industry bodies found in this specific part of the industry are exceptionally important to the self-regulatory process. State regulation can make use of the industry bodies which already exist in this field, or can try to establish new organisations which can serve as a platform for the negotiations of the industry, for example to make codes. State regulation can influence the self-regulation process by stating requirements for industry bodies. Thus, the Act can formulate a requirement – e.g. with regard to the incorporation of public-interest groups into the in-

dustry body – for registering an industry code. This indirect way of influencing the structuring of industry bodies can be seen as typical for regulating self-regulation according to the theoretical concept. However, in the Australian approach this tool is used rather to influence the code-making *process* than the organisations themselves.

Another possibility which targets the institutions themselves is to register the self-regulatory institutions which meet the statutory requirements. This concept is not found in Australia.

3. Relationships between the institutions

Another way to regulate self-regulation is to arrange the configuration of the different institutions which take part in the self-regulatory process. This too can be achieved in the same indirect way mentioned above, that is to put the registration of a code – or of the registration of the self-regulatory body – under the condition that specific institutions have to be invited to co-operate in code making. As co-operation between the enterprises, interest groups and the governmental supervisory regulatory bodies is the core of the self-regulatory process, thus the relationships between these institutions become particularly important. From the Australian example as well as from comparative studies on broadcasting regulation one can learn that the proximity-distance-regulation between governmental regulators and the industry bodies as well as the different enterprises should not be underestimated. On the one hand, the representatives of governmental supervisory bodies can play a role as mediators or by giving or gathering information i.e. on working group meetings; on the other hand, there is the risk of the regulators being captured by the industry, or preventing a frank debate among the representatives of the industry. Which is the best "working distance" has to be judged in view of the specific conditions of regulation in the field in question. However, one can state that distinct spheres of responsibility for the governmental regulator on the one hand, and the self-regulatory organisations on the other, is desirable.

4. Structuring the process rather than the content of self-regulation

In the theory of "Regulated Self-Regulation" the process of industry code-making is seen as the most important aspect. Consequently, the Australian system of regulation has developed a sophisticated system of conditions which have to be fulfilled in order to register an industry code. There is a wide range of possible requirements which can be stated in order to ensure or optimise the fulfilment of certain objectives. For example:

- the possibility of other organisations – supervisory bodies, interest groups – to give their views at certain stages in the code-making process
- the possibility for the public to obtain information on the proposed code at certain stages of the code-making process (see 7.)
- defining a minimum standard of acceptance of the code in the field of regulation
- setting time limits for code-making and code reviews

„Regulated Self-Regulation“ does not necessarily mean that substantial requirements for content have to be left to the self-regulatory body completely. The law may contain rules relating to the content of the codes, e.g. what is required as a minimum level of protection. That is why countries that welcome state influence in a broad sense can integrate

elements of „Regulated Self-Regulation“ into their regulatory concept.
When setting the requirements for the codes, compatibility of the regulatory concept as a whole with European directives has to be taken into consideration. Also for this reason, requirements concerning the content of the codes can be necessary. Furthermore it has to be examined in each single case if and under which terms codes are sufficient to effectively transpose European directives into national law.

5. Using or creating incentives

Overlapping interests may not be sufficient to make all relevant enterprises take part in the regulation process. It is theoretically plausible[1] and it can be seen in the Australian approach that the industry needs incentives to co-operate. One incentive may be just the avoidance of governmental regulation in this field. So the so-called "heavy stick in the background" seems to remain an important tool. Furthermore, incentives can be created. In the field of consumer protection, for example, to establish a "brand" can make it attractive for the industry to take part in self-regulation in order to be able to use the brand for marketing purposes.

6. Sanctions

An unambiguous outcome is the necessity to have effective sanctions in the case of breaches of codes or standards, regardless of the fact that they have been laid down in industry codes or command-and-control regulation or imposed by the regulator or an industry body. Our study backs the conclusion of other research projects that the lack of effective sanctions can be seen as one of the "deadly sins" of self-regulation.[2]

7. Evaluation

Evaluation of regulation on a regular basis and orientated to specific criteria has to be seen as an essential part of modern regulation. It is not only state regulation that should be subject to such an evaluation, but also self-regulation, especially industry codes themselves. Again the registration of a code can be used as a tool to demand evaluation of codes.
It is the enforceability of the codes that decides on the compatibility of the regulatory concept with European law.

8. Role of the public

The question has to be answered at various stages of a self-regulatory process as to if and to what extent the process should be open to the public. Publicity can be seen as an effective tool, as both theoretical analysis and the experience gained in Australia confirm that it is not only a tool to invite people to express their views, but it can also act as a control mechanism. On the other hand, frank exchanges of views may be made difficult and confidential negotiations may be made impossible in the focus of public observance where they would be beneficial to regulation. Thus, in a regulatory concept the points where the public can have access to the process should be chosen with some care. Hearings during an evaluation process are mentioned as a positive example. A lack of such hearings can be seen as a drawback of the current Australian approach.

Elements of a regulatory concept:

- Defining a specific function for self-regulation
- Defining the structure of the self-regulatory organisations
- Relationships between the institutions
- Structuring the process rather than the content of self-regulation
- Using or creating incentives
- Sanctions
- Evaluation
- Role of the public

III. Instruments to regulate self-regulation

To show the range of tools for regulating self-regulation and forward some criteria concerning the use of these tools is the key purpose of this study. At this stage the following tools are to be mentioned.

1. Registration of codes

In a self-regulatory system which is based on industry codes the registration of the code is a central tool for structuring the process of code-making as well as certain elements of rules which the code must include. Such rules may concern the structure of the organisations involved as well as the structure of the *relationships* between these organisations. The Australian experience shows that it is of major importance to define the process of code-making in the Act in full detail.

2. Certification of the self-regulatory organisations

A supplement or an alternative to the registration of codes is the certification of the self-regulatory body. This instrument is not available in the Australian approach. If the law-maker does not opt for the registration of the codes, other means have to be found to guarantee that all relevant interests have been taken into consideration, such as requirements in respect of the organisation (e.g. requirements relating to the membership of representatives of interest groups).

3. Power to the regulator to request a code

In order to have the possibility of setting a starting point for self-regulation, the state regulator can be given the power to request a code. It is thus possible to react quickly and flexibly to new situations, such as new programming formats. Such support for the self-regulation process appears to be particularly needed where the incentive for the industry to create or supplement a code is not set high enough, or not obvious.

4. Legal powers to the regulator in the case of failure of a code

As mentioned above, self-regulation has to have a scope in which the industry can develop its own rules and gain experience. Not withstanding, the Australian experience

gained as well as theoretical consideration suggest that there has to be command-and-control regulation in the background in the event of the failure of self-regulation so that important objectives can still be achieved and to motivate enterprises to co-operate. To achieve the latter, the system has to be formed in a way that "hard" state regulation is not merely a theoretical option but a workable aspect of the process. The act can define certain criteria in which the failure of the code is made clear or give the governmental supervisory body the power to define these criteria.

5. Requirements for evaluation of codes and sunset clauses

While evaluation and reviews of Acts are standard procedures in countries like Australia, the same does not apply in the case of industry codes. However, this is seen as a point in which the Australian system can be optimised. There are evaluations, but in most cases they are not mandatory. Evaluation helps to make self-regulation a process which is not restricted to the sole adoption of a code. Not only the interest groups, but also the supervisory bodies and the public can be given an opportunity to influence the process of self-regulation at this stage. A way to secure the undertaking of evaluations is to limit the period of time for the code to be enforced (so-called sunset clauses).

6. Possible sanctions

Although self-regulation can achieve its objectives by convincing the subjects of regulation, or at least making them accept the regulatory decisions, it can presumably not work without the possibility of sanctions in the case of breaking the rules. Therefore, the regulatory framework should define the type of sanctions and furthermore name the responsible body to carry out such sanctions and define on what grounds sanctions should be imposed.

7. Rights for special groups

To give particularly influential views a voice in the code-making process, i.e. as a counterpart to strong pressure groups, the regulation can grant rights to individual groups. This may also serve as an incentive to create such a group if has not been established yet. If there is no need for such a permanent representation of the specific interest for the specific issue, it may make sense to use the above-mentioned network model.

8. Deriving benefits from consumer complaints in terms of control

The regulatory system can use consumer complaints as a means to detect breaches of codes. Again the Australian model shows possibilities as well as limits to the concept. The latter include the fact that some violations cannot be detected by the consumer (due to information asymmetries as far as information goods are concerned). For instance it is impossible for a television viewer to be sure whether a journalist has received a gift of money for his comment, or if a story has been done according to journalistic standards).

9. Ways to ensure publicity

In exploiting the impact of publicity, public hearings can be made mandatory at appropriate stages of the code making, or the evaluation process. Besides that, the draft of a code has to be made public to give everybody the chance to make statements.

10. Ways to collect and provide information

As obtaining information is an important source to support regulation in fast-changing societies, the regulation concept itself should contain means of gathering information for the public as well as the regulator and the interest groups. The regulator can be entitled to demand information from the industry bodies when needed. Creating a public information office is another even more extensive way.

Instruments to regulate self-regulation

- Registration of codes
- Power of the regulator to request a code
- Powers of the regulator in the case of a failure of a code
- Evaluation of codes and sunset clauses
- Possible sanctions
- Rights for special groups
- Deriving benefits from consumer complaints
- Ways to ensure publicity
- Ways to collect and provide information

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[1] Cf. *Douglas C. Michae*l, Federal Agency Use of audited Self-Regulation as a regulatory Technique, Administrative Law Review 1995 (1), 183 et seqq.

[2] *Verena A.-M. Wiedeman*n, Die zehn Todsünden der freiwilligen Presse-Selbstkontrolle, RuF 42 (1994), p. 82 et seqq.

Summary

Module A : Concept and theoretical framework

(1) Most of all in those sectors which are undergoing rapid change, the traditional form of state regulation is frequently seen as an encumbrance imposed on industrial development. On the other hand, industry itself needs regulation in certain cases (e.g. when it comes to opening markets or hindering the abuse of essential facilities). Moreover, the necessity to safeguard public interests, that is to say diversity of media content and the protection of minors - even though this might all just partly reflect preliminary precursors - its place within the so-called information society subsists. Therefore, it is of major importance to find monitoring concepts which will enable the targets set to be effectively accomplished, and moreover, without any negative side-effects undermining the advantages of such controls. What is more, these controls should be adaptable to any framework in place, that is to say, flexible but efficient enough to transpose given European directives into national law.

(2) The weaknesses of the traditional legislative concepts in force have been brought to light above all by politico-legal science studies. The interests of the objects of regulation (in other words companies) tend to be ignored, something which leads to resistance instead of co-operation. In an ever-increasing manner the regulating state does not have at its disposal the necessary information needed to regulate imperatively. Furthermore, globalisation has led to "forum shopping" by enterprises providing them with loopholes to escape from state regulation - just to mention a few drawbacks. On the other hand, scientific observations indicate that pure self-regulation will have its share of executive woes, especially when it comes to execution of the goals set, which need not necessarily fall into the same interest category as those of the economy itself, the fulfilment of which is however politically desirable or even required by constitutional or European law.

(3) Can regulated self-regulation be seen as an answer to the current regulatory dilemma? Can it be seen as a kind of third path to implement monitoring in the information society? To accomplish the desired goals, self-regulation can be embedded in traditional regulatory concepts in such cases. This study intentionally uses the abstract term "regulated self-regulation" as it is capable of describing all the forms of state-controlled self-control, whereas the term co-regulation is not always used distinctly as far as the politico- scientific debate goes.

(4) Currently there is no "regulatory choice theory" at hand to help lawmakers with their choice of suitable sets of regulatory concepts and tools in dealing with each problem to which regulation is to be applied. To find out more about the advantages and disadvantages of these diverse concepts and tools, it is fundamental not only to rely on theoretical analysis, but also to study how other countries have dealt with the matter of „Regulated Self-Regulation“ practically. The first area to be taken as an example is media law. The interim report includes fieldwork carried out in Australia.

Module B: Case study Australia

(1) A general shift to self-regulation in the fields of broadcasting and telecommunications took place in Australia in the 90s of the last century. This case study, which is based on the analysis of documents, as well as interviews done with 18 Australian experts in this field, describes a model that indeed carries the name "self-regulation" and which does emphasise the responsibility incumbent on the industry. Officially, however, it imposes regulatory obligations on the activities in the economy (one Australian expert mentioning that "Nothing has been given away"). This is therefore a prime example of „Regulated Self-Regulation".

(2) The Australian model is characterised in all fields by its regulation setting, which in respect of distinct goals set relies entirely on so-called "industry codes". The rules which the industry needs to comply with in order to achieve the specific goals set are embodied in these codes. The Australian concept is therefore not just a state regulation containing elements of self-regulation, but it relies on self-regulation as far as possible. Nevertheless, there are a number of diverse tools to secure accomplishment of the goals set, and they serve as back-up in the case of any failure of the industry codes.

(3) The industry codes, the most important regulatory tool, must be registered by a regulatory state body. Herewith an investigation is carried out to verify whether the statutory requirements to obtain the issuing of such a code have been met, e.g. the participation of specific interest groups (to name just one). In addition, the supervisory body monitors the process of drafting a code by sending representatives to work groups of self-regulation organisations. In the field of broadcasting, spectators and listeners, or interest groups, can put in complaints directly to the station concerned if it is not complying with the rules laid down in the codes. There is no systematic monitoring on the part of a supervisory body. If the broadcaster does not remedy the complaint, the complaint has to be relayed to the regulatory body, which however is not authorised to impose any sanctions. Nevertheless, in cases of repeated violation a) terms can be set to make the codes a condition on the licence in order thus to directly monitor "black sheep" or b) industry codes can be replaced by so-called "standards", which can be directly enforced by the supervisory body as law set by the state, in which case self-regulation is no longer in force. Thus the responsibility of the governmental supervisory body is retained in the case of complete failure of self-regulation.

Module C: The toolbox

(1) The interim report gives an overall view of the first results, which were worked out on the basis of the theoretical analysis and the case study of Australia. First of all, the Australian tools will be transferred to the toolbox, and in the course of the study the toolbox will be replenished. Information will be supplied concerning the contextual terms of the tools, constituting the manual to be used in operating the toolbox.

(2) There are at least two main points to be taken into consideration if the areas are to be identified in which „Regulated Self-Regulation" can serve as an alternative to command-

and-control regulation. Firstly, the effectiveness of „Regulated Self-Regulation“ depends on the goals defined to be accomplished, and secondly, special attention has to be given to any particularities of the specific field, that is to say the constitution of the industry, existing interest groups, those who are able to define public interests in the area concerned and furthermore, the culture which has spread within the area, etc. The findings of this study reveal that the advantages of „Regulated Self-Regulation“ can be particularly strengthened with regard to goal-setting if the following requirements are met.

- That the goals are not fundamental to such an extent that command-and-control regulation is expected from the public. In Australia, for instance, guarantee of Australian content in programming was excluded from the system of self-regulation.
- With regard to the desired goal, the nature of the interests attributed by the different participants within the industry should not be completely opposing, but they should at least overlap in some respects. In Australia, the adverse nature of the interests originating from the enterprises are said to be responsible for the failure of self-regulation in the field of "interconnection".

(3) The concept illustrating self-regulation should be taken beyond its mere regulatory framework. Not only the theoretical analysis, but also the case study led to the assumption that certain prior conditions need to be fulfilled in the regulatory framework in order to make „Regulated Self-Regulation“ work efficiently. For example, the statutory definition of a very specific function of self-regulation is important (e.g. the classification of content criteria as regards the protection of minors, and the evaluation of individual offerings using criteria). Furthermore, the creation and use of incentives for the industry have to be taken into account to stimulate the co-operation of the industry (e.g. by establishing the code as a "brand" which is effective in advertising). Finally, the necessity of evaluation of the process of self-regulation in order to judge whether or not self-regulation is working in specific areas.

(4) The primary aim of this study is to demonstrate the range of tools available for self-regulation, and-furthermore to forward some criteria on how to apply these tools. At this stage the following tools can be named:

- registration of codes
- power to the regulator to request a code
- legal powers to the regulator in the case of failure of a code
- requirements for evaluation and sunset clauses
- possible sanctions
- rights for special groups
- deriving benefits from consumer complaints
- ways to ensure publicity

- ways for state bodies to collect and provide information and offer it to third parties.