HANS-BREDOW-INSTITUT
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EMR

# Final Report
# Study on Co-Regulation Measures in the Media Sector

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

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**Editorial note on the draft of the final report**

The purpose of this draft is to provide a document for Seminar 2 in January 2006. All empirical data available as of 1 January have been incorporated in the draft. However, the intention of the contractor is to complete the assessment for the final version. At the same time an impact assessment focussing on crucial points of the systems found within the EU will be carried out on the systems of nominated non-EU countries.

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# Table of Contents

# 1. INTRODUCTION

## 1.1. Objective of the study

The European Commission, General Directorate „Information Society and Media“, has issued this study in connection with the amendment of the Television without Frontiers Directive, which it has been suggested should be renamed the „Audiovisual Media Services Directive“. However, the background relevant to the study is even broader. New technologies and internationalization have led to widespread and fundamental changes within the European Union. These developments, which are often described as a change of former industry societies into so-called information societies, are a challenge for the regulating states. Traditional regulation, though successful and efficient in the past, might be unsuitable in the new circumstances. The role of the state and supranational institutions like the European Union might accordingly need to be redefined. However, how to redefine the respective roles is the subject of controversial political debate.

Against this background, the consideration of „better regulation“ is not merely a question of „social engineering“, part of the task is to work out better ways to achieve the policy goals under changing conditions; surely the broader background mentioned above has to be considered. Co-regulation is regarded by many as a means to achieve better regulation and to accomplish both coping with the increasing risk of failure of traditional regulatory concepts, and handing back responsibility to society where that seems appropriate. However, this raises fundamental questions concerning legitimization.

The study shows that a variety of co-regulatory systems are already in place in European Member States. At least for some objectives and social conditions the Member States have already opted for co-regulation as an appropriate means of achieving regulatory objectives. The media sector might in this regard be considered as a „front runner“ from which actors in other policy fields might learn.

Given the connection with fundamental changes of state and regulation, and the cultural and economic importance of the media sector, it does not come as a surprise that debates on co-regulation have been highly controversial. On the one hand, protagonists of self-regulatory bodies articulate the fear that their established voluntary system might be „captured“ by the state and made into a co-regulatory system. On the other hand, state regulators and private watchdogs voice the concern that partly empowering the industry to regulate itself might put the fox in charge of the henhouse.

Against this background the study aims to provide the following:

1. A broad picture of co-regulatory measures taken to date in the media sector in all 25 Member States and in three non-EU countries.
2. An overview of the knowledge already gained about co-regulatory measures.
3. Assessment of the efficiency and effectiveness of co-regulatory systems.

4. Identification of legal obstacles when it comes to the implementation of co-regulatory models, focusing on European Law.
5. Outlook and suggestions concerning implementation of co-regulatory measures in the EU Member States

Against the background of an ongoing process of convergence and multiplying types of traditional media the focus of the study has to be adjusted regarding the types of media to be covered:

- Press,
- Broadcasting,
- Online and Mobile Services,
- Film and interactive games.

The following regulatory objectives are included for examination:

- Protection of Minors and Human Dignity
- Advertising
- Quality, Ethics, Diversity of Private Media
- Annex: Access, Standard Setting

The specific way in which a Member State defines the remit of the public broadcasters, as to whether it might be co-regulation under our definition or not, does not fall within the scope of the study.

## 1.2. Approach and method

### 1.2.1. Theoretical background

The first step undertaken was to acquire an overview of the understanding of co-regulation in the academic literature. The reason for this is twofold: firstly, the development of a working definition of co-regulation needs a conceptual framework. Secondly, the impact assessment cannot be completely achieved empirically, given the complexity of the policy objectives such as protecting minors and limitations of research capacity. At this stage of work, different lines of academic debate could be identified as shown in chapter 2.1 below.

### 1.2.2. Identifying co-regulatory systems

Co-regulatory systems have been identified in three steps:

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

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

The first step has been undertaken with the help of correspondents from the network of experts of the EMR. Following guidelines handed out by the contractor, the correspondents have written country reports that have been published on the project's web page[1]. Furthermore, members of the contact committee have been invited to comment on the reports. All comments have been considered by the contractor for the further stages of research. Moreover, during Seminar 1 held on 28 April 2005 in Brussels participants had the opportunity to comment on the preliminary findings.

At a second step, the reports have been scanned in order to identify systems where no co-existence of state-regulation and non-state regulation could be found. For such systems it was logically impossible to find co-regulation since it is the minimum of each definition that there is such a combination. This process led to the exclusion of systems in Estonia, Latvia, Malta, Poland and Slovakia.

To make sure that no system would be excluded where co-regulation in whatever shape might be found, there was an invitation to the respective correspondent to cross-check and comment on our assumption that there was no combination of state and non-state regulation.

The aim of the following step was to arrive at a working definition. A consistent set of criteria has to be found that defines the scope of examination. The breadth of this definition is especially important as it predetermines which concepts applied in different Member States will be addressed by case studies and which will not. A definition that is too broad, embracing every form of regulation that aims to influence the market (which can be seen as a system of self-regulation since in an ideal market there is a balance of supply and demand), would not draw any distinction between traditional and new forms of regulation, whereas a definition that is too narrow would exclude relevant concepts. There is no value in terminology as such. However, it is necessary to define boundaries for pure self-regulation and traditional state regulation in order to identify the spectrum of regulatory systems to be covered by this study.

The aim of this study directs us to the establishment of an adequate working definition. It is to explore the potential and limits of co-regulatory models within the EU Member States and at European level as innovative keys to better government for the enforcement of public goals in the media sector. This implies a focus on:

- the Member State or EU perspective
- the achievement of public goals
- regulation rather than sporadic intervention
- the real division of labour between non-state and state actors

[1] See http://co-reg.hans-bredow-institut.de.

– to some degree sustainable and formalised non-state settings and sustainable and formalised links between non-state regulation and state regulation.

First, we explore how studies already conducted have dealt with the problem of defining co-regulation. This includes studies that analyse co-regulation explicitly. However, it would have been neither feasible nor fruitful to include all studies touching upon collaboration between non-state and state actors in regulation. We have focused on studies examining regulation in the media sector, as long as these studies do not just deal with pure self-regulation or pure state regulation. Other studies were taken into account where their results seemed beneficial.

The working definition given in the interim report[2] read as follows:

Non-state-regulatory system:

- The setting up of organisations, rules or processes
- To influence decisions of persons or, in the case of organisations, decisions of, or within, such entities
- As long as the setting up is conducted by, or within, the organisations or parts of society that are the addressees of the regulation

Link between the non-state-regulatory system and state regulation:

- The system is established to achieve public policy goals
- There is a legal basis for the non-state-regulatory system
- The state/EU leaves discretionary power to a non-state-regulatory system
- The state uses regulatory resources to influence the non-state-regulatory system

The working definition has been discussed with the project's advisory board[3] in order to gather additional input and consider different perspectives on the criteria of a working definition. Furthermore, when applying this definition to the identified systems at a later stage of the conduct of work a recalibration of the criteria had to be undertaken (see the result at chapter 2.4). Some criteria have just been specified: As we look at the whole regulatory process (rule making, implementation and enforcement), systems are included where state organisations and non-state organisations act during different stages of the regulatory process (e.g. state enforcement of non-state codes). For application of the definition it is sufficient therefore if the influence on the decisions of persons or organisations by non-state regulation and/or the discretionary power of non-state organisations is restricted to one of the different stages of the regulatory process (rule making, implementation, enforcement). We also specified the meaning of „using regulatory resources" in the sense that the state uses regulatory resources to influence the outcome of the regulatory process (that is why a state financing of non-state organisations without regulatory intention would be excluded). One criterion has

2 The interim report is available from http://europa.eu.int/comm/avpolicy/stat/studi_en.htm#17.

3 See below Annex 1.

been substantially changed: While in the interim report we demanded a „legal basis“ for the non-state regulatory system, we now consider a „legal connection“ between state and non-state regulation as sufficient. Therefore systems where the state simply ties up to existing non-state regulation are included. We opted to broaden the definition at this point in order to cover all systems where a division of labour between state and non-state regulation can be found. However, parallel (state and non-state) regulatory processes without any legal connection between them are still excluded.In order to get the information needed to judge whether a system was co-regulatory according to the definition worked out at this step, the correspondents were asked to write a second country report in summer 2005. For these second country reports the same procedure applied as for the first one, the reports have been published on the web page and comments on the content of the country reports have been requested, and were afterwards considered for further steps of the study. The correspondents have been asked to apply the definition and judge whether a system might be co-regulatory or not. However, to achieve consistency of the application of the criteria of the definition, the final subsumption has been undertaken by the same members of the project team for all regulatory systems. The result can be seen at chapter 2.3.

Nearly all systems that are co-regulatory under the definition were assessed regarding their impact. However, a reduction of the sample was necessary to make the assessment feasible and to avoid redundancies. A few systems were not earmarked for impact assessment since an intra model comparison seemed not to be feasible (only two regulation ethics in press) and comparison with models of co-regulation for other types of media did not promise deeper insight because of the framework of regulation being poles apart. However we paid attention to the following points:

- Having systems which belong to the same model but differ when it comes to criteria other than those which constitute the model enables assessment of the importance of those other criteria
- Theoretical findings as well as empirical research already completed lead to protection of minors and advertising regulation as promising policy objectives to be achieved by co-regulation
- Inclusion of models from countries other than those of similar size, geographical location and regulatory tradition

The list of assessed systems can be found in Annex 2.

### 1.2.3. Impact assessment

Impact assessment is a standard tool for regulators in several countries; however, this normally is not a specific empirical evaluation of a system in place but an estimation of costs and benefits of regulatory changes. Therefore, those concepts could not be used for the purpose of this study. Different concepts of regulatory impact assessment have been identified and considered, see below chapter 4. Additionally, the advisory board of the project met on 1 July

2005 in Hamburg to discuss the methodology of the impact assessment. The key recommendations were as follows:

- The assessment should not only focus on the outcome in regard of the specific policy objective and its effectiveness and efficiency but also include process objectives like transparency, openness and others.
- For complex regulatory settings, which cannot be measured in a set of well-defined variables, the advisors agreed that there is no valid and reliable way of empirically measuring regulatory impact. Therefore, a mix of different methods and qualitative methodology should be used.
- Given the different regulatory cultures and traditions, modelling or clustering seems advisable to enable comparability.
- Rule making, implementation and enforcement should be analysed separately.

Based on this work, the following methodology for the impact assessment was rolled out.

Before the writing of this draft no assessment of the systems of the chosen non-EU countries had been undertaken. The idea is to add this as the very last step of the study when the debate on the assessment of co-regulatory systems in Europe is completed. Then weaknesses of the models practiced in Europe and the assessment of the non-EU systems – which have been chosen because they are especially advanced – can focus on the points regarding which the regulation in Europe can learn most.

The evaluation rests on two pillars; the assessments of documents and an expert survey.

#### 1.2.3.1. Document research

Document research has been undertaken with help from the correspondents. The following documents were included:

- Evaluation reports on the system in place commissioned by government, regulators or others
- Activity reports of the organisations involved in the system
- Independent evaluations by academics or others

Correspondents were asked to scan through those documents and provide us with information which would help to answer the questions that we have also asked the experts (see questionnaire general and specific part, see annex 3).

Additionally, the correspondents were asked to assess media coverage of conflicts within the system. The correspondents referred to information on the nature of the conflict – if any – including cause, handling and outcome. Short reports on these topics provided by the correspondents form the basis for assessment of the respective regulatory system.

#### 1.2.3.2. Expert survey

The second pillar of the impact assessment is the expert survey conducted in autumn 2005.

Two different types of experts were identified for each regulatory system assessed, the first type of experts are those who are acting within the regulatory system in place.[4] To choose the relevant experts a flow chart of each assessed system was worked out and thus all included organizations were identified. The results were cross-checked with the correspondents. In doing so, the choosing of those internal experts followed the established „position approach". Possible disparities between the numbers of organisations representing specific interests did not affect the analysis, since it was not focussed on a quantitative counting, but on characteristic agreements or disagreements by the different experts. As a rule, within an identified organisation the head was chosen as the relevant expert unless there were reasons to believe that he or she was not closely enough connected with the regulation to get valid results (e.g. with organisations where regulatory affairs are just a minor point left to a specific department). In the case when there were different internal bodies the heads of those had been identified as experts where possible.

Additionally, external experts were chosen following the „reputation approach". Therefore, the correspondents were asked to identify keywords which are specific to the assessed regulatory system, the most relevant database for academic literature for the respective field, and to identify the scholars with the greatest amount of published books and articles regarding the keywords. The most relevant were chosen as external experts. Where this approach turned out not to be feasible (because there had not been enough academic reflection on a system in the respective Member State), correspondents were required to use the position based method: The correspondents were asked to identify the relevant university chairs and name them as external experts. Whereas the internal experts – though answering on their own account not as official spokesperson of their respective organisation – are as rule connected with specific interests within the regulatory system; the external experts were chosen to offer a different perspective and furthermore, offer the possibility of pointing to specific strength or weaknesses of a system where an acting expert might not see the wood for the trees.[5]

Furthermore, if they were not already part of the system, and therefore chosen as internal experts, representatives of consumer groups were invited to answer the questionnaire in the role of external experts. Therefore the correspondents were asked to identify members of:

- the BEUC;
- the European Consumer Centres Network (ECCN)
- the European Public Health Alliance (see http://www.epha.org/r/14).

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[4] Ulrike Fraoschauer and Manfred Lueger, „Expertinnengespräche in der interpretativen Organisationsforschung," *Das Experteninterview – Theorie, Methode, Anwendung*, Alexander Bogner, Beate Littig and Wolfgang Menz (eds.), 2nd ed., Wiesbaden: 2005, pp. 223, 226 +.

[5] Ulrike Fraoschauer and Manfred Lueger, „Expertinnengespräche in der interpretativen Organisationsforschung," *Das Experteninterview – Theorie, Methode, Anwendung*, Alexander Bogner, Beate Littig and Wolfgang Menz (eds.), 2nd ed., Wiesbaden: 2005, pp. 223, 226 +.

Additionally:

- viewers' and listeners' councils
- parents associations

As regards the questionnaire, the flowcharts of the systems had provided us with information about the „linchpins" of the regulatory system, the points regarded as the „make or break" hitches for regulation from an analytical point of view. Therefore, a specific part focuses for each assessed regulatory system on such points and tries to evaluate them. Some questions asked for strengths and weaknesses, others are intended to disclose agreements or disagreements among the different actors within the policy field. If at a specific intersection the collaboration is needed between different actors – for example between a state and a non-state regulatory body – we assume that disagreement about this function indicates that the system is at least at this particular point not running smoothly (for a specimen questionnaire see Annex 3).

Furthermore, a general part identical for all systems was forwarded to the experts. This general part aims at detecting strengths and weaknesses as well. In addition, however, process-related objectives like transparency or sustainability are assessed. This part of the questionnaire focuses on conditions which the European Court of Justice of the European Communities has outlined as requirements for implementing a European Community directive (see below 5.2). Hence, the results enable us to estimate whether those objectives are met by a specific system in a Member State.

The questionnaire „Germany: Protection of minors in broadcasting" has been pre-tested internally. The test showed a time of completion of approx. 40 minutes, which is regarded as acceptable (max. 45 minutes)[6]. To avoid that our misunderstanding of the actual functioning of a system led to incomprehensive formulation of questions, and, therefore to invalid answers the correspondents were asked to comment on the specific respective parts. Furthermore, explanatory notes at the top of the questionnaire point to this problem and invited expert to submit comments while answering if questions seemed to be odd.

The questionnaires were sent by mail to the identified experts. This method is today well accepted.[7] The disadvantage of e-mail-based questionnaires, that one cannot be sure that the expert him- or herself has filled in the questionnaire, did not create major disadvantages for this survey regarding the internal experts since the organisation involved is relevant for the analysis, not the specific responsive employee. However, the experts were not asked for an official position but their own well-informed opinion. The chance of a comparatively high rate of return seemed to be good since the experts were likely to assume that the results of the

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6 Susanne Weber and Anna Brake, „Internetbasierte Befragung", *Quantitative Methoden der Organisationsforschung*, Stefan Kühl, Petra Strodtholz and Andreas Taffertshofer (eds.), Wiesbaden: 2005, pp. 59 +.

7 Susanne Weber and Anna Brake, „Internetbasierte Befragung", *Quantitative Methoden der Organisationsforschung*, Stefan Kühl, Petra Strodtholz and Andreas Taffertshofer (eds.), Wiesbaden: 2005, pp. 59 +.

study could have an impact on the European Commission's attitude to co-regulatory systems, and therefore might affect their work. In this respect the study has been in an advantageous situation compared with purely academic surveys.

Overall more than 270 experts have been addressed, 76 utilizable questionnaires were returned by 30 December 2005. They have been analysed with the standard statistical software tool SPSS.

## 1.3. Implementation

The methodology for assessing the framework for implementation of co-regulatory measures in the Member States is based on conventional legal analysis of EU Law. Additionally, the correspondents have been asked to enquire whether there has been legal debate on limits for co-regulation, especially regarding national constitutional and cartel laws.

# 2. CONCEPT AND TERMINOLOGY: UNDERSTANDING CO-REGULATION

## 2.1. Co-Regulation as a modern form of government

### 2.1.1. Regulation in the information society

It is not only that the term „co-regulation" is used in many different ways (see below 1.2.2.), the understanding of „regulation" is controversial as well. In American legal political studies regulation means a specific form of state influence on economic processes, whereas in Europe the term is generally understood as being used generically to describe means of achieving public policy objectives.

However, the term is not used in a consistent way in Europe and its meaning is altering.[8] The understanding of regulation changes with the transformation of democracy as such, and policies and politics. Regulation within a given society can be described as being positioned in the triangle of state, economy and civil society.

Modern regulatory theory holds that an adequate understanding of regulatory phenomena can not be seen as a kind of tool in the hand of a steering actor, most likely the state, but sometimes an industry player or association as well. According to this understanding regulation has to be seen as a social process rather than a part of social mechanics. However, this is easily said but hard to be followed reliably, even in research. When forced to make assumptions on impact assessment, parts of the regulatory process have to be isolated and constructed as a simple stimulus-response relationship. However, we have tried to consider the procedural understanding of regulation even when it comes to impact assessment. That is to say that the yardsticks to measure the impact are construction within the regulatrory system as well.

Regulating media faces specific problems. First of all, media are without any doubt important for society as such and for the role of the state as well. However, when it comes to specific functions and assessing the impact of media services, the assumptions vary depending on the theoretical and political background. This is true for the position media have and should have within the above-mentioned triangle of state, economy and civil society. The important role of media leads to media policy trying to ensure the positive functions (promoting cultural diversity) and to reduce negative externalities (risks for the development of minors, possible misleading of consumers). A comprehensive description of our assumption on the role of the media and its regulation cannot be given here; however some basic assumptions shall be made transparent:

- Media enables self-observation of society, therefore their functioning is not only in the interest of the relevant actors but is also of public interest.

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[8] See Julia Black, Critical Reflection on Regulation", London 2002, pp 2+.

- Different types of media contribute in different ways to this function; furthermore their development paths, and therefore the relevant policy field, differ from each other.

Based on this important role, the freedom of communication of the media is protected by art. 10 ECHR, and by the constitutions of the Member states as well. The ECHR has acknowledged the role of the media for the societies.[9]

### 2.1.2. Theoretical Framework

Co-regulation has not been „invented" for media regulation, though this field is traditionally a model case for new forms of regulation, but ties in with a broad debate on regulatory failure and ways to improve regulation.

The existing studies are either purely empirical or follow different theoretical tracks which cannot be recapitulated here in depth. However, the debate on co-regulation stems from the different analyses on the changing role of the state in regulating modern societies. The fact that traditional forms of regulation are becoming less and less effective is attributed mainly to the following factors:

- Traditional regulation, such as „command-and-control regulation", ignores the interests of the objects (companies) it regulates**,** and this may generate resistance rather than co-operation; depending on their resources these objects (companies) may be capable of asserting counter-strategies or else may evade regulation.[10]
- Furthermore, the regulating state displays a knowledge gap and this gap is growing.[11] The idea behind the welfare state, which is to improve the public good as far as possible, is doomed to failure in increasingly complex, rapidly changing societies where knowledge is dissociated.[12] The model, therefore, cannot be an omniscient state, but rather a state able to make use of the knowledge held by different actors. This means that co-operation with the objects of regulation, which possess supreme knowledge of the field in question, is essential.
- The above-mentioned knowledge gap poses an even greater danger to the regulatory state in view of the fact that, in modern societies, information has become the most important „finite resource", and in effect may also become an important „regulatory

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9 ECHR Lentia v. Austria (17207/90); ECHR Zana v. Turkey (18954/91); ECHR Fressoz & Roire v. Frankreich (29183/95); ECHR Sürek v.Turkey (34686/97).

10 Cf. Renate Mayntz, „Regulative Politik in der Krise?", Sozialer Wandel in Westeuropa. Verhandlungen des 19. Deutschen Soziologentages, Joachim Matthes, (ed.), Berlin: 1979, pp. 55+.

11 Jörg Ukrow, Die Selbstkontrolle im Medienbereich in Europa, München, Berlin: 2000, pp. 10+.

12 Karl-Heinz Ladeur, „Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental law", *Environmental Law and Ecological Responsibility*, Gunther Teubner, Lindsay Farmer and Declan Murphy, (eds.), West Sussex: 1994, pp. 301+.

resource". However, in contrast to the resource „power", information is not at the privileged disposal of the state.

- There are not only knowledge gaps but also gaps of understanding that cannot be overcome. According to the „system theory", regulation is often an attempt to intervene in autonomous social systems which follow their own internal operating codes. The economy, the legal system, education, science and other spheres are seen as autonomous systems of this kind. It is impossible for the political system to control the operations of those systems directly.[13] This means that indirect forms of regulation have to be used (and have been used already).
- Moreover, traditional regulation does not seem to stimulate creative activities effectively. Initiatives, innovation and commitment cannot be imposed by law.[14] Given that modern regulation has to rely on co-operation with the objects of regulation to achieve its objectives, this is becoming another significant factor.
- Traditional regulation tends to operate on a case-by-case 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").[15]
- Finally, another obstacle facing traditional regulation is globalisation. It enhances the potential for international „forum shopping" to evade whatever national or European regulations are in force (see above). This trend is seen as a major reason for the failure of traditional state regulation. In addition, there is another regulatory hindrance imposed by globalisation: while the economic system tends primarily to lock into multinational or even global structures, legal regulation still derives mainly from national states and supranational institutions. Structures of global non-governmental law are now emerging which national states have to take into account.[16]

There are several changes in regulation by means of which states react to the limitations mentioned above, such as:

- from regulating completely to partial state regulation
- from state sanctioning to social sanctions

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13 It is, therefore, impossible for the political system to control the operations of these systems directly. Renate Mayntz and Fritz W. Scharpf (eds.), *Gesellschaftliche Selbstregelung und politische Steuerung*, Frankfurt am Main et al.: 1995.

14 Renate Mayntz, „Politische Steuerung: Anmerkungen zu einem theoretischen Paradigma", *Jahrbuch zur Staats- und Verwaltungswissenschaft*, Vol. 1., Thomas Ellwein/Joachim Jens Hesse/Renate Mayntz and Fritz W. Scharpf, (eds.), Baden-Baden: 1987, p. 98.

15 Gunnar-Folke Schuppert, „Das Konzept der regulierten Selbstregulierung als Bestandteil einer als Regelungswissenschaft verstandenen Rechtswissenschaft", special issue „Regulierte Selbstregulierung", *Die Verwaltung* 2001, Beiheft 4: pp. 201+.

16 Cf. Gunther Teubner, „The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy", *Law and Society Review* 31, 1997: pp. 763+.

- from unidirectional to co-operative rulemaking and implementation
- from enforcement to convincing strategies.[17]

Most of these regulatory developments entail co-operation between state and non-state actors. Generally speaking, there are three theoretical approaches to this phenomenon: a macro, a „meso" and a micro perspective. In the legal and socio-political line of debate, macro approaches have been predominant, making use of system theory as a mode of attack. The „meso" perspective focuses on institutional settings in modern societies. Finally, studies which are centred on specific actors and their (potential) behaviour can be described as adopting the micro approach. Models for further debate which have been especially influential will be outlined below.[18]

Participants in the legal and socio-political line of discussion share the basic view that the increasing complexity in some areas of society and the pace of change are the main reasons why regulatory interventions are more and more ineffective, while indirect forms of regulation may, under certain circumstances, be more successful. Depending on the underlying theoretical suppositions, various concepts emerge from this. *Teubner*[19] has developed a concept of „reflexive law" (*reflexives Recht*), concluding that the state must formulate its regulatory programmes in such a way that it is understood within autonomously operating social systems. *Teubner* utilises *Nonet* and *Selznick's* concept of „Responsive Law"[20] – which was also influential in the economic approaches discussed below – as well as *Luhmann's* design of social systems.

Some discern a „retreat of law to the meta-level of procedural programming" *(Rückzug des Rechts auf die Meta-Ebene prozeduraler Programmierung*).[21] If it is assumed that law can no longer intervene in autonomous social systems directly, it will be confined to indirect regulation of social self-regulation. This paves the way for a state whose role is to regulate social procedures, i.e. stipulate legal requirements for private negotiations. The proclamation of a shift towards more procedural forms of regulation is based on these arguments.[22]

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17 Gunnar-Folke Schuppert, „Das Konzept der regulierten Selbstregulierung als Bestandteil einer als Regelungswissenschaft verstandenen Rechtswissenschaft", special issue „Regulierte Selbstregulierung", *Die Verwaltung* 2001, Beiheft 4: pp. 201+.

18 For a more detailed description and references see Wolfgang Schulz and Thorsten Held, Regulated Self-Regulation as a Form of Modern Government, Eastleigh: 2004, pp. 12+.

19 See generally, Gunther Teubner, *Law as an Autopoietic System*, Oxford: 1993; G. Bechmann, „Reflexive Law: A New Theory Paradigm for Legal Science?", *European Yearbook in the Sociology of Law, State, Law, and Economy as Autopoietic System*, Gunther Teubner and A. Febbrago, (eds.), Milan: 1991- 1992.

20 Philipp Nonet and Philip Selznick, Law and Society in Transition, New York: 1978, pp. 78+.

21 Klaus Eder, „Prozedurale Rationalität", *Zeitschrift für Rechtssoziologie* (ZfRSoz) 1986, Vol. 7, pp. 1+.

22 Karl-Heinz Ladeur, „Proceduralisation and its Use in a Post-Modern Legal Policy", *Governance in the European Union*, Olivier De Schutter et al. (eds.), Luxembourg: 2001, pp. 53-69.

Finally, in view of the problems arising from knowledge management in the information society the state is perceived as assuming the role of supervisor, assisting private organisations in their learning processes.[23]

However, apart from isolated examples and case studies, these theoretical approaches have – as far as we know – not led to a set of criteria enabling the regulator to assess the effectiveness of instruments which combine state and non-state regulation. Nevertheless, some of these theoretical findings can be validated as relevant background information.

To describe new forms of collaborative regulation – following the „meso" approach – the term „governance", already used to identify the structure of global regulation, has entered the general debate on regulation.[24] This approach is based on the assumption that the role and structure of the state are fundamentally transformed in a changing society. Governance is seen as a process of interaction between different social and political actors, and growing interdependencies between the two groups, as modern societies become ever more complex, dynamic and diverse.[25] Although – or even because? – the term still lacks precise contours[26] it has became a buzzword around which debates about new forms of regulation revolve. In this respect, the studies we have analysed - and also our own study - can be seen as research into governance. Governance can be charaterised by three criteria: (1) the coordination of interdepedecies between actors on different levels based on (2) institutionalised regulatory systems or regulatory structures with (3) coordination crossing the borders of organisations or even states.[27] This definition reflects that decentralisation of regulation has to be dealt with. By pointing to the regulatoy structures this definition avoids basing itself on terms like regulation or control which come with the association of a central actor. However, another way to react to the changes of contemporary society is to develop a decentered definition of regulation.[28] It goes without saying that decentred governace perpective is open to different combinations of state and non-state regulation, and, therefore, to co-regulation.

Approaches derived from the idea of „responsive regulation", focusing on individual actors (micro approach), are more distinctly tangible. Like the above-mentioned theoretical concepts, these approaches envisage a „third way" which adopts the middle ground between, on the one hand, resigned or liberal non-regulation and, on the other, a clinging to traditional

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23 Helmut Willke, Supervision des Staates, Frankfurt am Main: 1997.

24 James N. Rosenau: „Governance, Order and Change in World Politics", *Governance without government: order and change in world politics,* James N Rosenau, Ernst-Otto Czempiel (eds.), Cambridge: 2001, pp. 1-29.

25 Jan Kooiman, Governing as Governance, Sage: 2003.

26 Renate Mayntz, Governance Theory als fortentwickelte Steuerungstheorie? MFIfG Working Paper, Köln: 2004.

27 Arthur Benz, „Governance - Modebegriff oder nützliches sozialwissenschaftliches Konzept", *Governance - Regieren in komplexen Regelsystemen. Eine Einführung*, Arthuer Benz (ed.), Opladen: 2004, p. 25.

28 Julia Black, Critical Reflection on Regulation", London 2002, pp 16+.

forms of state regulation.[29] Based on empirical findings and observations from game theory, some studies have shown that state regulation is by no means more effective simply because sanctions are stricter and more severe. The probability of sanctions being imposed is also important for the effectiveness of regulation. Sanctions which are too severe might not be imposed by the regulator in order to avoid unwelcome side effects (e.g. job losses). When choosing an appropriate regulatory concept and suitable tools one has to ask which form sanctions should take and how discretionary they should be (to stick with this example) in the light of general conditions in the field of activity concerned (structure of the sector, regulatory traditions, cultural factors etc.). From this perspective regulation is like a „game" played between the regulatory body and the institution to be regulated. However, it might be part of the regulatory strategy to involve third parties (for instance public interest groups) in order to prevent the regulator being captured by the regulated organisation.[30] Empirical studies build on this and show – by way of example – that price regulation in telecommunications can have adverse effects since it can provoke antagonistic lobby strategies.[31]

This concept leads to a „pyramid of enforcement strategies" having „command regulation with non-discriminatory punishment" at the top and pure „self-regulation" at the bottom. For each objective one has to work out which strategy is the most effective one for the regulating state.[32]

In terms of the interaction between state and non-state control, this theoretical concept gave rise to the idea of „enforced self-regulation". This suggests that single companies (it is not a collective approach, which is based on industry associations) are motivated to work out codes of conduct specifying legal requirements and to set up mechanisms for independent control within the organisation itself. The task of the governmental regulator is by and large restricted to the control of this control.[33]

This theoretical background serves two purposes: first, it can enhance understanding of the context surrounding the studies we have analysed, and second, knowledge of regulation and the social fields in which regulation seeks to cause effects is necessary in order to judge the impact of regulation. We shall, therefore, come back to these approaches at the appropriate stage.

### 2.1.3. Development paths – The staring point matters

Debates on a national and European level from time to time suffer from misunderstandings that are fuelled by the fact that there are different development paths for regulatory systems

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29 See Ian Ayres and John Braithwaite, Responsive Regulation, Oxford: 1992, p. 17.

30 See e.g. Ian Ayres and John Braithwaite, Responsive Regulation, Oxford: 1992, p. 38+.

31 Tomaso Duso, Lobbying and Regulation in a Political Economy: Evidence from the US Cellular Industry, Berlin: 2001.

32 See Ian Ayre and John Braithwaite, Responsive Regulation, Oxford: 1992, pp. 38+.

33 On this concept see: ibid., pp. 101+.

and, therefore, different starting points for co-regulation. Where prior to considering co-regulation there has been a strict command-and-control regulation, co-regulation comes as a form of liberalisation and will, as a rule, be applauded by the industry. In contrast where voluntary self-regulation has been paramount, any debates on co-regulation might be seen as the state capturing the respective self-regulator. In this instance Germany can serve as an example: associations of the Internet industry especially remained reluctant for a long time.[34]

Furthermore is plausible to assume that it matters for the understanding of a co-regulatory system whether it was set up by the state or emerged from private initiative. The former is the case if the states „uses" co-regulation as a new form of achieving policy objectives. This rather mechanic and state-centred view is likely to influence perception and behaviour of the relevant actors and, therefore, the actual working of a co-regulatory system. In contrast, if the co-regulation developed from the industry or civil society side the attitude and action might be quite different.

Regulatory theory teaches on a general basis that the development path of regulation matters.[35] Regulatory systems are as a rule not invented from a blueprint but tie in with the development so far. However it is relatively new for studies on regulation to consider this point. For our analysis this leads to:

- Asking the correspondent to explain not only the status quo but regulatory developments as well.
- When assessing and comparing systems we acknowledge that the developments influence the actual functioning of any systems.

### 2.1.4. Co-Regulation vs. Self-Regulation

Within the understanding of this study co-regulation is typified by a specific combination of state and non-state regulation. Other forms of combining state- and non-state regulatory activities are singled out as well as systems without any state involvement. The latter could be called (pure) self-regulation.

For a regulatory system to be classified as co-regulation does not mean that it is per se more effective in achieving an objective than a self-regulatory system. There is no clinching argument that state involvement means better regulation. Quite the reverse is stated sometimes arguing that in self-regulatory systems industry does really take over responsibility and therefore ensures implementation.

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[34] See Heise online, 14.06.2002, Verbände kritisieren geplante Änderungen beim Jugendmedienschutz, available from http://www.heise.de/newsticker/meldung/28255; the then-head of the self-regulatory body FSM was cited with the criticism that regulated self-reegulation was in his view a contradiction in terms.

[35] For path dependence of regulation see Martina Eckardt, Technischer Wandel und Rechtevolution, Tübigen, 2001; Klaus Heine and Wolfgang Kerber, European Coporate Laws, Regulatiory Competition and Path Dependence, http://www.isnie.org/ISNIE00/Papers/Heine-Kerber.pdf.

However, this study focuses on how state regulation can be enhanced by combing state- and non-state regulation without handing over responsibility completely to the private sector. Therefore, self-regulatory systems are not examined regardless of their actual effectiveness. It must be mentioned that problems of terminology may occur since the non-state part of a co-regulatory system is called „self-regulation" in some Member States, especially when it makes use of an established voluntary regulation by the industry.

## 2.2. Studies on Co-regulation already done

The definition of co-regulation in this study is not primarily an academic approach to locate a relatively new regulatory phenomenon but done to focus on systems which are potentially capable of implementing directives. Therefore we are not primarily aiming at academic discourse regarding the conception of co-regulation but a feasible set of criteria. Nevertheless, understanding in existing studies are a basis for our thoughts.

### 2.2.1. EU Documents, Studies and Communications

The **„White Paper on European Governance"** published by the European Commission deals with possible reforms in governance. In this context, it mentions the term co-regulation several times as an example of better, faster regulation.

In the Commission's view, „co-regulation combines binding legislative and regulatory action with measures taken by the actors most concerned".[36] It recognises that the shape of these and the combination of „legal and non-legal instruments" will vary from one sector to another.[37]

The White Paper's approach to achieving improvements in regulation focuses in particular on a mix of policy instruments. Following some explicit discussion of co-regulation, it puts the case for „combining formal rules with other non-binding tools such as […] self-regulation within a commonly agreed framework".[38]

Improving regulation was the specific concern of the **„Final Report of the Mandelkern Group on Better Regulation",** delivered by a panel of consultants appointed by the European Council with a view to implementing the conclusions of the Lisbon summit in 2000.

In considering „co-regulation" as an alternative regulatory format, that report also highlights the combination of public authority objectives with responsibilities undertaken by private actors.[39] It discusses two particular co-regulation strategies[40] that can be summarised as „initial

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36 European Commission, European Governance – a White Paper, COM(2001)428 final, available at http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf, p. 21.

37 Ibid.

38 Ibid. p. 20.

39 Mandelkern Group on Better Regulation, Final Report, 13 November 2001, available at http://csl.gov.pt/docs/groupfinal.pdf, p. 15+.

40 Ibid., p. 17.

approach" and „bottom to top".[41] Common to both, however, is a certain leeway for mandatory rules with varying degrees of detail, while the private actors contribute to legislation either as original rule-makers („initial approach") or on a cooperative basis („cooperative approach"). Nevertheless, the *Mandelkern Group* does acknowledge the state's option to „penalise companies' failure to honour their commitments without giving regulatory force to those commitments".[42] Finally, the importance of guarantees is stressed in order to safeguard the public interest by means of supervisory mechanisms.[43]

Another consequence of the Lisbon summit was a communication from the Commission in 2002 in the form of an action plan for „**Simplifying and improving the regulatory environment**".

One aim to be achieved in the context of „impact assessment" was a more appropriate choice of regulatory instruments, one of them being co-regulation. The Commission's understanding of co-regulation here is essentially based around a legislative act serving as a „framework".[44] In this respect, co-regulation may serve as a way of confining legislation to essential aspects. Also, the need for statutory action distinguishes it from self-regulation, which is based solely on voluntary codes etc. established by non-state actors in order to regulate and organise themselves.[45]

In the Interinstitutional Agreement on Better Lawmaking[46] the European Parliament, Council and Commission agree on co-regulation as an alternative method of regulation. Those methods are mentioned with regard to the obligation to legislate only where it is necessary and to the principles of subsidiary and proportionality. Co-regulation is distinguished from self-regulation – the latter is also mentioned as an alternative method of regulation – and defined as the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, NGOs or associations). This agreement is refered to in a Communication from the Commission to the Council and the European Parliament on Better Regulation for Growth and Jobs in the European Union.[47]

Regarding audiovisual policy European Commissioner *Marcelino Orjea* delivered his views on self-regulation, regulated self-regulation and co-regulation in a speech at the „**Seminar on Self-Regulation in the Media"** in Saarbrücken (Germany). Regulated self-regulation, to use

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41 See also the summary by Carmen Palzer, „Co-Regulation of the Media in Europe: European Provisions for the Establishment of Co-Regulation Frameworks", *IRIS plus* 6/2002, p. 3.

42 Mandelkern Group on Better Regulation, op. cit., p. 16.

43 Ibid.

44 European Commission, Action plan „Simplifying and improving the regulatory environment", COM(2002) 278 final, available at http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0278en01.pdf, pp. 11+.

45 Ibid., p. 10.

46 2003/C 321/01.

47 COM (2005) 97 final.

the terminology of the Birmingham Audiovisual Conference, is characterised as „self-regulation that fits in with a legal framework or has a basis laid down in law“[48]

The concept of self-regulation applied by *Oreja* is based on agreements about behavioural rules between the actors and any third parties concerned. As he points out, it cannot be defined simply as a lack of regulation.

*Oreja's* definition of „co-regulation“ attaches major importance to the idea of a partnership between private and public sectors. Compared with „regulated self-regulation“, where state and private operators handle different stages in the rule-making and monitoring process, with notable differences in the degree of detail, co-regulation in his view seems to imply more joint activity between public and private actors.

Consequently, the process of the revision of the Television without Frontiers Directive included reflections on alternative methods of regulation for this policy field as well.[49]

### 2.2.2. Academic research

**„Co-Regulation of the Media in Europe: European Provisions for the Establishment of Co-Regulation Frameworks“** by *Carmen Palzer* of the Institute of European Media Law (EMR, Saarbrücken, Germany), is published by the European Audiovisual Observatory in its supplement IRIS plus, issue 6/2002.

In her general definition of co-regulation, the author describes a system with „elements of self-regulation as well as [..] traditional public authority regulation“.[50]

The key feature of self-regulation in this context – especially in contrast to self-monitoring – is seen to be the self-elaboration of binding regulations. This task may also be performed by self-regulatory organisations, although there is a suggestion that third parties such as consumers might be involved in the rule-making.[51]

Public authority regulations form the basis for co-regulation, which aims at achieving public goals. This framework is monitored by the state as intensively as the goals to be reached require.[52]

A follow-up to that article, **„Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea“** by *Tarlach McGonagle* of the Institute for Information Law (IViR, University of Amsterdam, The Netherlands) is published in IRIS plus, issue 10/2002.

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48 Marcelino Oreja, Speech at the Seminar on Self-Regulation in the Media, Saarbrücken, 19-21 April 1999, available at http://europa.eu.int/comm/avpolicy/legis/key_doc/saarbruck_en.htm.

49 See Issues Paper for the Liverpool Audiovisual Conference, Protection of Minors and Human Dignity, Right of Reply, July 2005.

50 Carmen Palzer, „Co-Regulation of the Media in Europe: European Provisions for the Establishment of Co-Regulation Frameworks”, *IRIS plus* 6/2002, p. 2.

51 Ibid.

52 Ibid.

After referring to other attempts at definitions[53] and the general „definitional dilemma", *McGonagle* reduces „co-regulation" to the common denominator of „'lighter' forms of regulation than the traditional State-dominated regulatory prototype".[54] It thus becomes clear that non-state regulatory elements are also involved.

Discussing concrete forms of state involvement, the author mentions constant review and appeals against decisions made by the co-regulatory body. He proposes that these mechanisms be established through legislation and reviewed by the courts.[55] However, *McGonagle* strongly emphasises cooperation between professionals and public authorities in the field of rule-making and enforcement so as to benefit from emerging synergies.[56]

**„Selbstregulierung und Selbstorganisation"** is the final report on a study conducted by IPMZ (Institute for Journalism and Media Research, Zurich, Switzerland) for the Swiss Federal Bureau of Communication (BAKOM).

As in the earlier IPMZ study **„Rundfunkregulierung – Leitbilder, Modelle und Erfahrungen im internationalen Bereich"**[57], the starting point for the definition of co-regulation here is an arrangement about rules between private and public actors.[58]

In **„Selbstregulierung und Selbstorganisation",** *Puppis et al.* develop their definition on the basis of non-state regulation, as they assume co-regulation to be a special type of self-regulation.

Emphasising the broad range of definitions, the authors argue that the basis for any self-regulation is a trinity of rule setting, enforcement and the imposition of sanctions[59], which must all be carried out by a private actor[60]. As a hallmark, the rules must originate from within the group to whom they are addressed.[61] The rules may contain material obligations as well as procedural regulations.[62] Distinguishing between different levels of compulsoriness, the authors extend their definition of self-regulation to „gentlemen's agreements" that are not le-

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53 Especially Carmen Palzer, op.cit., and Wolfgang Schulz and Thorsten Held, Regulated Self-Regulation as a Form of Modern Government – Interim Report for a study commissioned by the German Federal Commissioner for Cultural and Media Affairs, Hamburg: 2001 (see also the final report: Wolfgang Schulz and Thorsten Held, Regulated Self-Regulation as a Form of Modern Government, Eastleigh: 2004).

54 Tarlach McGonagle, „Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea", *IRIS plus* 10/2002, p. 2.

55 Ibid., p. 3.

56 Ibid., pp. 3+.

57 Otfried Jarren et al, Rundfunkregulierung – Leitbilder, Modelle und Erfahrungen im internationalen Bereich, Opladen et al.: 2002, p. 107.

58 Manuel Puppis et al., Selbstregulierung und Selbstorganisation, unpublished final report, 2004, p. 10.

59 Ibid., p. 54.

60 Ibid., p. 55.

61 Ibid.

62 Ibid.

gally binding.[63] Especially in the area of broadcasting, self-regulation is seen as a sensible complement to state regulation.[64]

The above-mentioned tasks of setting up and enforcing rules and imposing sanctions for violations may also be conducted in public-private cooperation.[65] Every co-regulatory system, however, has to be based on statutory rules.[66] The main objective of public interference is to prevent self-regulatory actors from focussing entirely on their own self-interest[67], given that the state is compelled to uphold the public interest. Another form of state interference may be the threat of legislation in order to stimulate self-regulation[68], but this is not considered to be true co-regulation.[69] Finally, *Puppis et al.* formulate different types of interference which do apply to co-regulation, notably obliging industry to self-regulate and stipulating rules about the content of regulation, its procedure and structure.[70] The issue of public restraint[71] from regulation arises particularly in the field of broadcasting, where it is not possible to influence the content of broadcasting, save for certain absolutely fundamental rules. Some room must, therefore be left for (free) self-regulation.[72]

**„Self-Regulation of Digital Media Converging on the Internet“** is the final report of a study (IAPCODE) conducted by the researchers of PCMLP (Programme in Comparative Media Law & Policy at Oxford University, Great Britain) for the European Commission.

Its general definition highlights the character of co-regulation as a combination form, which is neither pure self-regulation nor command-and-control regulation, but rather based on stakeholders' ongoing dialogue.[73]

The authors refer to *Hyuyse* and *Parmentier* who distinguish between the following state/self-regulatory relationships:

– subcontracting, where the state limits its involvement to setting formal conditions for rule making, but leaving it up to parties to shape the content

63 Ibid., p. 56.

64 Ibid., p. 57.

65 Ibid., p. 61.

66 Ibid.

67 Ibid., p. 62.

68 Labelled „coerced self-regulation" by Julia Black, „Constitutionalising Self-Regulation", *The Modern Law Review*: 1996, p. 27.

69 Manuel Puppis et al., op.cit., p. 62.

70 Ibid., p. 63.

71 The question of public restraint is discussed in general terms in Otfried Jarren et al, op.cit., p. 93.

72 Manuel Puppis et al., op.cit., p. 65.

73 PCMLP, Self-Regulation of Digital Media Converging on the Internet: Industry Codes of Conduct in Sectoral Analysis, 2004, available at http://www.selfregulation.info/iapcoda/0405-iapcode-final.pdf, p. 9.

- concerted action, where the state not only sets the formal, but also the substantive conditions for rule making by one or more parties
- incorporation, where existing but non-official norms become part of the legislative order by insertion into statutes.[74]

The PCMLP researchers add:

- „pure" self-regulation, whereby industry sets standards and polices them merely to increase product trust with consumers.

They come to the following conclusion: „If part of the calculation of industry bodies involves awareness that the state might do something or be compelled to do something should they fail to take responsibility for self-regulation, then we can say that there is at least co-regulatory oversight. Previous analyses of self-regulation have tended to focus on the codified aspects of co-regulatory oversight and audit and neglected the analysis of these less formal – but not less important – calculations on the part of self-regulating organisations."[75]

Nevertheless, the authors still draw a distinction between such „less formal" instruments of regulation and truly codified co-regulation.[76] In the media context in particular, they recommend that the state should „play an active role in certifying schema […], above and beyond any self-regulatory design requirements".[77] In their view, this is particularly important wherever the safeguarding of fundamental rights is in question.[78] Overall, they do not limit the scope of co-regulation in too narrow a way, but underline that its exact meaning may vary from one context to another.[79]

Also from PCMLP, *Danilo A. Leonardi's* report on **„Self-regulation and the broadcast media: availability of mechanisms for self-regulation in the broadcasting sector in countries of the EU"** summarises findings in the field of the „heavily regulated sector"[80] of broadcasting.

In his conclusions, *Leonardi* suggests a form of self-regulation that – without using the term co-regulation – comes close to elements already found in other definitions: the industry is to

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74 Ibid, p. 11, referring to Hyuyse and Parmentier (1990), p. 260.

75 Ibid., p. 11.

76 Ibid., pp. 11+.

77 Ibid., p. 12.

78 Ibid.

79 Ibid. Also citing Wolfgang Schulz and Thorsten Held, Regulated Self-Regulation as a Form of Modern Government, Eastleigh: 2004, pp. 7, 14 for examples of different meanings.

80 Danilo A. Leonardi, Self-regulation and the broadcast media: availability of mechanisms for self-regulation in the broadcasting sector in countries of the EU, 30 April 2004, available at http://www.selfregulation.info/iapcoda/0405-broadcast-report-dl.pdf, p. 2.

be given autonomy to formulate detailed rules, whilst statutory guidelines form a framework. After all, the „backstop powers" remain with the public regulator.[81]

**„Co-Regulation in European Media and Internet Sectors"** by *Christopher T. Marsden* of PCMLP is an article in the context of the afore-mentioned IAPCODE study which „outlines the main findings and research questions answered and explored by the report"[82]. It was published in the January 2005 issue of the German media law journal Multimedia und Recht (MMR).

*Marsden*'s article concentrates throughout – unlike most other reports by PCMLP that basically only use the expression „self-regulation" – on the term „co-regulation". Co-regulation in this sense is – similarly to the definition of the IAPCODE final report – distinguished from command-and-control regulation as well as from „'pure' self-regulation as observed in industry-led standard setting".[83] The concept is a middle way between over-harsh government intervention and exclusive self-regulation by industry.[84]

The author also emphasises the importance of interaction between general legislation and a self-regulatory body.[85] This interaction corresponds to the joint responsibilities of market actors and the state in a co-regulatory system.[86]

**„Selbst- und Ko-Regulierung im Mediamatik-Sektor – Alternative Regulierungsformen zwischen Staat und Markt"** is a study conducted by the Austrian Academy of Sciences (ÖAW, Vienna, Austria).

For their definition of co-regulation the authors consider the whole range of regulation, which they describe as a form of market intervention to influence industry behaviour in order to achieve public goals.[87] Co-regulation itself is regarded as a special, „alternative" category of regulation.[88]

However, it shares that category with the concepts of self-regulation in a broad or narrow sense. Thus, self- and co-regulation are defined as „collective, intentional constraints of behaviour" that are situated between market and state regulation, whilst the differentiation is achieved by analysing the intensity of the respective state involvement.[89]

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81 Ibid., p. 9.

82 Christopher T. Marsden, „Co-Regulation in European Media and Internet Sectors", *MMR* 2005, p. 3.

83 Ibid., p. 4.

84 Ibid.

85 Ibid.

86 Ibid., p. 5.

87 Michael Latzer et al., Selbst- und Ko-Regulierung im Mediamatik-Sektor – Alternative Regulierungsformen zwischen Staat und Markt, Wiesbaden: 2002, p. 31.

88 Ibid., Table 2 on p. 41.

89 Ibid., Box 3 on p. 43.

The authors see the main difference in statutory regulatory resources as a vital part of any co-regulatory system, while self-regulation lacks any explicit guidelines set by the state.[90] Self-regulation in a narrow sense, where no state influence whatsoever occurs,[91] can, therefore, be classified as true non-state regulation. In a broader sense, self-regulation could also involve the state setting incentives or influencing the self-regulatory system in another way.[92] Finally, co-regulatory institutions are not a part of the government. Still, they do have a unilateral basis in law and there is a strong public involvement, e.g. by public supervision or by setting objectives or structural guidelines.[93]

The idea of a framework type model is also developed in the booklet **„EASA – Guide to Self-Regulation“** published by the European Advertising Standards Alliance (EASA).

Without explicitly using the term „co-regulation“, the authors still avail themselves of the picture of „law and self-regulation complement[ing] each other like the frame and strings of a tennis racquet“.[94] In their view, a self-regulatory system consists of „rules or principles of best practice“ that are applied by organisations that are purposely and entirely set up by the industry.[95] Another important element is the voluntary nature of this process[96] and the independence of the self-regulatory organisation from the government and specific interest groups.[97] Finally, the organisation must have options regarding enforcement of its decisions in order to ensure credible regulation.[98]

Analysing the relationship between self-regulation and (statutory) law, EASA proposes splitting competences and tasks on one hand but acknowledges the advantages of interplay on the other. Whilst broad principles and safeguarding rules are laid down in statute law, self-regulatory action should govern the details of (e.g. advertising) content.[99] It also recognises that the threat of legislative intervention might further the readiness to effectively self-regulate an industry.[100]

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90 Ibid., p. 46.

91 Ibid., p. 47.

92 Ibid., op.cit., p. 46.

93 Ibid.

94 EASA, EASA Guide to Self-Regulation, 1999, available at http://www.easa-alliance.org/publications/en/easa_guide.html, p 9.

95 Ibid., pp. 7, 10.

96 Ibid.

97 Ibid., p. 10.

98 Ibid., p. 11.

99 Ibid., op.cit., p. 8.

100 Ibid., pp. 21+; however, in its Guide, EASA proposes not to let the situation develop this way by establishing an effective system earlier on.

**„The economic efficiency of self-regulation“** by *Nicklas Lundblad* and *Anna Kiefer*, IT researchers at the University of Goteborg, Sweden, is a conference paper from the 17th Annual BILETA Conference at the Free University of Amsterdam (Netherlands).

They do not offer an original definition of co-regulation so much as empirically feature the general concept of self-regulation. The concept they confer is quite broad, including non-enforceable rules, codes of conduct and labelling flanked by accountability and enforceability, a simple black-list and „self-regulation“ through market powers in a „perfect market situation“.[101] The authors explicitly renounce a definition of self-regulation that postulates the existence of intentionally created codes and/or particular organisations.

Comparing self-regulation systems with regulation by legislation, they acknowledge the special effects of interplay between the two systems, e.g. when there is „the possibility of a governmental process“, which they see as „more of a co-regulatory attempt“.[102]

In Germany some wortk has been done on the „regulierte Selbnstregulierung” – „regulated self-regulation” akin to co-regulation. In their study **„Regulated Self-regulation as a Form of Modern Government“**, produced for the German federal government, *Wolfgang Schulz* and *Thorsten Held* use the term „regulated self-regulation“ to describe new forms of regulation including non-state regulation as well as state regulation. They define regulated self-regulation as „self-regulation that fits in a framework set by the state to achieve the respective regulatory objectives“.[103]

Following the same paradigma **„Regulierte Selbstregulierung im Dualen System“** by *Andreas Finckh* is concerned with the German system of package waste disposal.

Although not dealing with media regulation itself, this work delivers insights into the broad range of applicability for „regulated self-regulation“. *Finckh* refers to this regulatory system as an interdigitation of mandatory regulations with elements of indirect control.[104]

So-called indirect control is based on the state regulating not in the „direct“ command-and-control mode, but leaving different options for action to the addressees.[105] By formulating for example rules of process or organisation or by announcing economic incentives, the state is able to abstain from *directly* influencing (environmental) decisions by law.[106] However, due to

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101 Nicklas Lundblad and Anna Kiefer, The economic efficiency of self-regulation, 2002, available at http://www.bileta.ac.uk/02papers/lundblad.html, Introduction.

102 Ibid., „Self-regulatory initiative in Sweden: SWEDMA”.

103 Wolfgang Schulz and Thorsten Held, Regulated Self-Regulation as a Form of Modern Government, Eastleigh: 2004, p. 8.

104 Andreas Finckh, Regulierte Selbstregulierung und das Duale System, Baden-Baden: 1998, p. 45.

105 Ibid., p. 42.

106 Ibid., p. 43.

the nature of solving ecological problems, the author deems a total restraint in the sense of non-state regulation inadequate.[107]

As a general definition for „regulated self-regulation“ the author offers the following: intentionally formulating constraints, processes and target values for non-state actors.[108]

## 2.3. Towards a working definition

Although there are various – implicit and explicit – approaches to defining co-regulation and although there are terms with overlapping meaning that have to be taken into account, there is one basic assumption that all definitions have in common: co-regulation consists of a state and a non-state component to regulation. Even this basic assumption is, at second glance, not easy to verify since the changes of contemporary society blur the division between state and non-state organisations. The state may influence the election of board members of private bodies or contribute to their funding. The advent of public-private-partnerships illustrates this development. It gives rise to restrictions on empirical research as well since some organisations cannot easily be categorised.

Furthermore, our analysis of existing studies reveals various dimensions of the state and non-state components of co-regulation. For the non-state part:

- What is meant by regulation? (Influencing decisions or also pure consultation)
- Does the industry regulate itself?
- How much must the non-state component be formalised to call it co-regulation? (Just organisations, rules or processes or also informal agreements and case-by-case decisions)
- Other criteria

As for the state component of regulation, which establishes the link with the non-state component, these studies raise the following questions:

- What are the goals? (Public policy goals, individual interests)
- How much formalisation must there be on the state side? (Legal basis for the non-state regulatory system or also informal agreements between state and non-state bodies)
- What scope do non-state actors have for decision-making? (Can it be called co-regulation if the state can overrule any decision taken by non-state regulation?)
- Does co-regulation imply any state influence on non-state regulation? (e.g. the state using regulatory resources to influence the non-state regulatory system)

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107 Ibid., p. 36.

108 Ibid., p. 48.

- Other criteria

The studies partly give different answers to these questions and these are summarised in the following tables. After that we discuss these answers and elaborate our approach for the field studies.

| CRITERIA/STUDIES | White Paper | Mandelkern | Interinstitutional Agreement | Action Plan | Palzer IRIS plus 6/2002 | McGonagle IRIS-plus 10/2002 | Ukrow | Puppis et al. | PCMLP: IAPCODE |
|---|---|---|---|---|---|---|---|---|---|
| NON-STATE COMPONENT (SELF-REGULATION) | | | | | | | | | |
| What is meant by regulation (within „self-regulation“)? (influencing decisions or also pure consultation) | | | | | | | | | |
| Does the industry regulate itself? | measures taken by the actors most concerned | responsibility of the actors | parties which are recognised in the field (such as economic operators, social partners, non-governmental organisations, or associations) | non-state actors regulating and organising themselves | market players draw up their own regulations and are responsible for compliance | | industry determines its own rules | origin of rules lies with addressees | industry sets and polices its own standards |
| How much formalisation is there for the non-state component? (just organisations, rules or processes or also informal agreements, case-by-case-decisions) | non-binding tool | rule-making as an example | voluntary agreements as an example | agreements, codes, rules | organisations, own binding rules | | | binding character of rules not necessary | |
| Other criteria | | | | voluntary | voluntary | | not enforceable by state | | aim: pure self-interest |

| LINK BETWEEN THE NON-STATE AND THE STATE COMPONENT | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| What are the goals? (public policy goals, individual interests) | | | defined by the legislative authority | | public authority objectives | | | prevention of focus on self-interest | implicitly public goals as opposed to self-reg. |
| How much formalisation is there for the state component? (legal basis for the non-state regulatory system or also just informal agreements between state and non-state bodies) | binding legislative | mandatory rules | legislative act | legislative act, binding and formal | public authority regulations | system is to be set up by legislation | statutory regulations and/or just pleas by public authorities | basis in statutory rules | not clear; also threat of legislation = „co-regulatory oversight“ |
| Scope of decision for the non-state actors? (e.g. the state leaves discretionary power to a non-state-regulatory system) | | | | non-state actors remain part of rule-making process | | not clear, „constant review and appeals“ may imply full control by state | | public restraint is essential and room for self-reg. | rather not |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Does co-regulation imply any state influence on non-state regulation?<br>(e.g. the state using regulatory resources to influence the non-state regulatory system or incorporation of codes set by the industry without influencing the regulatory process within the non-state regulatory system) | regulatory action | „initial approach": state simply incorporates self-regulation rules into law<br>„penalising w/out regulatory force" | act entrusts the attainment of the objectives to non-state parties<br>criteria defined in the act<br>measures in order to follow up application, in event of non-compliance with or failure of the agreement | | incorporation of self-regulation system is possible | cooperation between state and private sector on rule-making and enforcement | | state can create rules for procedure, structure and content of regulation | basis = ongoing dialogue, but state should play active role in certifying schema |
| Other criteria | | supervisory mechanisms as safeguard | | | | | | threat of legislation ≠ co-reg. | |

| CRITERIA/STUDIES | Leonardi | Marsden | Latzer et al. | EASA-Guide | Lundblad/Kiefer | Finckh | Oreja | Schulz/Held |
|---|---|---|---|---|---|---|---|---|
| NON-STATE COMPONENT (SELF-REGULATION) | | | | | | | | |
| What is meant by regulation (within „self-regulation“)? (influencing decisions or also pure consultation) | | | market intervention to influence market actors' behaviour | | | | „fix and monitor the rules of the game“ | |
| Does the industry regulate itself? | | industry-led | intentional behav-iour constraints | system set up entirely by the industry | | | agreements amongst operators themselves | |
| How much formalisation is there for the non-state component? (just organisations, rules or processes or also informal agreements, case-by-case-decisions) | | acknowledgment of self-regulatory bodies | | organisations that set up rules and enforce them | informal concepts possible as well as „perfect market situation“ | | usually codes of conduct | intentional/ explicit self-regulation: different players agree to observe rules regarding their activities |
| Other criteria | | | only informal state involvement | voluntary | | | | distinguish implicit and explicit self-reg. and organisational and extra-organisational self-reg. |
| LINK BETWEEN THE NON-STATE AND THE STATE COMPONENT | | | | | | | | |
| What are the goals? (public policy goals, individual interests) | | | public policy (even with self-regulation) | | | | public policy | |
| How much formalisation is there for the state component? (legal basis for the non-state regulatory system or also just informal agreements between state and non-state bodies) | statutory guidelines as framework | general legislation is basis for co-regulation | statutory rules necessary | statute law not so much a basis as complementary | | „safety net“ in statutory law | basis in law or legal framework | self-reg. that fits in a framework set by the state to achieve the respective regulatory objec-tives |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Scope of decision for the non-state actors? (e.g. the state leaves discretionary power to a non-state-regulatory system) | not clear; however, autonomy in rule-making is guaranteed | | | | | „independence of social dynamics is respected“ | reg. self-reg. implies monitoring of details by private actors | |
| Does co-regulation imply any state influence on non-state regulation? (e.g. the state using regulatory resources to influence the non-state regulatory system or incorporation of codes set by the industry without influencing the regulatory process within the non-state regulatory system) | | interaction between state and industry and joint responsibility for rule-making | state regulatory resources such as guidelines, objectives, supervision are a vital part of co-regulation | setting of broad principles by statute law | possibility of governmental process | economic incentives sufficient | inter-link with regulation | |
| Other criteria | | | | | | | co-reg. implies public-private partnership | |

## 2.4. Criteria for determining which types of regulation are covered by the study

Co-regulation means combining non-state regulation and state regulation in such a way that a non-state regulatory system links up with state regulation.

At this stage, a working definition has to be found in order to judge which systems will be examined further. The inclusion of systems for further examination does not constitute an assessment of the effectiveness of these systems. What requirements must be fulfilled to comply with European law and to establish valid instruments to transpose the obligations from directives will be analysed at a later stage of this study.

In response to the dimensions drawn from existing studies, we opt to pursue the following paths, bearing in mind the rationale for the working definition in this study. For the purposes of this research, the non-state component of the regulatory systems we intend to examine further includes:

- the creation of specific organisations, rules or processes
- to influence decisions by persons or, in the case of organisations, decisions by or within such entities
- as long as this is performed – at least partly – by or within the organisations or parts of society whose members are addressees of the (non-state) regulation

We refrain from calling the non-state component „self-regulation“ since this term commonly describes systems based solely on industry's self-responsibility. Some would even argue that the strength of self-regulation lies in the absence of state interference.

In the systems we will examine further, the link between a non-state regulatory system and state regulation meets the following criteria:

- The system is established to achieve public policy goals targeted at social processes.
- There is a legal connection between the non-state regulatory system and the state regulation (however, the use of non-state regulation need not necessarily be mentioned in acts of parliament).
- The state leaves discretionary power to a non-state regulatory system.
- The state uses regulatory resources to influence the outcome of the regulatory process (to guarantee the fulfilment of the regulatory goals).

Explanations of the criteria and examples of included and excluded cases are contained in the following table:

| Non-state regulatory system | | | |
|---|---|---|---|
| Criteria | Explanation | Cases included (examples) | Cases excluded by this criterion (examples) |
| The creation of organisations, rules or processes | This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting. | • Codes of conduct<br>• Self-regulatory bodies<br>• | • Informal agreements<br>• Case-by-case decisions |
| To influence decisions by persons or, in the case of organisations, decisions by or within such entities | The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange. The non-state regulatory system must take part in making, implementation or enforcement of rules. | • Drawing up of codes (as long as they contain rules in addition to state law)<br>• Implementation of rules,<br>• Enforcement of rules | • Pure consultation |
| As long as this is performed by or within the organisations or parts of society that are addressees of the regulation | The range of possible subjects of non-state action has to be limited to make the definition workable. | • Self-regulatory bodies founded and/or funded by the industry | • Measures by third parties (e.g. NGOs) |

| Link between the non-state-regulatory system and state regulation | | | |
|---|---|---|---|
| Criteria | Explanation | Cases included | Cases excluded by this criterion |
| The system is established to achieve public policy goals | The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation. | • Rules for the protection of minors<br>• Advertising rules<br>• Ethicical rules | • Measures to meet individual interests |
| There is a legal connection between the non-state regulatory system and the state regulation | If there were no limits on the link to non-state regulation all forms of interaction would come to the fore. | | |
| | <u>1) Form of legal connection</u><br>All kinds of legal connections (acts, regulators' guidelines, contracts) are sufficient | <u>1) Form of legal connection</u><br>• Acts<br>• Regulators' guidelines<br>• Contracts (countersigned documents, bilateral declaration in letters | <u>1) Form of legal connection</u><br>• Informal agreements<br>• Affirmative mention in a minister's speech |

| | | | |
|---|---|---|---|
| | 2) Scope of legal connection<br>The legal connection need not be a real legal „basis“ for the non-state regulatory system. Otherwise, forms where the state simply ties up to existing non-state regulation (e.g. the state implements and enforces codes set by the industry) would be excluded at this stage, although there is a division of labour between state and non-state-regulation. However, the use of non-state regulation has to be mentioned within the legal connection. | 2) Scope of legal connection<br>• Whole regulatory system is based on law (e.g. youth protection in Germany)<br>• According to an act or a regulator's guideline, the state regulator enforces a non-state code | 2) Scope of legal connection<br>• Non-state regulation is not mentioned within the legal connection |
| The state/EU leaves discretionary power to a non-state regulatory system | Innovative forms can only be found if there is real „division of labour“ between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.<br>Discretionary power can be left at the level of making and/or the level of implementation and/or the level of enforcement of rules. This discretionary power limits the scope for state regulation. When it comes to lawmaking, one can only speak of discretionary power if the state binds itself to apply the non-state code and if changes of the non-state codes are adopted by the state as a rule (adoption of changes is immanent to the regulatory system).<br>When it comes to implementation of rules, there is discretionary power only if the state leaves leeway to the non-state part with regard to the concretion of the state rules. | • Non-state bodies rate if broadcasts or services are in line with state rules<br>• A state act refers to a non-state code in such a way that is still possible for the non-state system to change the code | • Traditional regulation<br>• The state adopts a non-state code in such a manner that changes of the code will not also be adopted as a rule |

| | | | |
|---|---|---|---|
| The state uses regulatory resources to influence the outcome of the regulatory process (to guarantee the fulfilment of the regulatory goals) | Co-regulation has to be distinguished from pure self-regulation. The existence of a legal connection alone does not mean that there is a „division of labour" between non-state and state actors.<br><br>It does not matter at which stage of the process the resource is used. An influence on the non-state part is not necessary as long as the state has an influence on the outcome of the regulatory process including making, implementation and enforcement of rules. This therefore includes systems where the state acts after non-state organisations have acted (e.g. the state enforces codes set by the industry). | | The state leaves it completely to the non-state regulatory system to fulfil the regulatory goals. |
| | 1) Kinds of resources<br><br>„Strong" resources like power and money | 1) Kinds of resources<br><br>• Power<br>• Money | 1) Kinds of resources<br><br>• publicity |
| | 2) Intention of usage of resources<br><br>It is necessary that the state uses the resources to influence the outcome of the regulatory process. | 2) Intention of usage of resources<br><br>• Using financing as an incentive to change non-state regulation | 2) Intention of usage of resources<br><br>• giving money or resources without regulatory intention |

# 3. CO-REGULATION IN EUROPE AND SELECTED NON-EUROPEAN COUNTRIES

## 3.1. Co-Regulatory systems

### 3.1.1. Identification of the systems of co-regulation

The next step is to identify the systems described in the second country reports that meet the criteria of our working definition (see 2.1.3).

Within the second country reports about 70 systems were described by our correspondents. This was partly the consequence of the broad discretion we left to the correspondents regarding the choice of the systems to describe in order to make sure that no co-operative system would have been overlooked. In the covering note, we gave one or several examples in which media sector according to our understanding a co-operative system might be found, adding that these examples were not meant to be exhaustive. Consequently, we invited the correspondents, in case of them being of the opinion that in their respective country further interesting forms of co-operative regulation in the mentioned broad sense exist, to elaborate on these systems as well.

Each of these systems where both state regulation and non-state-regulation can be found was analysed by the members of the project team according to the criteria which have been elaborated in order to determine which types of regulation are regarded as co-regulation for the purposes of this study. This led to the exclusion of further co-operative systems that did not meet one or several criteria of the definition. In the following part, the application of the definition to the co-operative systems is portrayed, examples given shall illustrate this. It should be noted that some of the systems, only named once, could also be cited in connection with other criteria which they do not fulfil either.

#### 3.1.1.1. The creation of specific non-state organisations, rules or processes

As mentioned above, the working definition requires at least a non-state regulatory system (part 1 of the definition), including the creation of specific non-state organisations, rules or processes. Thus, internal committees set up by a broadcasters, having the task to implement the law did not fall within the definition. Such systems were occasionally found regarding labelling or rating issues, e.g. the rating system in Cyprus or in the Czech Republic.

Additionally, informal agreements as e.g. in Ireland regarding the issue of assessing video games, and case-by-case-decisions are excluded.

Contracts between the state and one broadcaster (like the contractual agreements between the government and CLT-UFA in Luxembourg) are also not co-regulatory according to the definition.

#### 3.1.1.2. Influence on decisions by persons or organisations

The second criterion is an influence on decisions by persons or organisations. Where non-state bodies only give advice to state regulators (like the Advisory Committee in Cyprus, the Advertising Council in the Czech Republic, the Collège d'avis in Belgium and the Media Council in Sweden) one cannot speak of "regulation".

#### 3.1.1.3. Performance by or within the organisations or parts of society whose members are addressees of the (non-state) regulation

Another group of systems that failed on this criterion are those systems that are state run with societal participation. Such systems may consist of a state advisory body, often part of or associated to a state authority in which stakeholders participate. The organisations, rules or processes created in those cases are state-run, even if societal groups were presented in the respective board. Such a "state participatory systems" is the Board of Classification of Cinematographic Works in Cyprus, the Conseil national des programmes in Luxembourg, the Collège d'avis in Belgium or the Media Council in Sweden. In these cases, the criterion "performance by or within the organisations or parts of society whose members are addressees of the (non-state) regulation" is likewise not fulfilled, as the representatives of societal groups do not perform a non-state regulatory system, they rather collaborate with the state in a state dominated system.

#### 3.1.1.4. Public policy goals

The fourth criterion is the aim to achieve public policy goals. All of the systems we looked at fulfil this requirement, as they all rely on the protection of minors, ethics or protection of consumers.

#### 3.1.1.5. Legal connection between state and non-state regulation

Even if the criterion of a legal connection between state and non-state regulation is understood in a broad sense, systems are excluded where non-state regulation is not mentioned in the state law (including regulators' guidelines) at all, and where binding agreements between the state and non-state-bodies or industry players cannot be found either.

This criterion excludes systems where e.g. self-regulatory systems and state systems are working parallel, as e.g. in Greece: even if the SAFENET initiative was set up by an initiative of the regulator EETT, it is now working independent of state influence (which means that the criterion "state uses regulatory resources to influence the outcome of the regulatory process (see below) is not fulfilled, either). The presently existing co-operation of both in the field of promotion of public awareness is of an informal nature. Another example is the Hungarian Advertising Association/Hungarian Advertising Self-Regulatory Board, where no formal relationship between the state and the non-state part exists. Despite the fact that, meanwhile, non-state regulation is mentioned in the law, the latter merely recognises the significance of the practice of industry self-regulation, but there real connection between state and non-state

regulation. In addition, the criterion "state uses regulatory resources to influence the outcome of the regulatory process" (see below) is not fulfilled, either. Similar considerations apply as regards the situation of the Hungarian Content Providers Association.

#### 3.1.1.6. Discretionary power

According to our working definition one cannot speak of co-regulation if the state does not leave discretionary power to a non-state regulatory system. This is e.g. the case for advisory bodies that have no formal influence on the final decision. The Committee of Ethics in Cyprus does not have discretionary power in that sense. Systems where non-state codes are adopted by the state in a way that changes to these codes made by the industry are not adopted automatically (like the Code of Journalistic Ethics in Cyprus) are excluded as well. Similar is the situation in relation to the Signalétique-system in France: whereas the Signalétique originally was developed by the Broadcasters, it is now part of state regulation and the classification may only be carried out by broadcasters. There is no discretionary power left if the state treats any non-state action like a normal part of its state acts.

#### 3.1.1.7. State uses regulatory resources

In addition, systems only fall under our working definition if the state uses regulatory resources to influence the outcome of the regulatory process, thus guaranteeing the fulfilment of the regulatory goals. This is not the case where a non-state-regulation is working independently of state influence, e.g. SAFENET in Greece.

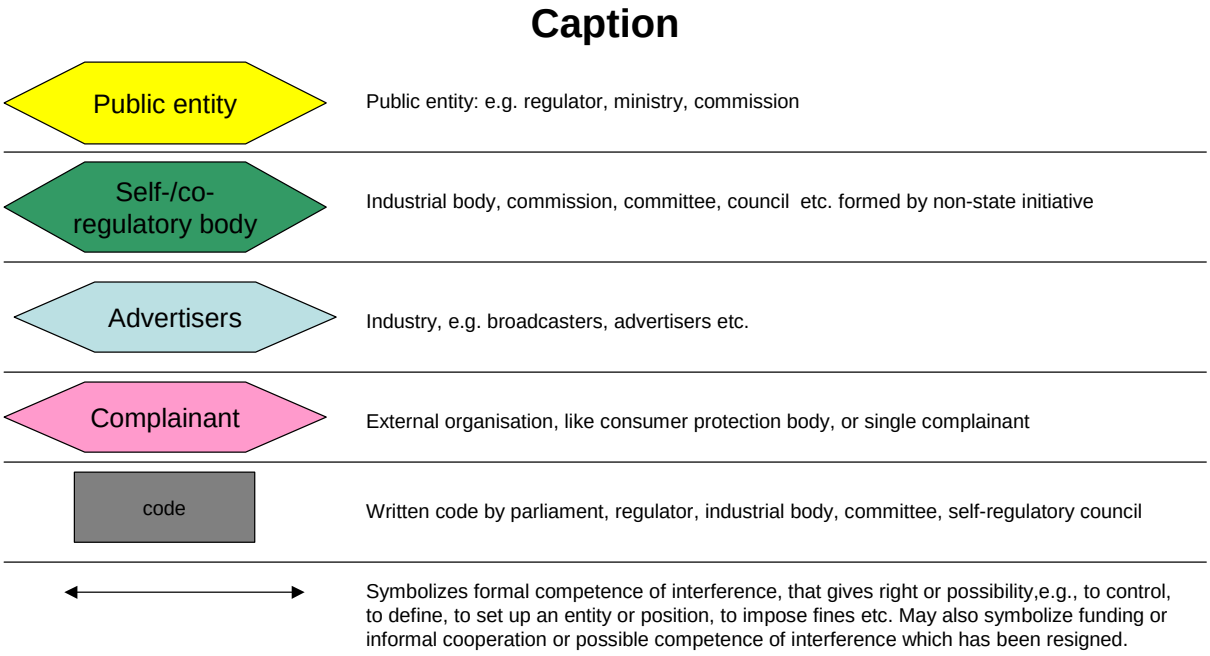
Not all systems that fall under the working definition are included into the impact assessment. A few co-regulatory systems have been excluded due to the reasons mentioned above (see 1.2.2). An overview on the systems with both state and non-state regulation, the systems that fall under the working definition and the systems included into the impact assessment can be found in Annex 2.

### 3.1.2. Co-regulatory systems in the EU

These systems earmarked for impact assessment are described in the following sub-chapter. For a comprehensive description of the systems whose main characteristics are reflected in short in the following subsections please refer to the respective country reports.[109]

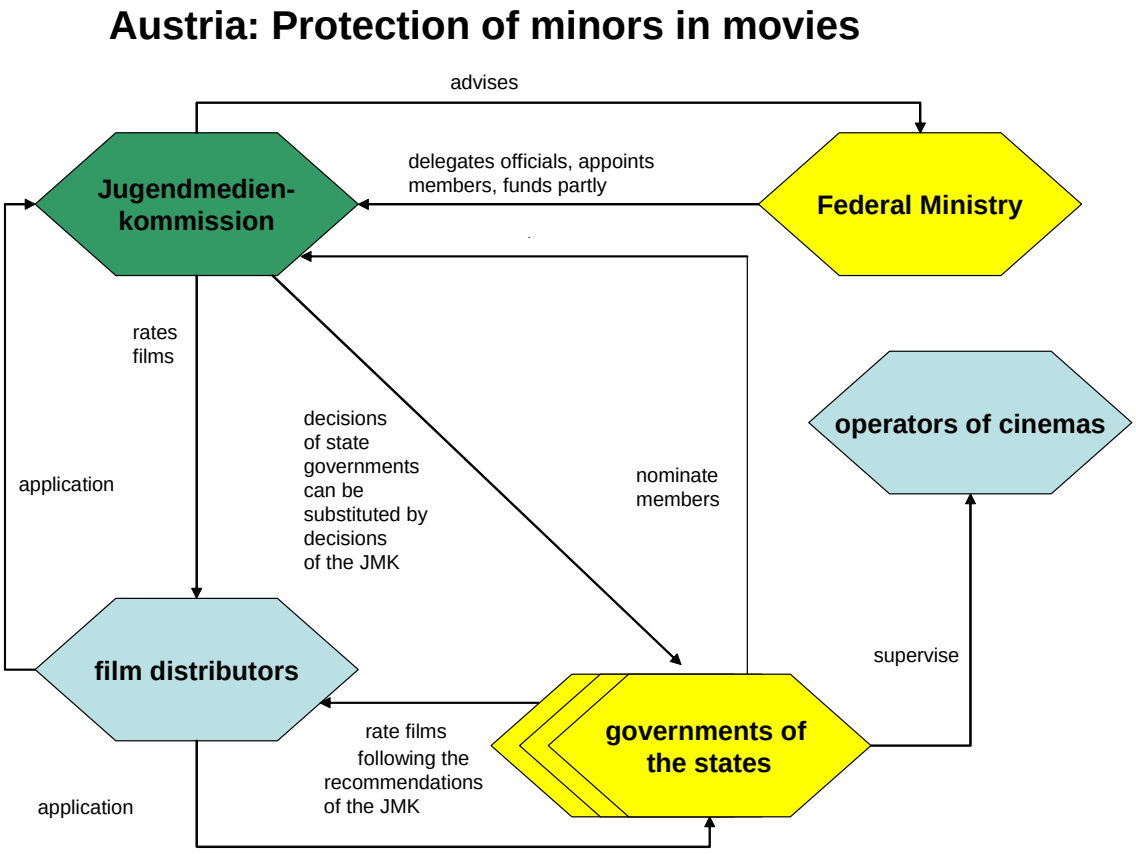
At the beginning of each system portray there is a flowchart outlining the functioning of the system. For the meaning of the symbols and lines please refer to the following caption.

[109] The country reports are available from http://www.hans-bredow-institut.de/forschung/recht/co-reg/reports/index.html.




### 3.1.2.1. Austria: Protection of minors in movies

- Medium: movies (including DVDs and CD-ROMs)
- Public policy objective: protection of minors
- State regulator involved: governments of the Bundeslaender (states)
- Non-state organisations involved: Jugendmedienkommission (JMK, Commission for the Protection of Mionors against Improper Media Contents)
- Task of non-state regulation: JMK rates movies, DVDs and CD-ROMs (state governments usually follow the recommendations of JMK; exemption: Vienna: Magistrat decides after consulting a Filmbeirat (special board).
- Legal connection: in some states, state acts refer to decisions of the JMK: e.g. Salzburg: Jugendschutzgesetz (State Act on the Protection of Minors); Niederoesterreich: Lichtschauspielgesetz (State Act on Cinemas); in some states there is no legal connection; however, the state governments usually follow JMK's recommendation (exemption: Vienna: Magistrat decides after consulting a Film-beirat)
- Regulatory resources used by the state to influence the outcome of the regulatory process: Representatives of the federal government and the states are members of the JMK; Federal Ministry of Education, Science and Culture and the states appoint members of the JMK; JMK is partly funded by the Federation
- Enforcement, sanctions: governments of the Bundeslaender (states)




*3.1.2.1.1. Overall description of the system including public policy objective the system aims to achieve*

Task of the regulatory system is the protection of minors in the field of movies, DVDs and CD-ROMs.

Although competence for lawmaking regarding the protection of minors lies with the Bundeslaender (states) the non-state Jugendmedienkommission (JMK, Commission for the Protection of Mionors against Improper Media Contents) that was founded to advise the Federal Minister of Education, Science and Culture makes recommendations on age classification of movies, DVDs and CD-ROMs. Generally, recommendations of JMK are not binding. However, the state authorities of the Bundeslaender (states) that are responsible for age classification regularly follow JMK's recommendations.

*3.1.2.1.2. Task of non-state regulation*

The state laws on cinemas regularly contain a principal restriction on access to films for persons under 16 or 18 years of age. This minimum age can be lowered by a state government on application by the distributor. The decision of the state government on this matter can be substituted by a decision of the JMK. However, for pornographic films, the statutory minimum age of 18 years is applicable without exemption.

#### *3.1.2.1.3. Connection between the non-state regulatory system and the state regulation*

Only in some states there is a legal connection:

According to the Lichtschauspielgesetz (state act on cinemas) in Niederoesterreich (Lower Austria), a recommendation of JMK substitutes the approval by the Government of Lower Austria.

The Jugendschutzgesetz (state act on the protection of minors) in Salzburg also states that recommendations of JMK substitute for the approval by the Government. However, the state government can differ from a JMK decision upon the application of a presenter or a film distributor.

According to the Kinogesetz (state act on cinemas) of Wien (Vienna), film classification is carried out by the Magistrat (Municipal Authority) for specific age groups of minors, after having heard the the Filmbeirat (Board for Film Assessment) of Vienna. Although recommendation of the Filmbeirat may be replaced by the decision of „other Austrian boards or commissions, members of which were appointed by the Government of Vienna", decisions of the Filmbeirat are not substituted by JMK decisions, in practise.

In some states there is no legal connection. However, the state governments usually follow JMK's recommendation.

#### *3.1.2.1.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

Federal government and the states have an impact on the organisation of JMK as members of JMK are representatives of the federal government and of the states: One member of each of the eight Pruefausschuesse (panels) that give recommendations on the minimum age is a representative of the states. Two representatives of the states are also members of the Appellationsausschuss (Appellate Body). In addition, the Geschaeftsfuehrer (manager) of JMK must be an official of the Federal Ministry. The Federal Minister is the chairperson of the Kuratorium (Executive Board, which is not engaged in the rating of films).

All members of JMK are appointed by the Federal Minister of Education, Science and Culture. Four states, Burgenland, Niederoesterreich (Lower Austria), Oberösterreich (Upper Austria) and Steiermark (Styria) have nominated members to the panels.

JMK is also partly funded by the Federation (and partly by the film distributors). The Federation pays for general costs (hosting of the office; public relations, including the website and printed information). The states do not contribute to the financing of the JMK.

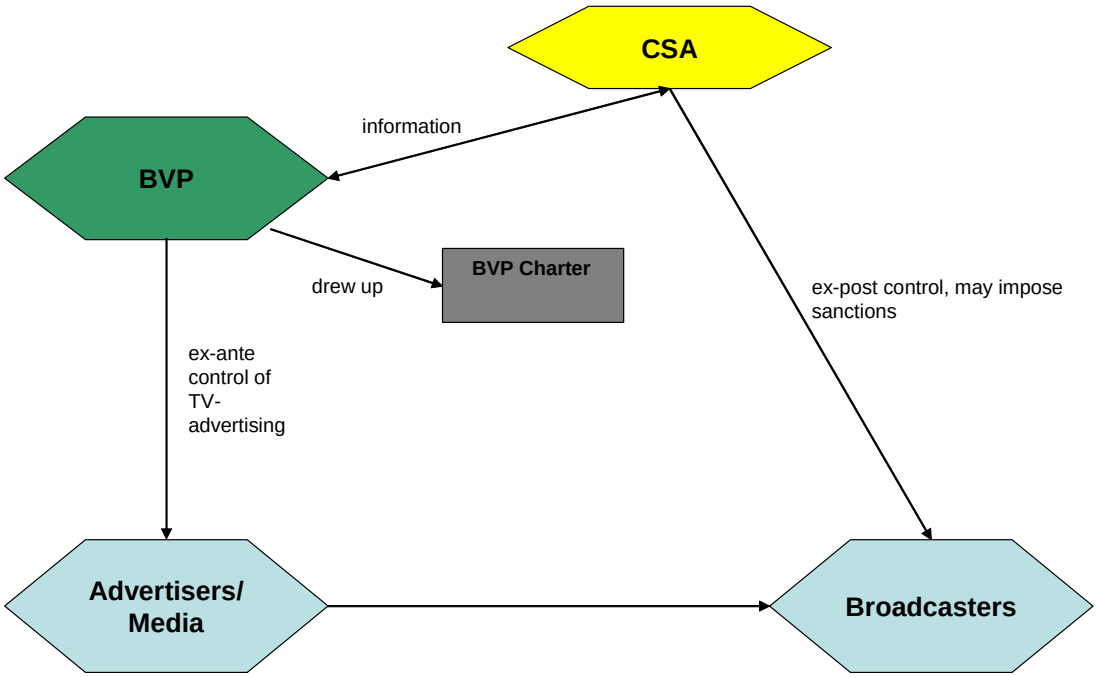
#### *3.1.2.1.5. Enforcement, sanctions*

If JMK's recommendations on age classification are adopted by a state the authorities of this state are responsible for enforcement.

### 3.1.2.2. France: Advertising regulation

- Medium: all kinds of media
- Public policy objective: protection of consumers by advertising rules
- State regulator involved: Conseil supérieur de l'audiovisuel (CSA, Higher Council in Audiovisual Media)
- Non-state organisations involved: Bureau de vérification de la publicité (BVP, Advertising Verification Bureau)
- Task of non-state regulation: ex-ante control of advertisements
- Legal connection: Mandatory ex-ante assessment of TV advertisements at CSA was abolished with the view of the capability of BVP to assumer this task. No further legal connection except for correspondence between CSA and BVP.
- Regulatory resources used by the state to influence the outcome of the regulatory process: CSA can overrule BVP's decisions when performing ex post control of advertisements
- Enforcement, sanctions: BVP can issue a formal warning or ask a provider not to publish an advertisement; CSA enforces compliance with state law rules on advertising

**France: Advertising regulation**




#### 3.1.2.2.1. Overall description of the system including public policy objective the system aims to achieve

In the 90s, ex ante control of advertising by the state regulator Conseil supérieur de l'audiovisuel (CSA, Higher Council in Audiovisual Media) was abolished. From then on, CSA only has applied ex-post control. Ex ante control is performed by a non-state body, the Bureau de vérification de la publicité (BVP, Advertising Verification Bureau).

#### 3.1.2.2.2. Task of non-state regulation

The BVP defines rules, set out in the BVP Charter, which apply to the whole advertising industry. This covers all forms of media advertising. BVP provides advice to professionals during production and gives an opinion on the conformity of their campaign or messages with the

applicable regulations before publication or broadcasting. The BVP develops, or helps specific sectors to develop, specific codes of ethics in the field of advertising.

In principle, advertisers and media are not required to obtain advance clearance of their advertising with the BVP. However, an exception was made in the field of television advertising. Since 1992, ex ante control of television advertising is performed by the BVP, while the CSA performs an ex post control of radio and television advertising. Advertisers and agencies are required to obtain advance clearance of their advertising with the BVP under the BVP charter. For the ex ante control agencies and/or advertisers must provide a copy of the final advertisement to the BVP prior to its distribution. The advertisement is screened by a working group of the BVP. After screening an opinion/decision on the compliance or non-compliance of the message with the regulation and/or ethical rules is given by the BVP.

#### 3.1.2.2.3. Connection between the non-state regulatory system and the state regulation

There is no legal basis, in particular in Loi no 86-1067 du 30 septembre 1986 relative à la liberté de la communication modifiée et completée (French Broadcasting Act), for BVP's ex ante control. However, the legal obligation to declare advertising prior to broadcasting was removed in 1993 in order to allow ex ante control by BVP. In addition, CSA and BVP exchange correspondence: the BVP, on the one hand, consults the CSA before issuing regulations or doctrines; the CSA, on the other hand, informs the BVP of infringements of the regulations it has been informed of.

#### *3.1.2.2.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

The CSA is under no legal (or contractual) obligation to request or follow the decisions or opinions of the BVP with regards to television advertising. Therefore, CSA can overrule the BVP's decisions.

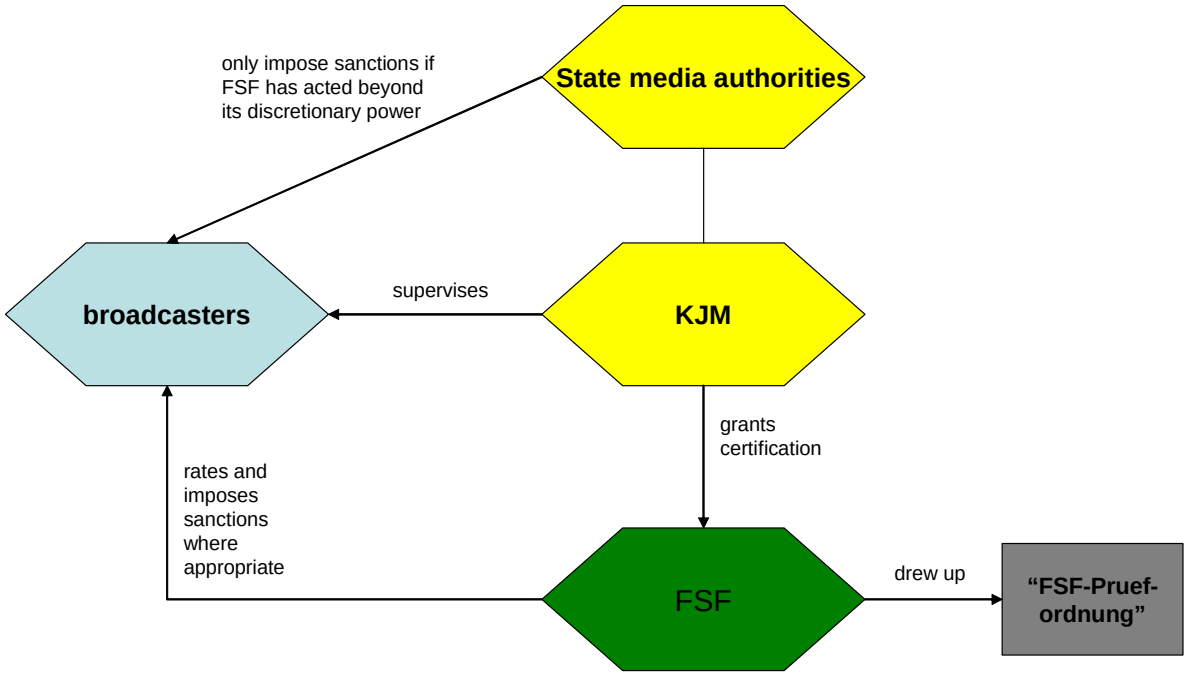
#### *3.1.2.2.5. Enforcement, sanctions*

In case of non-compliance with one of its decisions in the field of television advertising, BVP may issue a formal warning or ask the provider not to publish the advertisement. Consumers often complain directly to BVP. CSA is responsible for the enforcement of compliance with state law rules on advertising.

### 3.1.2.3. Germany: Protection of minors in broadcasting

- Medium: broadcasting for more than just one of the states (Bundeslaender) of Germany
- Public policy objective: protection of minors
- State regulator involved: Landesmedienanstalten (State Media Authorities) and Kommission fuer Jugendmedienschutz (KJM, Commission for the Protection of Minors in electronic Media)
- Non-state organisations involved: „Einrichtungen freiwilliger Selbstkontrolle“ (Organisations for Voluntary Self-Regulation): Freiwillige Selbstkontrolle Fernsehen (FSF, Organisation for the Voluntary Self-Regulation of Television)
- Task of non-state regulation: mainly ex ante rating (content that can be submitted to FSF before being broadcast), partly enforcement (ex post rating; content that cannot be submitted to FSF before being broadcast; e.g. live broadcasts) by FSF
- Legal connection: state act: Jugendmedienschutzstaatsvertrag (JMStV, Interstate Treaty on the Protection of Minors in the Media), certification of „Einrichtungen freiwilliger Selbstkontrolle”
- Regulatory resources used by the state to influence the outcome of the regulatory process: certification of „Einrichtungen freiwilliger Selbstkontrolle” if they fulfil certain legal requirements
- Enforcement, sanctions: partly by FSF, backstop power by state media authorities and KJM

**Germany: Protection of minors in broadcasting**




#### *3.1.2.3.1. Overall description of the system including public policy objective the system aims to achieve*

The enactment of the Jugendmedienschutzstaatsvertrag (JMStV, Interstate Treaty on the Protection of Minors in the Media) in 2003 extended the responsibility of non-state bodies („Einrichtungen der Freiwilligen Selbstkontrolle”) and their scope for decision-making. In order to secure compliance with the aims of the interstate treaty, it established a certification requirement for non-state bodies. In the television sector, Freiwillige Selbstkontrolle Fernsehen (FSF, Organisation for the Voluntary Self-Regulation of Television) was certified under the new law. On the state side, responsibility for supervision of broadcasters and providers lies with the Landesmedienanstalten (State Media Authorities) and the Kommission fuer

Jugendmedienschutz (KJM, Commission for the Protection of Minors in electronic Media). Although the state media authorities are independent from the state governments, they can be seen as state regulators as they are constituted by law and are bound to a legal remit which lies in the supervision of broadcasting and media services.

#### *3.1.2.3.2. Task of non-state regulation*

When it comes to broadcasting, the task of a certified „Einrichtung der Freiwilligen Selbstkontrolle" is to classify content and to ensure the enforcement of rules. Furthermore, it may make exemptions to the watershed regulation for the broadcasting of films, which had been given a rating by the non-state body for film (FSK, see below 3.1.2.5) under the Jugendschutzgesetz (Federal Act for the Protection of Minors) some time ago.

#### *3.1.2.3.3. Connection between the non-state regulatory system and the state regulation*

Conditions of certification of „Einrichtungen der Freiwilligen Selbstkontrolle", tasks of these bodies and rules regarding the relation between state and non-state regulation, are laid down explicitly in the JMStV.

#### *3.1.2.3.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

Under the JMStV, instruments exist to regulate non-state regulation, of which the most important is that „Einrichtungen der Freiwilligen Selbstkontrolle" need certification. Certification is only granted if:

- the independence and competence of the members of the control committees are ensured;
- adequate funding is guaranteed by a multitude of providers;
- guidelines for the decisions of the committees have been worked out in such a way that in practice effective protection of minors is ensured;
- procedural rules have been worked out on the extent of examination, on the obligation on the participating providers to submit relevant content to the „Einrichtung der freiwilligen Selbstkontrolle", on sanctions and on the revision of decisions (organisations responsible for the protection of minors must be given the chance to request a revision);
- it is ensured that providers are heard before a decision is made, the reasons for the decision are given in writing and are disclosed to interested persons;
- a body responsible for dealing with complaints has been established.

Certification may be granted for four years, but can be renewed.

Certified „Einrichtungen der Freiwilligen Selbstkontrolle" are supervised by the KJM. If the decisions of a non-state organisation are not in line with the JMStV, the KJM can revoke its

certifications. The JMStV does not stipulate any other sanctions that can be imposed on the non-state organisations.

#### *3.1.2.3.5. Enforcement, sanctions*

Where certified „Einrichtungen der Freiwilligen Selbstkontrolle" exist, the powers of state regulatory bodies to impose sanctions on broadcasters are limited.

The state media authorities and the KJM may not impose sanctions on broadcasters as long as the following requirements have been fulfilled: The respective content had been submitted to a certified „Einrichtung der Freiwilligen Selbstkontrolle" before this content was broadcast, the provider had followed the decision of this non-state body and the „Einrichtung der Freiwilligen Selbstkontrolle" had not acted beyond the scope of its discretionary power. When the JMStV has been infringed by the broadcast of content that could not be submitted to a „Einrichtung der Freiwilligen Selbstkontrolle" in advance (e.g. live broadcasts), certified „Einrichtungen der Freiwilligen Selbstkontrolle" have to deal with the matter after the content has been broadcast. As long as a provider follows the decision of the non-state body and this body does not act beyond the scope of its discretionary power, the state media authorities and the KJM cannot impose sanctions on the provider. However, this non-state regulatory „shield" only gives „protection" if the broadcaster is affiliated to the licensed „Einrichtung der Freiwilligen Selbstkontrolle" (such affiliation is not necessary, if the respective content is submitted to the „Einrichtung der Freiwilligen Selbstkontrolle" before the content is broadcast).

That certified „Einrichtungen der Freiwilligen Selbstkontrolle" „deal with the matter" includes the imposing of sanctions. „Einrichtungen der Freiwilligen Selbstkontrolle" only get a certification if they have issued procedural rules, including rules on possible sanctions.

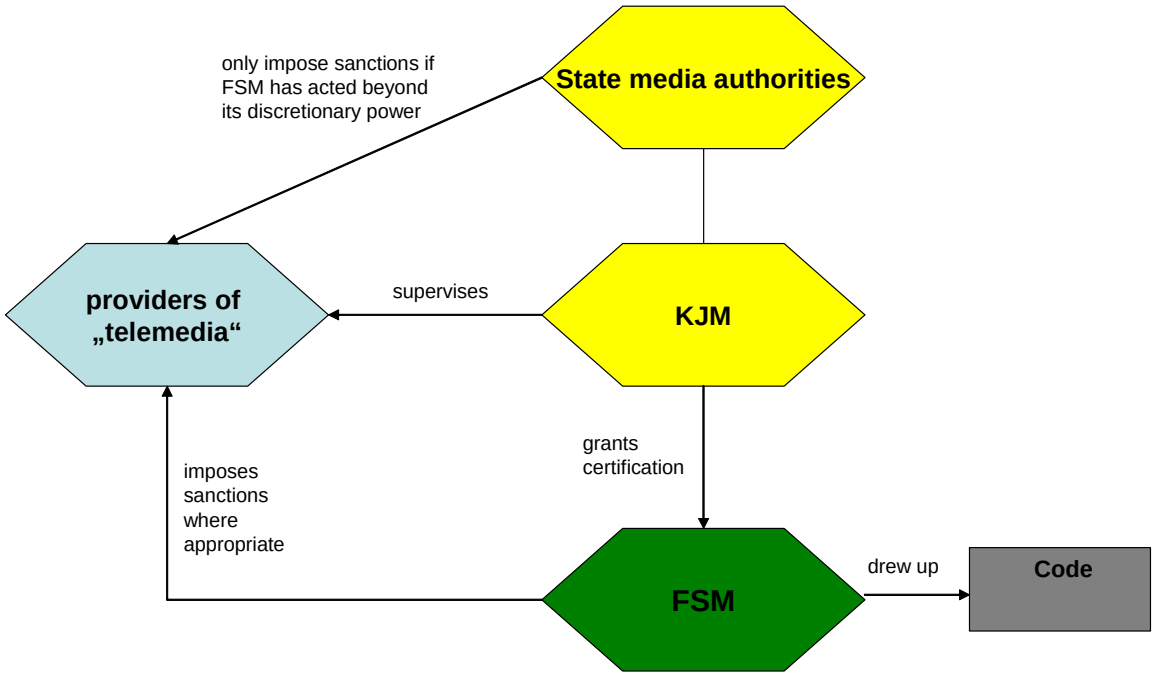
Besides monitoring by the state media authorities, complaints help to find illegal content. „Einrichtung der Freiwilligen Selbstkontrolle" can only be certified if they offer the opportunity to submit complaints to them.

If a „Einrichtung der Freiwilligen Selbstkontrolle" has acted beyond its discretionary power, state media authorities may impose sanctions on a broadcaster that has infringed the law.

### 3.1.2.4. Germany: Protection of minors in internet services

- Medium: so called Telemedien (telemedia), mainly internet services
- Public policy objective: protection of minors
- State regulator involved: Landesmedienanstalten (State Media Authorities) and Kommission fuer Jugendmedienschutz (KJM, Commission for the Protection of Minors in electronic Media)
- Non-state organisations involved: „Einrichtungen freiwilliger Selbstkontrolle“ (Organisations for Voluntary Self-Regulation): Freiwillige Selbstkontrolle Multimedia-Diensteanbieter (FSM, Assossiation for the Voluntary Self-Monitoring of Multimedia Service Providers)
- Task of non-state regulation: enforcement of rules for the protection of minors based on state law (Jugendmedienschutzstaatsvertrag (JMStV, Interstate Treaty on the Protection of Minors in the Media)) and non-state codes
- Legal connection: state act: JMStV; certification of „Einrichtungen freiwilliger Selbstkontrolle”
- Regulatory resources used by the state to influence the outcome of the regulatory process: certification of „Einrichtungen freiwilliger Selbstkontrolle” if they fulfil certain legal requirements
- Enforcement, sanctions: FSM: notice and request for changes; reproval; contract penalty; exclusion from membership; backstop power by state media authorities and KJM

**Germany: Protection of minors in internet**




#### *3.1.2.4.1. Overall description of the system including public policy objective the system aims to achieve*

The enactment of the Jugendmedienschutzstaatsvertrag (JMStV, Interstate Treaty on the Protection of Minors in the Media) in 2003 extended the responsibility of non-state bodies („Einrichtungen der Freiwilligen Selbstkontrolle”) and their scope for decision-making. In order to secure compliance with the aims of the interstate treaty, it established a certification requirement for non-state bodies. Freiwillige Selbstkontrolle Multimedia-Diensteanbieter (FSM, Assossiation for the Voluntary Self-Monitoring of Multimedia Service Providers) gained certification with regard to the Internet sector. On the state side, responsibility for supervision of broadcasters and providers lies with the Landesmedienanstalten (State Media

Authorities) and the Kommission fuer Jugendmedienschutz (KJM, Commission for the Protection of Minors in electronic Media). Although the state media authorities are independent from the state governments, they can be seen as state regulators as they are constituted by law and are bound to a legal remit which lies in the supervision of broadcasting and media services.

#### *3.1.2.4.2. Task of non-state regulation*

When it comes to so-called „Telemedien" (telemedia, mainly internet services), content does not have to be submitted to an „Einrichtung der freiwilligen Selbstkontrolle" in advance. However, if there is a breach of the law, certified „Einrichtungen der freiwilligen Selbstkontrolle" have to deal with the matter. FSM has set up a code (Verhaltenskodex Freiwillige Selbstkontrolle Multimedia-Diensteanbieter e.V.) which refers to the rules of the state law, the JMStV. There is also a special code for search engines (Verhaltenssubkodex fuer Suchmaschinenanbieter).

That certified „Einrichtungen der freiwilligen Selbstkontrolle" „deal with the matter" includes the imposing of sanctions. Rules on sanctions can be found in the „Beschwerdeordnung" of FSM (see below).

#### *3.1.2.4.3. Connection between the non-state regulatory system and the state regulation*

Conditions of certification of „Einrichtungen der freiwilligen Selbstkontrolle", tasks of these bodies and rules regarding the relation between state and non-state regulation, are laid down explicitly in the JMStV.

#### *3.1.2.4.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

Under the JMStV, instruments exist to regulate non-state regulation, of which the most important is that „Einrichtungen der freiwilligen Selbstkontrolle" need certification. Certification is only granted if:

- the independence and competence of the members of the control committees are ensured;
- adequate funding is guaranteed by a number of providers;
- guidelines for the decisions of the committees have been worked out in such a way that in practice effective protection of minors is ensured;
- procedural rules have been worked out on the extent of examination, on sanctions and on the revision of decisions (organisations responsible for the protection of minors must be given the chance to request a revision);
- it is ensured that providers are heard before a decision is made, the reasons for the decision are given in writing and are disclosed to interested persons;
- a body responsible for dealing with complaints has been established.

Certification may be granted for four years, but can be renewed.

Certified „Einrichtungen der freiwilligen Selbstkontrolle" are supervised by the KJM. If the decisions of a non-state organisation are not in line with the JMStV, the KJM can revoke its certifications. The JMStV does not stipulate any other sanctions that can be imposed on the non-state organisations.

#### *3.1.2.4.5. Enforcement, sanctions*

The imposition of sanctions by state media authorities and KJM is excluded as long as a provider follows the decision of the „Einrichtung der freiwilligen Selbstkontrolle" and this non-state body does not act beyond the scope of its discretionary power. In contrast to the system with regard to broadcasting, Internet providers need not be affiliated to the „Einrichtung der freiwilligen Selbstkontrolle" to be protected by the non-state shield. It is sufficient that they follow the decisions of a licensed „Einrichtung der freiwilligen Selbstkontrolle" – no matter whether they are affiliated to this body or not.

That certified „Einrichungen der freiwilligen Selbstkontrolle" „deal with the matter" includes the imposing of sanctions. Non-state bodies only get a certification if they have issued procedure rules, including rules on possible sanctions. According to the „Beschwerdeordnung" of FSM the following sanctions are available: notice and request for changes; reproval; contract penalty; exclusion from membership.

Besides monitoring by the state media authorities and a state organisation called *Jugendschutz.net*, complaints help to find illegal content. „Einrichtungen der freiwilligen Selbstkontrolle" can only be certified if they offer the opportunity to submit complaints to them.

If an „Einrichtung der freiwilligen Selbstkontrolle" has acted beyond its discretionary power, state media authorities may impose sanctions on an online provider who has infringed the law.

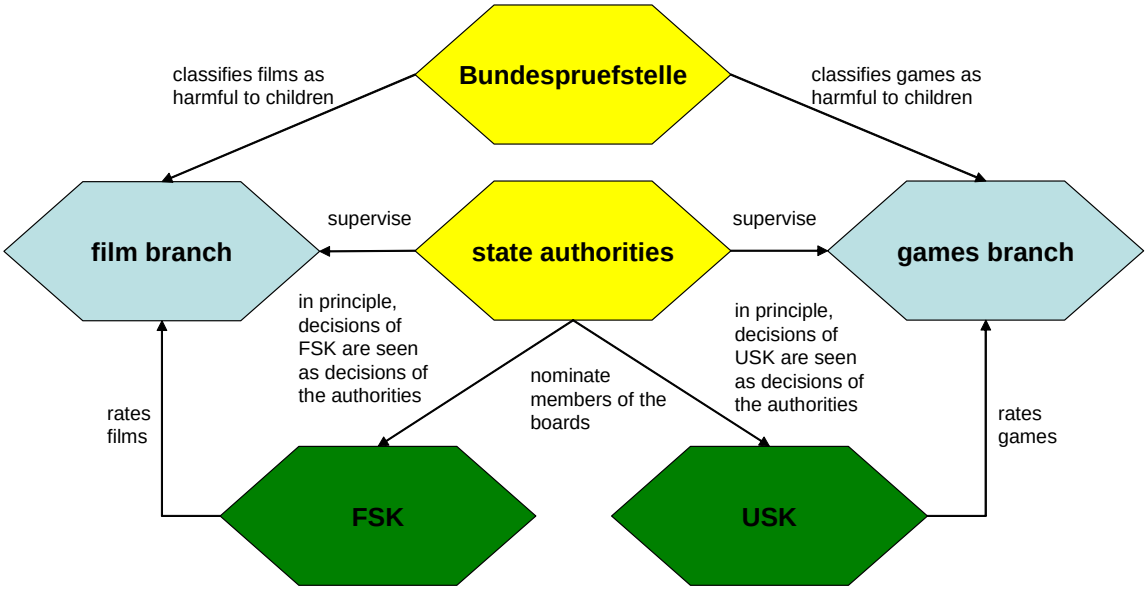
### 3.1.2.5. Germany: Protection of minors in movies and video games

- Medium: movies (including DVDs), video games
- Public policy objective: protection of minors
- State regulator involved: Bundespruefstelle fuer jugendgefaehrdende Medien (BPjM, Federal Department for Media Harmful to Young Persons) Oberste Landesjugendbehörden (State Authorities Responsible for the Protection of Minors)
- Non-state organisations involved: „Organisationen der freiwilliger Selbstkontrolle" (Organisations for Voluntary Self-Regulation): Freiwillige Selbstkontrolle Filmwirtschaft (FSK, Film Classification Board), Freiwillige Selbstkontrolle Unterhaltungssoftware (USK, Assossiation for the Voluntary Self-Monitoring of Entertainment Software)
- Task of non-state regulation: FSK: rating of movies and DVDs, USK: rating of video games
- Legal connection: federal act: Jugendschutzgesetz (JuSchG, Federal Act for the Protection of Minors); agreement between state authorities responsible for the protection of minors on a joint procedure including decisions of „Organisationen freiwilliger Selbstkontrolle"
- Regulatory resources used by the state to influence the outcome of the regulatory process: Appointing of members of the examination boards of FSK and USK; FSK: a representative of the state authorities is the chairman of the examination boards; USK:

representatives of the state and the federal government are members of the advisory board of USK; a representative of the state authorities responsible for the protection of minors takes part in the examination of video games; possibility of overruling of FSK and USK decisions by the state authorities.

- Enforcement, sanctions: compliance with FSK and USK ratings is enforced by the state authorities responsible for the protection of minors; additionally: non-state supervision procedure that may lead to imposition of contract penalties

**Germany: Protection of minors in movies and video games**




*3.1.2.5.1. Overall description of the system including public policy objective the system aims to achieve*

When it comes to the protection of minors in the film sector in Germany, non-state bodies have traditionally played an important role: they have been, and still are, responsible for age classification. The federal Jugendschutzgesetz (JuSchG, Federal Act for the Protection of Minors), which came into force in 2003, distinguishes between different levels of content: Content that is harmful to children (jugendgefaehrdend) is classified by the federal Bundespruefstelle fuer jugendgefaehrdende Medien (BPjM, Federal Department for Media Harmful to Young Persons). Material that has been classified as harmful to minors must not be shown in places children have access to and must not be provided to children. Content that is not harmful to children, but can impair children's development (entwicklungsbeeintraechtigend) is rated by the Oberste Landesjugendbehörden (State Authorities Responsible for the Protection of Minors). However, this age classification (suitable for all children and adolescents, over 6 years, 12 years, 16 years or not suitable for children and adolescents) has been handed over to non-state bodies: Freiwillige Selbstkontrolle Filmwirtschaft (FSK, Film Classification Board) is responsible for age classification of films. Age classification of video games falls within the responsibility of the Freiwillige Selbstkontrolle Unterhaltungssoftware (USK, Assossiation for the Voluntary Self-Monitoring of Entertainment Software).

#### *3.1.2.5.2. Task of non-state regulation*

Non-state organisations are involved when it comes to content that can impair children's development (entwicklungsbeeintraechtigend). Access of children and adolescents to such content may only be granted if the state authorities or the non-state organisations have rated the content as suitable for children and/or adolescents of the respective age. Age classification (as suitable for all children and adolescents, over 6 years, 12 years, 16 years or not suitable for children and adolescents) is done by FSK (films) and USK (video games). Classifications made by FSK and USK have to be observed by persons and organisations which offer the respective content or grant access to it.

#### *3.1.2.5.3. Connection between the non-state regulatory system and the state regulation*

While before 2003, a non-state body classified films on the basis of an agreement between the states, the new JuSchG explicitly stipulates that age classification can be performed by non-state bodies („Organisationen der freiwilliger Selbstkontrolle"). According to the JuSchG, the state authorities responsible for the protection of minors can agree on a joint procedure including decisions of „Organisationen der freiwilliger Selbstkontrolle" funded or supported by industry associations. This agreement can determine that decisions of „Organisationen der freiwilliger Selbstkontrolle" are seen as decisions of the state authorities as long as a state authority does not make a different decision.

#### *3.1.2.5.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

State authorities have an impact on the organisation of FSK and USK as members of these organisations are nominated by the state authorities and some members are representatives of the state authorities: When it comes to FSK, age classification is performed by examination boards. State authorities nominate the majority of the members of the boards. A permanent representative of the state authorities is the chairman of the examination boards.

Representatives of the state and the federal government are members of the advisory board of USK. In addition, a representative of the state authorities responsible for the protection of minors takes part in the examination of video games.

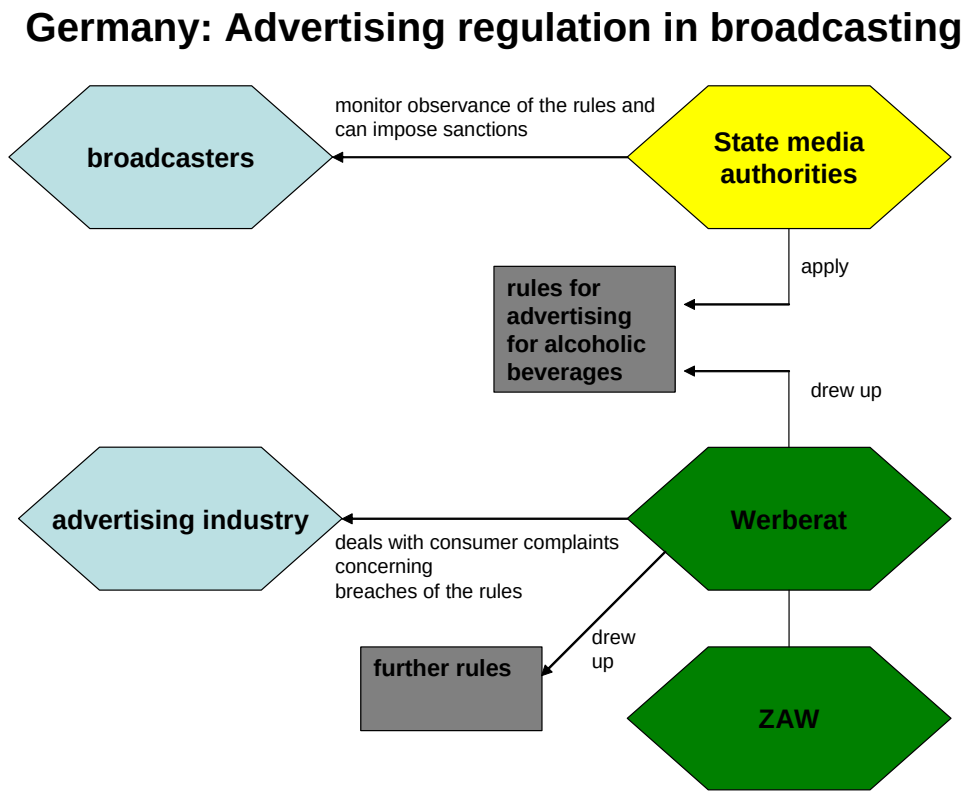
Theoretically, the state authorities can overrule each decision of these non-state organisations. According to the rules of FSK and USK, the state authorities that are responsible for the protection of minors can request a second examination of a film or a video game by FSK or USK. In this case, a so-called „Appellationsausschuss" which has seven members decides on the rating of a film. When it comes to the FSK there are four representatives of the state authorities besides the chairman in this committee. At USK, all members of this committee are representatives of the state authorities.

#### *3.1.2.5.5. Enforcement, sanctions*

Breaches of provisions of the JuSchG either fall under criminal law (indictable offences) or are prosecuted as administrative offences (which means that the offender has to pay a monetary fine). Compliance with FSK and USK ratings is enforced by the state authorities responsible for the protection of minors. Besides this, there is a non-state procedure: If a film is shown not in accordance with FSK rating a so-called supervision procedure (Ueberwachungsverfahren) is conducted by the association FSK is part of. This procedure may lead to imposition of a contract penalty.

### 3.1.2.6. Germany: Advertising regulation in broadcasting

- Medium: broadcasting
- Public policy objective: protection of consumers by advertising rules (with regard to advertising for alcoholic beverages)
- State regulator involved: Landesmedienanstalten (State Media Authorities)
- Non-state organisations involved: Deutscher Werberat (German Advertising Council)
- Task of non-state regulation: setting up rules on advertising for alcoholic beverages (Verhaltensregeln des deutschen Werberates ueber die Werbung fuer alkoholische Getraenke)
- Legal connection: Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchfuehrung der Trennung von Werbung und Programm und fuer das Sponsoring ( Joint Guidelines of the State Media Authorities on Advertising, the Separation of Advertising and Content, and on Sponsoring)
- Regulatory resources used by the state to influence the outcome of the regulatory process: state media authorities do not use resources to influence the drafting of the non-state rules on advertising for alcoholic beverages; however, they are free to set up rules on this topic themselves if the non-state rules do not meet (European) legal requirements
- Enforcement, sanctions: enforcement with regard to members of the advertising industry: German Advertising Council; enforcement with regard to broadcasters: state media authorities




#### *3.1.2.6.1. Overall description of the system including public policy objective the system aims to achieve*

Provisions for the regulation of advertising in Germany can be found in several acts. The Rundfunkstaatsvertrag (RStV, Interstate Treaty on Broadcasting) contains special advertising rules for broadcasters. The Landesmedienanstalten (State Media Authorities) are responsible for regulation of broadcasters with regard to advertising matters. Although they are independent from the state governments, they can be seen as state regulators as they are constituted by law and are bound to a legal remit which lies in the supervision of broadcasting and media

services. State media authorities monitor the programmes according to the provisions in the RStV as well as in laws on special issues. There are no state laws concerning alcohol advertising in broadcasting (as in art. 15 of the Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (the Television without Frontiers Directive)). However, the RStV empowers the state media authorities to issue joint guidelines on the implementation of advertising regulations. In the guidelines it is stated that the state media authorities also have to apply the Verhaltensregeln des deutschen Werberates ueber die Werbung fuer alkoholische Getraenke (rules of the German Advertising Council about advertising of alcoholic beverages). The Deutscher Werberat (German Advertising Council) is a non-state body that deals with issues of taste and decency of advertising measures.

#### *3.1.2.6.2. Task of non-state regulation*

It is the task of the German Advertising Council to take measures for the development of advertising regarding content, message, and design. Furthermore, its mission is to support responsible actions in the advertising sector as well as to detect and to eliminate grievances. One of its main functions is to deal with consumer complaints regarding advertising. The German Advertising Council sets its own codes and rules concerning permissible advertising that serve as the basis for its decisions. The German Advertising Council forms part of the Zentralverband der deutschen Werbewirtschaft (ZAW, German Advertising Federation) and, hence, the two bodies have a common membership. As all members of ZAW are part of the advertising industry, the German Advertising Council is not responsible when it comes to misbehaviour of broadcasters. However, the state media authorities refer to the rules of the German Advertising Council about advertising for alcoholic beverages in their guidelines.

#### *3.1.2.6.3. Connection between the non-state regulatory system and the state regulation*

The German Advertising Council is mentioned in the Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchfuehrung der Trennung von Werbung und Programm und fuer das Sponsoring (joint guidelines of the State Media Authorities on Advertising, the Separation of Advertising and Content, and on Sponsorship). These guidelines are enacted on the basis of the RStV and serve to concretise its rules for the daily work of the state media authorities. In the guidelines it states that the state media authorities also have to apply the rules of the Verhaltensregeln des deutschen Werberates ueber die Werbung fuer alkoholische Getraenke (rules of the German Advertising Council about advertising of alcoholic beverages).

#### *3.1.2.6.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

It was the decision of the state media authorities to refer to the rules of the German Advertising Council about advertising of alcoholic beverages instead of setting up rules on this topic

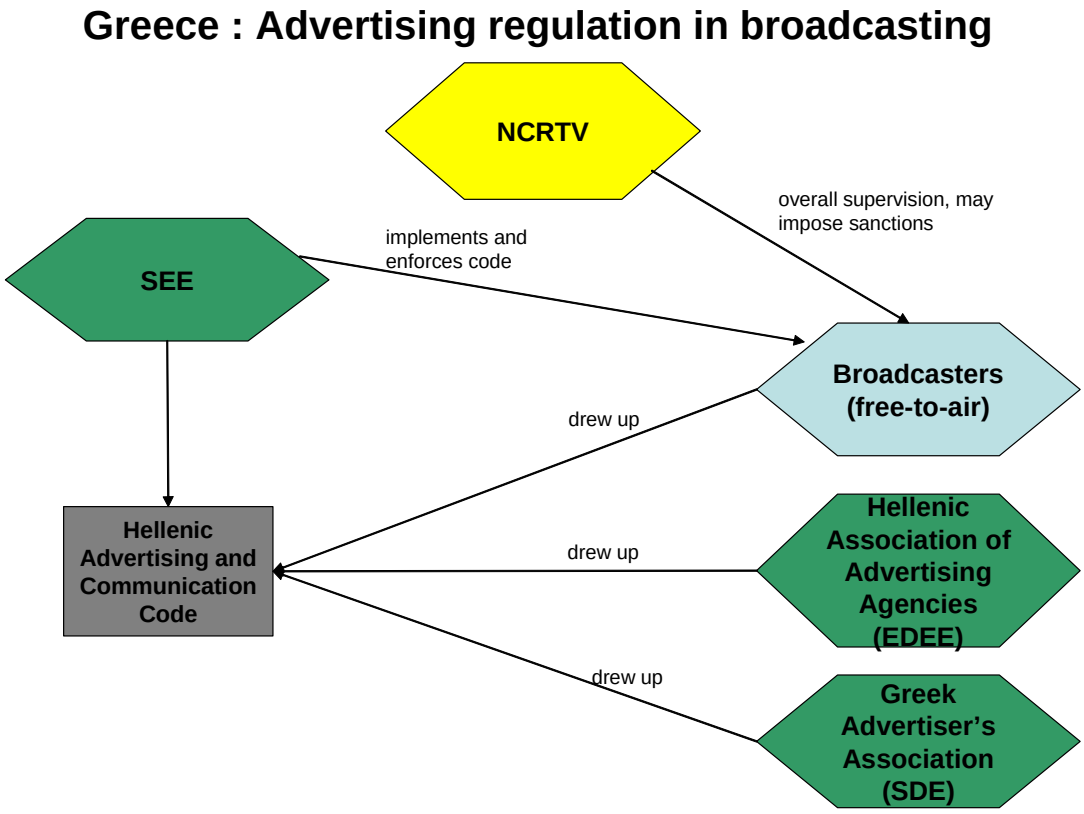
themselves. The state media authorities are responsible for the supervision and enforcement of the advertising rules in the RStV and in their guidelines.

#### *3.1.2.6.5. Enforcement, sanctions*

The German Advertising Council enforces its own rules with regard to members of the advertising industry. When it comes to broadcasters, enforcement of advertising rules falls within the responsibility of the state media authorities.

### 3.1.2.7. Greece: Advertising regulation in broadcasting

- Medium: broadcasting
- Public policy objective: protection of consumers by advertising rules
- State regulator involved: National Council for Radio and Television (NCRTV)
- Non-state organisations involved: code-making: Hellenic Association of Advertising and Communication Agencies (EDEE) and the Hellenic Advertisers' Association (SDE); enforcement: Avertising Self-Regulation Council (SEE)
- Task of non-state regulation: code-making (Hellenic advertising and communication code) and enforcement of the code
- Legal connection: state law 2863/2000: legal obligation for broadcasters to join non-state regulation
- Regulatory resources used by the state to influence the outcome of the regulatory process: legal provisions for „contracts" (which in fact are codes in this context) between broadcasters which amongst other rules contain rules on advertising
- Enforcement, sanctions: in the case of the Hellenic code of advertising and communication standards, SEE is responsible for enforcement; NCRTV still has overall responsibility




#### *3.1.2.7.1. Overall description of the system including public policy objective the system aims to achieve*

Greek law 2863 / 2000 provides for non-state regulatory mechanisms with respect to radio and television services. Broadcasters must conclude multi-lateral contracts in which their parties define the rules and ethical principles governing the programmes broadcast. In the advertising sector, the holders of operating licences for free-to-air radio and television stations, along with the Hellenic Association of Advertising and Communication Agencies (EDEE) and the Hellenic Advertisers' Association (SDE) drew up the Hellenic advertising and communication code governing the content, presentation and promotion of advertisements by the

licence holders. Responsibility for the implementation and enforcement of the code lies with a non-state council, the Avertising Self-Regulation Council (SEE). State regulator National Council for Radio and Television (NCRTV) is responsible for the overall supervision of the system.

#### *3.1.2.7.2. Task of non-state regulation*

The Hellenic advertising and communication code governing the content, presentation and promotion of advertisements by the licence holders applies to all forms of advertising of all kinds of products and services as well as to all forms of commercial and public communication. The code specifies the rules of professional etiquette and ethics which must be observed by all parties involved in advertising – that is, advertisers, advertising agencies, and advertising media.

The main principles of the code are as follows:

- Every advertisement must be legal, proper, honest, and accurate.
- Every advertisement must be created in a spirit of social responsibility and comply with the principles of fair trade as these are generally understood in business.
- Advertisements must not undermine public trust in advertising activities.

There are special rules on the protection of privacy, the exploitation of reputation and the protection of minors.

The competence and responsibility for the implementation and enforcement of the code lies with SEE, which is a member of EASA - the European Advertising Standards Alliance. Individuals or representatives of consumer associations can submit complaints to be investigated free of charge. Two committees were established – a first-degree committee, which advises on applications for preliminary approval and also ex officio addresses potentially contravening advertisements and/or other forms of commercial and public communication, and a second-degree committee to process appeals against decisions by the first-degree committee.

#### *3.1.2.7.3. Connection between the non-state regulatory system and the state regulation*

Art. 9, chapter B of the Greek law 2863/2000 provides for non-state regulatory mechanisms in respect of radio and television services: Holders of a licence (both private radio and television channels broadcasting without encryption and suppliers of encrypted radio and/or television services) must conclude multi-lateral contracts in which their parties define the rules and ethical principles governing the programmes broadcast.

#### *3.1.2.7.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

Law 2863/2000 contains legal provisions for the contracts between the licence holders. There must be at least two parties to the contract; other radio and television bodies may be invited to sign subsequently. Failure to conclude or sign a contract would constitute a violation of the

legislation in force and result in the NCRTV withdrawing or suspending the corresponding licence.

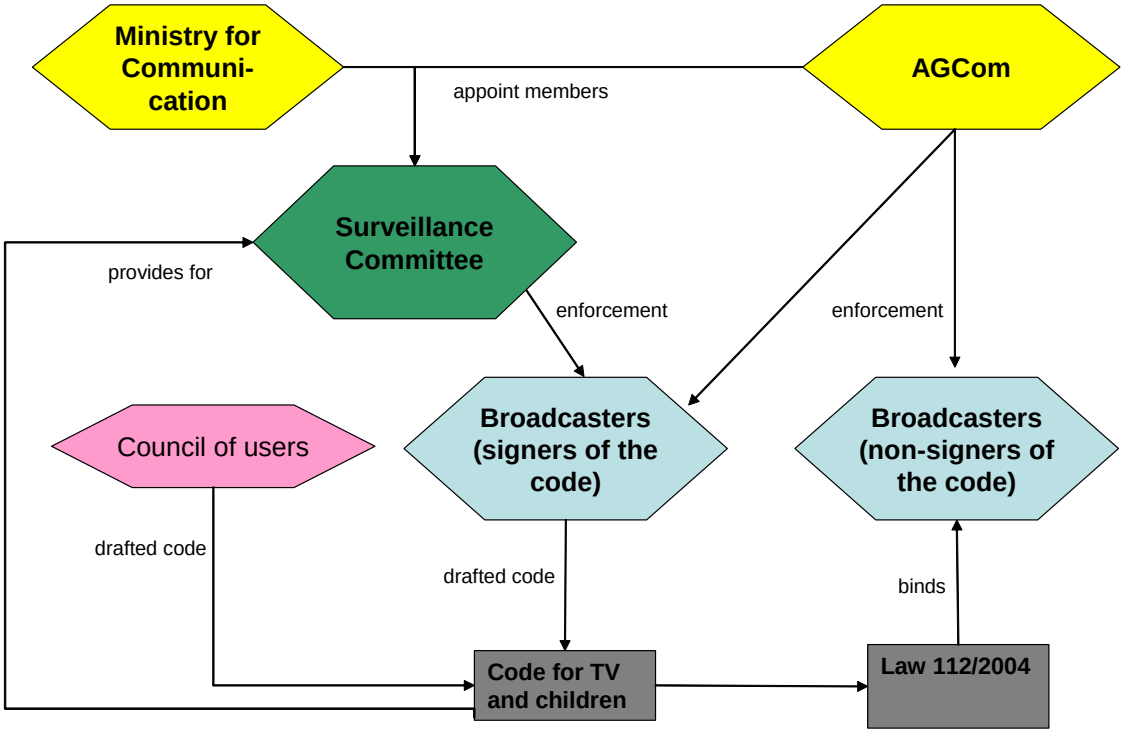
#### *3.1.2.7.5. Enforcement, sanctions*

SEE is responsibility for the enforcement of the code. Responsibility for the overall supervision of the system lies with state regulator NCRTV.

### 3.1.2.8. Italy: Protection of minors in television

- Medium: television
- Public policy objective: protection of minors
- State regulator involved: Autorita per le garanzie nelle comunicazioni (AGCom, Italian Communication Authority)
- Non-state organisations involved: Comitato di applicazione del Codice di autoregolamentazione TV e Minori (Surveillance Committee)
- Task of non-state regulation: code-making: Codice di Autoregolamentazione TV e Minori (Code for TV and Children) and enforcement of the code
- Legal connection: code has been formally incorporated into law 112/2004
- Regulatory resources used by the state to influence the outcome of the regulatory process: acknowledgement of the code by law; members of the Surveillance Committee were officially appointed by a decree of the Ministry of Communications adopted in accordance with AGCom; Ministry of Communications provides staff and accommodation to the Surveillance Committee
- Enforcement, sanctions: Surveillance Committee: request to discontinue or to change a programme; AGCom: fines and other sanctions (AGCom is responsible as the code was implemented into state law)

**Italy: Protection of minors in televison**



#### *3.1.2.8.1. Overall description of the system including public policy objective the system aims to achieve*

The Codice di Autoregolamentazione TV e Minori (Code for TV and Children) has been formally incorporated into state law 112/2004, resulting in its obligations being legally binding even for companies that are not signatories. According to its preamble, the Code is aimed at the protection of the mental and moral integrity of children, with a special commitment to the safeguards of younger children (0-14 years). With regard to implementation and enforcement, the Code provides for a non-state Comitato di applicazione del Codice di autoregolamentazione TV e Minori (Surveillance Committee) whose members were officially appointed by a decree of the Ministry of Communications adopted in accordance with the state regulator Autorita per le garanzie nelle comunicazioni (AGCom, Italian Communication Authority).

#### *3.1.2.8.2. Task of non-state regulation*

The Code provides for a comprehensive set of rules concerning the participation of children to TV broadcasts and the contents of TV programmes. In this respect, the Code sets some general principles which apply to all TV programs (prohibition on showing children as perpetrators, witnesses or victims of a crime etc.) and provides for several different groups of rules which apply to a certain time frame (e.g. „TV for children“ 16.00-19.00) and that specifically address advertising. Compliance with the Code is ensured by the Surveillance Committee, which acts either on its own initiative or upon a complaint from interested parties.

#### *3.1.2.8.3. Connection between the non-state regulatory system and the state regulation*

The Code has been formally acknowledged by state law 112/2004, resulting in its obligations to be legally binding even for companies that are not signatories. The law mandates that all TV broadcasters must comply with the provisions in the Code and that amendments and additions to the Code shall be adopted by means of a decree of the Ministry for Communications.

#### *3.1.2.8.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

The members of the Surveillance Committee were officially appointed by a decree of the Ministry of Communications adopted in accordance with AGCom. The Surveillance Committee is a joint organisation made up of representatives both of broadcasters and institutions (including inter alia: AGCom, CoReCom (Comitato Regionale per le Comunicazioni), National Council of Users (which members are appointed by AGCom and which is funded by AGCom) etc.). The Surveillance Committee also benefits from logistic and technical assistance from the Ministry of Communications, which provides both staff and accommodation to the Surveillance Committee.

#### *3.1.2.8.5. Enforcement, sanctions*

If the Surveillance Committee decides that a broadcast is inconsistent with the Code, it can decide that this decision has to be published. Additionally, the Committee can request the

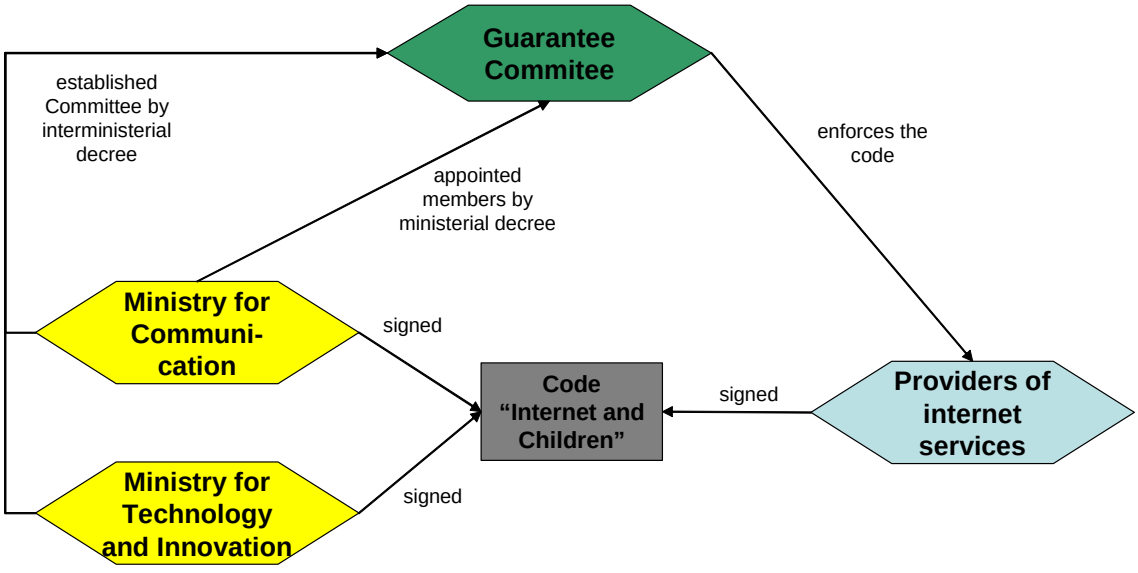
broadcaster to discontinue such TV programmes and to comply with the rules embodied in the Code.

Law 112/2004 stipulates that AGCom is in charge of the enforcement of the rules of the code adopted by the law. In case of an infringement, AGCOM can impose fines and other sanctions.

### 3.1.2.9. Italy: Protection of minors in internet services

- Medium: internet services
- Public policy objective: protection of minors
- State regulator involved: there is no state regulator involved
- Non-state organisations involved: Comitato di Garanzia per l'attuazione del Codice di autoregolamentazione Internet e Minori (Guarantee Committee)
- Task of non-state regulation: code-making (Codice di autoregolamentazione Internet e Minori (code "Internet and Children")) and enforcement of the code
- Legal connection: the Code was signed by the Minister of Communications and the Minister of Technology and Innovation; the Guarantee Committee was established by an interministerial decree issued by the Minister for Communication and the Minister for Innovation and Technology
- Regulatory resources used by the state to influence the outcome of the regulatory process: The members of the Guarantee Committee are appointed by a ministerial decree issued by the Minister for Communications; two representatives of the Ministry for Communications and two representatives of the Presidency of the Council of ministers are members of the Guarantee Committee
- Enforcement, sanctions: sanctions imposed by the Guarantee Committee range from a negative remark to a suspension of the right to display the „Internet and children“ sign

**Italy: Protection of minors in internet services**



#### *3.1.2.9.1. Overall description of the system including public policy objective the system aims to achieve*

Protection of minors in the Internet is addressed by the non-state Code „Internet e Minori“ which has been signed on 19 November 2003. A non-state Comitato di Garanzia per l'attuazione del Codice di autoregolamentazione Internet e Minori (Guarantee Committee) is responsible for supervising and enforcement of the Code.

#### *3.1.2.9.2. Task of non-state regulation*

The non-state code aims at the protection of minors. The Code seeks to prevent children from getting access to content which may impair their moral and psychic integrity. Additionally, the Code aims at safeguarding the children's privacy and personal data and at promoting equitable and secure access to Internet resources. The code also aims at protecting minors from unsolicited commercial information and from the exploitation of their vulnerability. Finally, there is a special commitment to the fight against sexual tourism and child prostitution and pornography.

Participation in this non-state system is voluntary and allows a provider to display a sign certifying affiliation to the Code, provided that the provider accepts the contents of the Code and, in particular, the surveillance activities and the sanctions therein.

A Guarantee Committee is responsible for supervising the implementation of the code and for its enforcement.

#### *3.1.2.9.3. Connection between the non-state regulatory system and the state regulation*

The Code constitutes an agreement between individuals, associations, the Minister of Communications and the Minister of Technology and Innovation, open to the adherence of any subject conducting Internet business activities. The Guarantee Committee was established on 10 March 2004 by an interministerial decree issued by the Minister for Communication and the Minister for Innovation and Technology.

#### *3.1.2.9.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

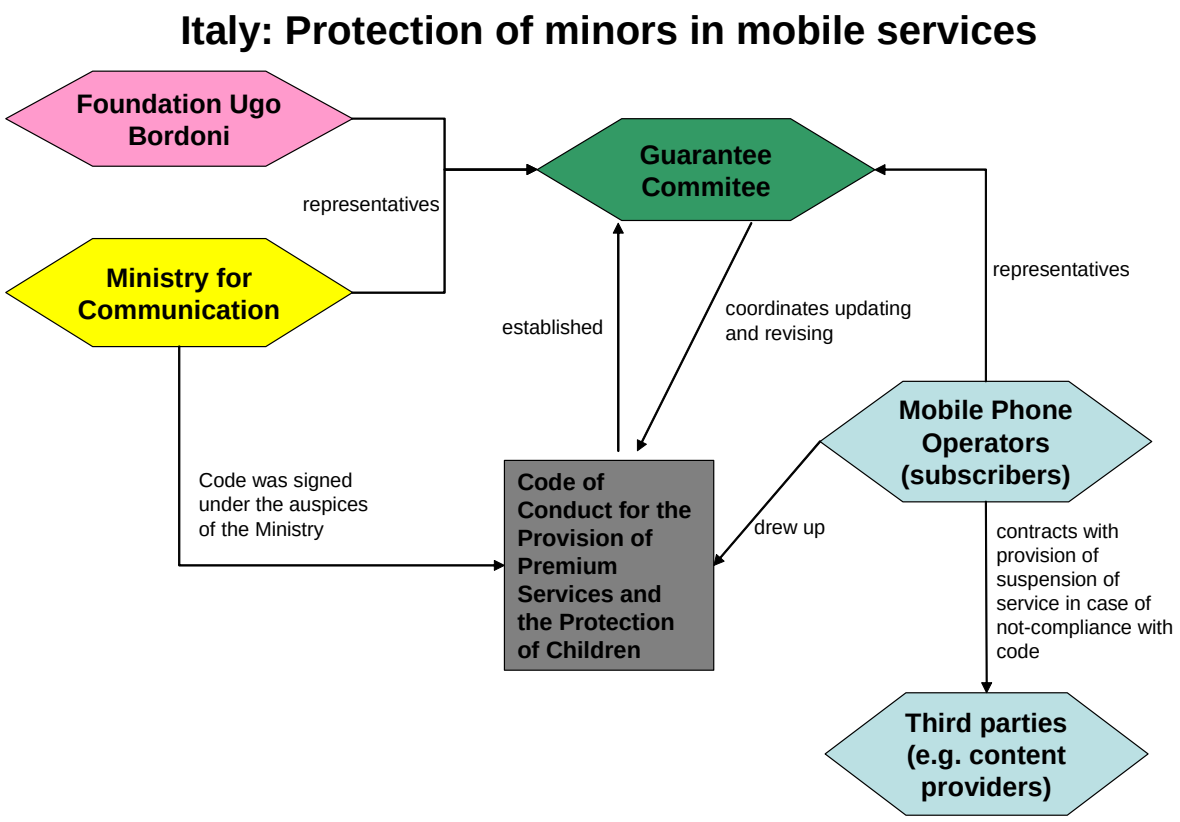
The state has an impact on the organisation of the Guarantee Committee: The Guarantee Committee was established on 10 March 2004 by an interministerial decree issued by the Minister for Communication and the Minister for Innovation and Technology. The Guarantee Committee is made up of eleven experts, who are officially appointed by a ministerial decree issued by the Minister for Communications. Four members of the Guarantee Committee are designated by the signatory associations: two represent the Ministry for Communications, two the Presidency of the Council of ministers and the others are designated by associations committed to the protection of minors and the National Users Council.

#### *3.1.2.9.5. Enforcement, sanctions*

The Guarantee Committee can impose sanctions ranging from a negative remark to a suspension of the right to display the „Internet and children“ sign.

### 3.1.2.10. Italy: Protection of minors in mobile services

- Medium: mobile services
- Public policy objective: protection of minors
- State regulator involved: there is no state regulator involved
- Non-state organisations involved: Organo di Garanzia (Guarantee Committee)
- Task of non-state regulation: code-making (Codice di condotta per l'offerta dei servizi a sovrapprezzo e la tutela dei minori (Code of Conduct for the Provision of Premium Services and the Protection of Children))
- Legal connection: the code was signed by Italian main mobile phone operators under the auspices of the Ministry of Communications
- Regulatory resources used by the state to influence the outcome of the regulatory process: representatives of the Ministry of Communications are members of the Guarantee Committee
- Enforcement, sanctions: there is no body or organisation responsible for the enforcement of the code




#### *3.1.2.10.1. Overall description of the system including public policy objective the system aims to achieve*

Although the sector of telecommunications falls within the scope of a number of statutes, decrees and regulations, the matter of premium services provided by mobile phone operators

had been an unregulated area. For this reason, Italian main mobile phone operators have signed, under the auspices of the Ministry of Communications, the Codice di condotta per l'offerta dei servizi a sovrapprezzo e la tutela dei minori (Code of Conduct for the Provision of Premium Services and the Protection of Children) which aims at protecting children and safeguarding human dignity, as well as ensuring the consumers' information. The Code mandates the establishment of a non-state Organo di Garanzia (Guarantee Committee), whose task is to coordinate the activities aimed at updating and revising the present provisions of the Code of Conduct.

#### *3.1.2.10.2. Task of non-state regulation*

The Code of Conduct deals with the matter of premium services provided by mobile phone operators. It contains rules that aim to protect children, human dignity and consumers' right to be informed. For this reason, the Code of Conduct lays down a set of provisions concerning the type and content of the services provided, imposes obligations to its signatories and also deals with the relations between mobile operators and third parties (i.e. the premium services providers).

The operators who have signed the Code of Conduct commit themselves to „respect it, modify it in accordance with developments in the mobile services sector, and take any necessary action to guarantee the observance of the principles contained therein." Therefore, the Code does create legally binding private law obligations for its signatories, while it has no effect vis-à-vis the operators who have not signed it. Nonetheless, the code is open to new subscribers, as clarified in art. 10: „The present Code of Conduct can be signed by any mobile operator intending to respect the obligations contained therein."

Art. 6.1 stipulates that „Signatories are to append the present Code of Conduct to contracts stipulated with third parties for the provision of premium services on mobile operator networks. Contracts are to include a proviso that third party services face suspension if the Code of Conduct is not respected".

The Code mandates the establishment of a Guarantee Committee, whose task is to coordinate the activities aimed at updating and revising the present provisions of the Code of Conduct. The Guarantee Committee has to meet at least once a year in order to revise the Code, to assess problems emerging from its application and to identify possible solutions. The Guarantee Committee is also legally bound to draft an annual report containing an up-to-date list of third parties, premium services, services directed exclusively at children, and specific procedures for the application of the regulations stipulated in the Code.

#### *3.1.2.10.3. Connection between the non-state regulatory system and the state regulation*

The code was signed by Italian main mobile phone operators under the auspices of the Ministry of Communications.

#### *3.1.2.10.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

The Committee is a collegiate body composed of representatives of the mobile phone operators, the Ministry of Communications and the Fondazione Ugo Bordoni (a foundation that was established by state entities and private companies and that is partly funded by public resources). The Committee's President is to be chosen among the representatives of the last two entities.

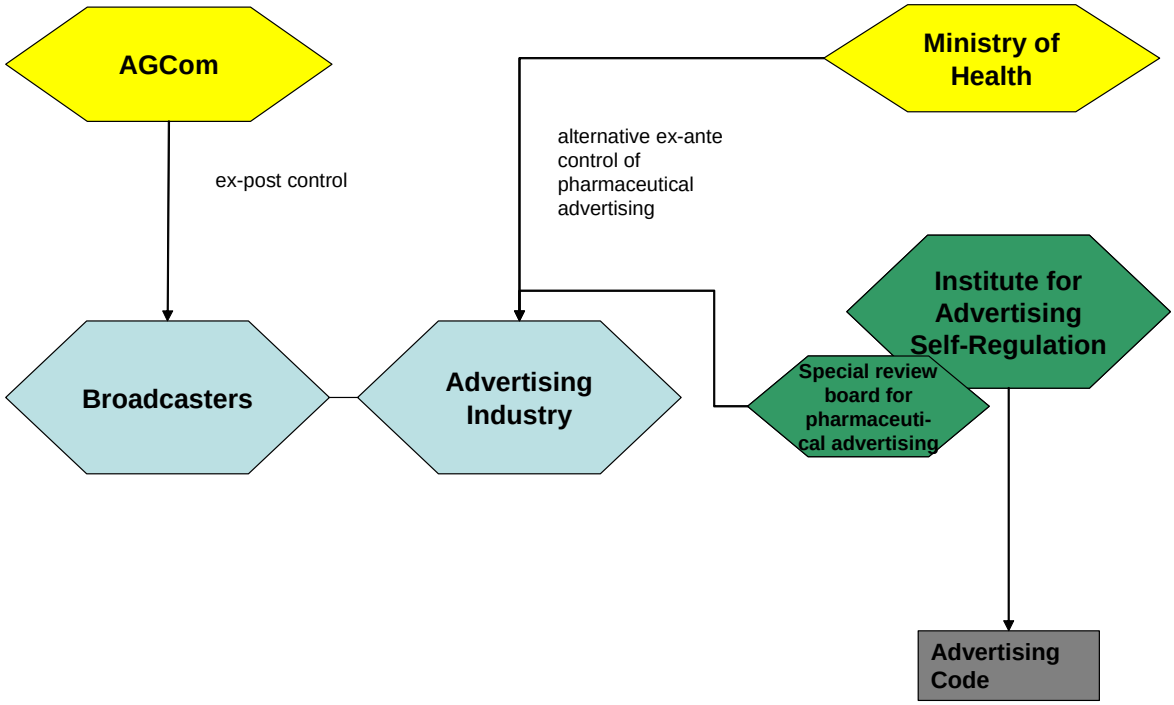
#### *3.1.2.10.5. Enforcement, sanctions*

As to complaint procedures and remedies to the infringement of the Code's rules, the Code of Conduct only provides for self-disciplinary measures: breaches may be reported to the operator concerned. The operator has to answer reported violations and reasoned requests in accordance with the provisions laid down in its services charter (legislative decree of 30 July 1999, no 286/1999 requires companies concerned in the supply of a public service to adopt a Services Charter pursuant to the guidelines issued by the Prime Minister).

### 3.1.2.11. Italy: Pharmaceutical advertising regulation

- Medium: all kinds of media
- Public policy objective: advertising rules (with regard to pharmaceutical advertising)
- State regulator involved: Autorita per le garanzie nelle comunicazioni (AGCom, Italian Communications Authority)
- Non-state organisations involved: Istituto dell'Autodisciplina Pubblicitaria (Institute for Advertising Self-Regulation)
- Task of non-state regulation: advance clearance of advertisements
- Legal connection: legislative decree of 30 December 1992, n. 541
- Regulatory resources used by the state to influence the outcome of the regulatory process: the Health Ministry may authorise the advertisement on the grounds of the sub-committee's positive appraisal; ex post control by AGCom.
- Enforcement, sanctions: ex post control is performed by AGCom

**Italy: Pharmaceutical advertising regulation**




#### *3.1.2.11.1. Overall description of the system including public policy objective the system aims to achieve*

A legislative decree mandates that all advertisements of pharmaceutical products sold over the counter shall be submitted to the Ministry of Health for prior authorisation. Alternatively, according to the decree, companies who advertise pharmaceutical products sold over the counter may submit their advertisements to a „self-regulation institute", namely to the Istituto dell'Autodisciplina Pubblicitaria (Institute for Advertising Self-Regulation). Jurisdictional and monitoring activities on advertising are carried out by two organs: the Comitato di controllo (Advertising Review Board) and the Giurì (Jury). When it comes to advertisements for pharmaceutical products sold over the counter, companies may submit their advertisements to a special sub-committee of the Advertising Review Board. The Advertising Review Board

decides on the ground of a non-state code for advertising, the Codice dell'Autodisciplina Pubblicitaria Italiana.

#### *3.1.2.11.2. Task of non-state regulation*

Companies may submit their advertisements to a special sub-committee of the Advertising Review Board (composed of a lawyer, a physician and a pharmacologist), which can either approve the advertisement or reject it. The Health Ministry may authorise the advertisement on the grounds of the sub-committee's positive appraisal. In this respect, the sub-Committee's ex ante review mechanism is alternative to the assessment of the advertisement by the relevant Ministerial Commission.

#### *3.1.2.11.3. Connection between the non-state regulatory system and the state regulation*

When it comes to advertising for pharmaceutical products, the legislative decree of 30 December 1992, 541, art. 6.1 mandates that all advertisements of such products shall be submitted to the ministry of Health for prior authorisation. According to art. 6.5 lit. b) of this decree, companies who advertise pharmaceutical products sold over the counter may submit their advertisements to a „self-regulation institute", namely to the Institute for Advertising Self-Regulation, as clarified by a decree of the Health Ministry of 18 June 1993.

#### *3.1.2.11.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

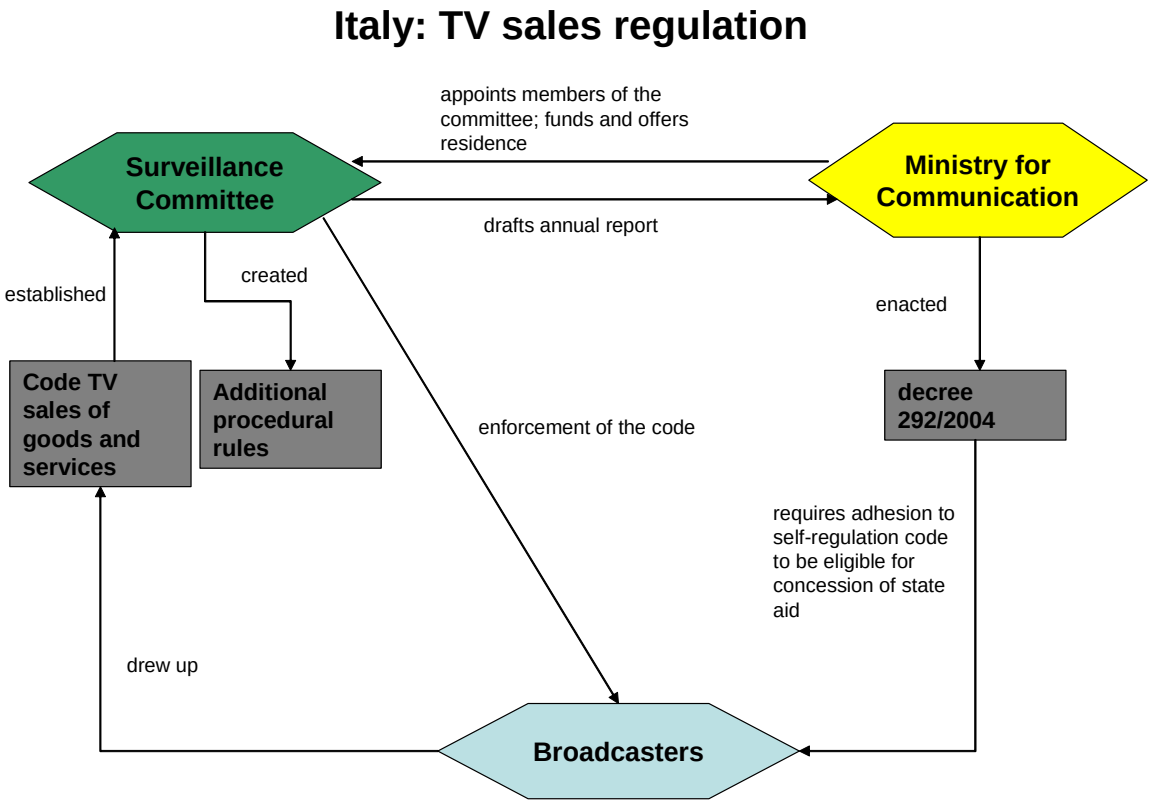
The Health Ministry may authorise the advertisement on the grounds of the sub-committee's positive appraisal; ex post control is done by the Autorita per le garanzie nelle comunicazioni (AGCom, Italian Communications Authority).

#### *3.1.2.11.5. Enforcement, sanctions*

Ex post control of advertisements is performed by AGCom.

### 3.1.2.12. Italy: TV sales regulation

- Medium: television
- Public policy objective: consumer protection with regard to TV sales
- State regulator involved: Autorita per le garanzie nelle comunicazioni (AGCom, Italian Communications Authority)
- Non-state organisations involved: Comitato di controllo (Surveillance Committee)
- Task of non-state regulation: code-making (Codice di autoregolamentazione in materia di televendite spot di televendita di beni e servizi di astrologia, di cartomanzia ed assimilabili, di servizi relativi ai pronostici concernenti il gioco del lotto, enalotto, supernalotto, totocalcio, totogol, totip, lotterie e giochi similari) and enforcement of the code
- Legal connection: according to art. 1.3 of the decree of the Ministry of Communication of 5 November 2004, 292/2004 compliance with the code on TV sales is a condition for broadcasters for receiving state aids; art. 1.2 lit. h) of the decree of the Ministry of 31 January 2003 requires the commitment to respect the code as a condition for the concession of state aids to local broadcasters
- Regulatory resources used by the state to influence the outcome of the regulatory process: the members of the Surveillance Committee are appointed by the Ministry of Communications; representatives of state institutions (e.g. Ministry of Communications, AGCom) are members of the Committee; the Committee is funded by the Ministry of Communications
- Enforcement, sanctions: Surveillance Committee: decision to discontinue broadcasting of a specific program; in serious cases or cases of repeated violations: broadcaster has to broadcast the Committee's decision




#### 3.1.2.12.1. Overall description of the system including public policy objective the system aims to achieve

According to the preamble of the non-state Codice di autoregolamentazione in materia di televendite spot di televendita di beni e servizi di astrologia, di cartomanzia ed assimilabili , di servizi relativi ai pronostici concernenti il gioco del lotto, enalotto, supernalotto, totocalcio, totogol, totip, lotterie e giochi similari, TV sales of goods and services such as astrology, lotteries etc. required more detailed provisions than those embodied in the state-regulation

instruments. As regards the concept of TV sales and advertisements sales services, the Code expressly recalls the definition provided for by a decision of the state regulator Autorita per le garanzie nelle comunicazioni (AGCom, Italian Communications Authority), i.e. „a direct offer broadcasted to the general public via TV, with a view of supplying, in return for payment the payment of a fee, goods or services, including immovable property, rights and obligations“. Enforcement and compliance with the Code is ensured by a non-state Comitato di controllo (Surveillance Committee).

#### 3.1.2.12.2. Task of non-state regulation

The non-state code for TV sales is an agreement signed by several national and local TV broadcasters, whereby such broadcasters commit themselves to the compliance with a set of rules when broadcasting TV sales and establish a Surveillance Committee in charge of ensuring such compliance. The Surveillance Committee set up procedural rules for the regulation of the TV sales.

#### 3.1.2.12.3. Connection between the non-state regulatory system and the state regulation

Former Law 112/04 mandates that government adopts regulation that aims at reducing or discontinuing state aids and funding in favour of broadcasters who fail to comply with the Code. Such regulation has not yet been adopted. However, art. 1.3 of the decree of the Ministry of Communication of 5 November 2004, 292/2004 requires the adhesion to the self-regulation code on TV sales for broadcasters to be eligible for the concession of state aids. Likewise, art. 1.2 lit. h) of the decree of the Ministry of 31 January 2003 requires the commitment to respect the Code as a condition for the concession of state aids to local broadcasters.

#### 3.1.2.12.4. Regulatory resources the state uses to influence the outcome of the regulatory process

The Surveillance Committee resides at and is funded by the Ministry of Communications, whose twelve members are officially appointed by the Minister of Communications. Six of those members represent private and public as well as local and national broadcasters while the others represent State institutions, i.e the Ministry of Communication, AGCom, the Commissione per l'assetto radiotelevisivo (Ministerial Commission for Radio and TV), the Regional Communication Committees (Co.Re.Com.), the Regional Radio and TV Committees (Co.Re.Rat.) and the National Users' Council.

The above-mentioned provisions (see 3.1.2.12.3), which require broadcasters to adhere to or to commit themselves to respect the Code as a condition for the concession of State aids, create an economic incentive for operators to join this voluntary non-state regulatory system.

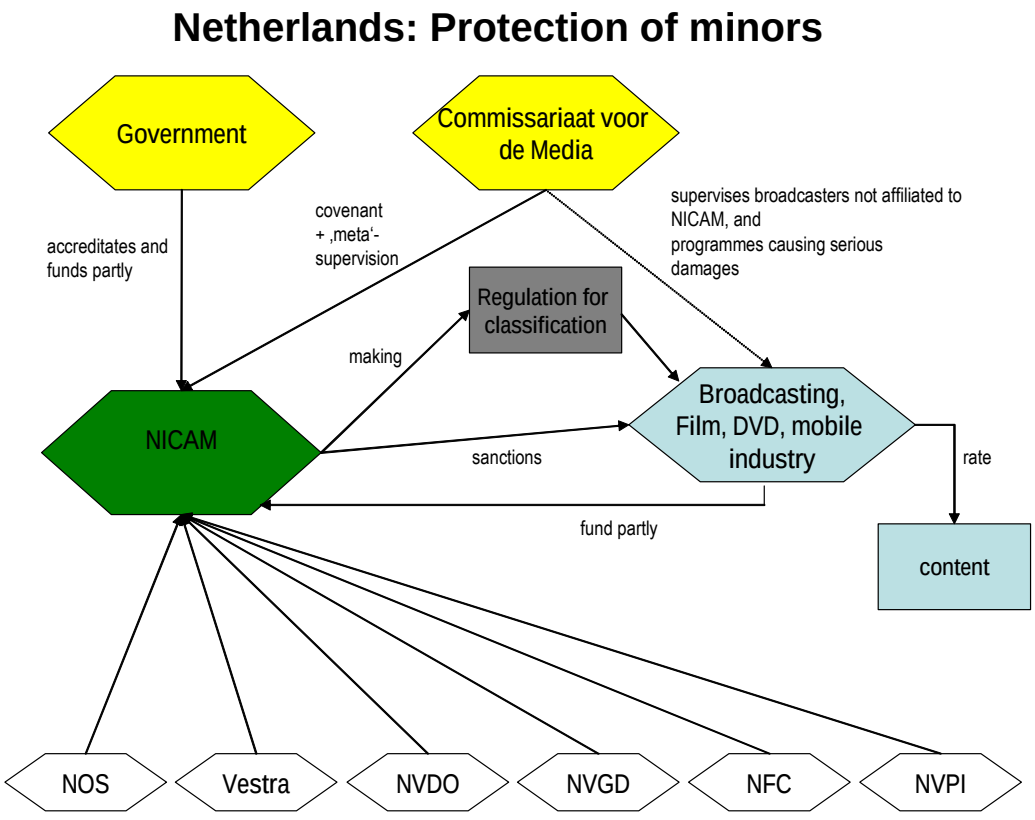
Supervision of the system is carried out by the Ministry of Communication. The Code mandates that the Surveillance Committee must draft an annual report for the Ministry describing the implementation of the Code, assessing the achievements of the year etc.

#### *3.1.2.12.5. Enforcement, sanctions*

If an infringement of the Code's provision is ascertained, the Committee may request the company to discontinue broadcasting of a certain transmissions. In serious cases, as well as in occasion of repeated violations, the Committee may impose upon the company the obligation to communicate the decision to its users. In a case of immediate necessity or of a clear and grievous violation of the Code, the Committee may also adopt temporary decisions such as admonitions and requests to discontinue the broadcasts until the outcome of the decision making process.

### 3.1.2.13. Netherlands: Protection of minors

- Medium: broadcasting, movies, DVD, video games, mobile services
- Public policy objective: protection of minors
- State regulator involved: Commissariaat voor de Media (CvdM, Dutch Media Authorithy)
- Non-state organisations involved: Nederlands Instituut voor de Classificatie van Audiovisual Media (NICAM, Netherland's Institute for the Classification of Audiovisual Media)
- Task of non-state regulation: code-making (setting of rules for rating of content performed by the providers themselves); rule enforcement
- Legal connection: Mediawet (Dutch Media Act); accreditation of non-state organisation
- Regulatory resources used by the state to influence the outcome of the regulatory process: accreditation of non-state organisation (NICAM); NICAM is partly funded by the state; „meta supervision" by the CvdM (the responsible minister could withdraw accreditation of NICAM)
- Enforcement, sanctions: NICAM: fines, revoking of NICAM-membership; Commissariaat voor de Media is responsible for enforcement with regard to programmes which can be seriously harmful (illegal content, hardcore pornography, gratuitous violence) and towards broadcasters which do not participate in the NICAM system




#### *3.1.2.13.1. Overall description of the system including public policy objective the system aims to achieve*

In August 1999 the non-state organisation Nederlands Instituut voor de Classificatie van Audiovisual Media (NICAM, Netherland's Institute for the Classification of Audiovisual Media) was founded by all involved media sector platform organisations after the government had announced it would be willing to bear the costs of founding a classification institute in which all relevant media organisations would participate. The main objective of the classification system is to protect youth from harmful content on TV, in movies, videos, DVDs and

video games. This objective should be met by classification of all audiovisual media content and by adequate information aimed at the consumers, especially parents. The Commissariaat voor de Media (CvdM, Dutch Media Authorithy), an independent regulatory authority that can be seen as state regulator, has a role in the system as well – namely with regard to programmes which can be seriously harmful (illegal content, hardcore pornography, gratuitous violence) and towards broadcasters which do not participate in the NICAM system.

The system has been extended to include content for mobile phones. NICAM has signed a contract with several mobile operators.

#### *3.1.2.13.2. Task of non-state regulation*

The classification system, called „Kijkwijzer" (in the double meaning of „Watch wiser" or „Viewing guide") was developed by independent experts and launched on 22 February 2001 by NICAM. It introduces a uniform classification system for film, TV, video, DVD. The system is based on a classification by age (all ages, not suitable for children younger than 6, 12 or 16 years old) and content descriptors, e.g. indications on what the „harmful content" consists of (violence, sex, fear, discrimination, drugs and alcohol abuse and coarse language). The organisations affiliated to NICAM classify productions themselves on the basis of the Kijkwijzer coding form. The persons who classify the productions within the companies are trained by NICAM. Following the NICAM regulations, television programmes classified as suitable for age twelve and older must not be broadcast before 8 pm. A second watershed states programmes classified as age sixteen should not be broadcast before 10 pm.

Members of NICAM have to respect all the rules regarding the classification, the use of symbols describing the audiovisual content and the time of broadcasts.

NICAM is responsible for:

- setting up of and further development of the classification of audiovisual material of its members;
- drafting regulations for classification and the time of broadcasting on TV;
- supplying information to the audience;
- supervising compliance including the handling of complaints;
- imposing sanctions (see below).

#### *3.1.2.13.3. Connection between the non-state regulatory system and the state regulation*

As far as TV is concerned the Mediawet (Dutch Media Act) provides the legal framework for the establishment of NICAM and lays down additional provisions relating to the control of harmful content on TV. The Media Act states that programmes that may impair the physical, mental or moral development of persons under the age of sixteen can only be broadcast if the operators are members of an organisation accredited by the government on certain criteria laid down in the Media Act, and are subject to the rules and supervision of that accredited organi-

sation. Broadcasters who do not opt for membership of NICAM fall directly under the supervision of the CvdM.

#### *3.1.2.13.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

According to the Media Act an organisation will classify for accreditation only if:

„(a) independent supervision by the organisation of compliance with the regulations […] is guaranteed;

(b) provision has been made for adequate involvement of stakeholders, including in any event consumer representatives, establishments which have obtained broadcasting time, experts in the field of audiovisual media and producers of audiovisual media;

(c) the financial position of the organisation ensures proper implementation of the activities." Following the provisions of the Media Act NICAM was accredited by a decision of government of 22 February 2001.

The NICAM is funded by both industry and state. The state contribution in 2003 was €532,000.00, which is 73% of the total costs. The intention of government is to decline its contribution the next years. The aim of government is to subsidise a maximum 40% of NICAM costs in 2006.

Recently the CvdM has been entrusted with the task of performing so-called „meta supervision" of the NICAM. This means each year NICAM will have to report to the CvdM on how it will safeguard the quality of the classification. Also NICAM should demonstrate to the CvdM to what extent the classifications are reliable, valid, stable, consistent and precise. Further arrangements regarding this check by the CvdM have been laid down in a supplement to a covenant between both parties.

Regarding the „meta supervision" the following is stated.

- NICAM should demonstrate to the CvdM to what extend the classifications are reliable, valid, stable, consistent and precise;
- each year before 1 March the NICAM will submit all necessary data to the CvdM.
- each year before 1 July the CvdM will report to the state secretary about its „meta supervision" on NICAM/Kijkwijzer.

The following data should be reported each year:

- overview of complaints lodged with NICAM (numbers and contents analyses);
- overview of results of checks by NICAM of classifications (internal quality check);
- description of other activities performed by NICAM for the internal quality check;
- summary of test–DVD.

At least once every two years there should be a comparison with classifications in other European countries. Furthermore data of most recent audience research should be included in the report.

If the NICAM fails to meet the legal conditions stated in the Dutch Media Act, the government can decide to withdraw the accreditation.

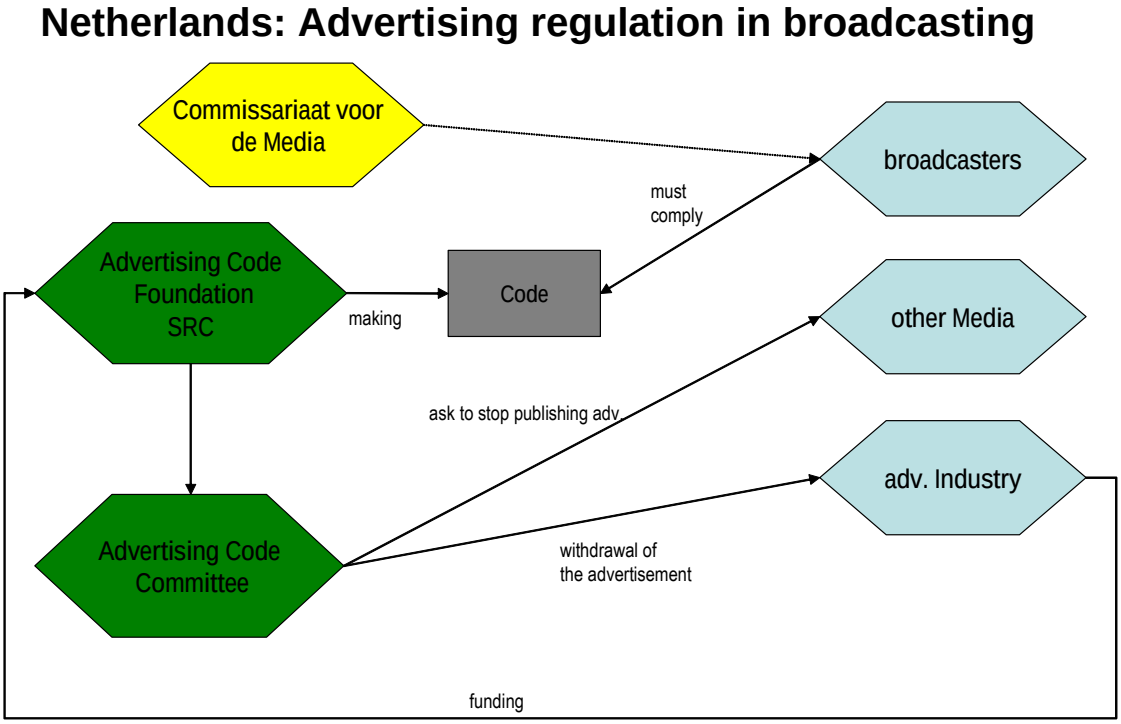
#### *3.1.2.13.5. Enforcement, sanctions*

Compliance with the rules set by NICAM is supervised by NICAM. It can impose the following sanctions: warnings; fines (maximum has recently been raised to € 135.000); revoking the NICAM-membership (only in the case of very severe or repeated violations).

The CvdM has to supervise the absolute prohibition on broadcasting content that can cause serious damage to minors. Furthermore the CvdM has to control whether the non-members of NICAM broadcast any programmes that could be harmful to minors.

### 3.1.2.14. Netherlands: Advertising regulation in broadcasting

- Medium: broadcasting
- Public policy objective: protection of consumers by advertising rules
- State regulator involved: Commissariaat voor de Media (CvdM, Dutch Media Authorithy)
- Non-state organisations involved: code-making: Stichting Reclame Code (Advertising Code Foundation); enforcement: Reclame Code Commissie (Advertising Code Committee)
- Task of non-state regulation: code-making (Nederlandse Reclame Code (Dutch Advertising Code)) and enforcement of the code
- Legal connection: Mediawet (Dutch Media Act) obliges broadcasters to affiliate with the Nederlandse Reclame Code if they want to include advertisements in their programmes
- Regulatory resources used by the state to influence the outcome of the regulatory process: the state does not influence the non-state regulatory process; however, there the state retains back stop power: according to the Dutch Media Act the Minister shall lay down rules implementing European advertising rules if the non-state code or non-state supervision of these rules is insufficient
- Enforcement, sanctions: Advertising Code Committee: decision that an advertisement must not be published; setting of conditions on the broadcast time of an advertisement




#### *3.1.2.14.1. Overall description of the system including public policy objective the system aims to achieve*

The non-state Nederlandse Reclame Code (Dutch Advertising Code) contains a body of rules and regulations to which all forms of advertising are subject, regardless of whether they are broadcast on radio or TV or published in a press magazine. The public policy objective is to protect the public (especially children) from misleading and harmful advertising and to make advertising in general – regardless of the media in which it is offered – accountable. This code is drawn up by the non-state Stichting Reclame Code (Advertising Code Foundation). Compliance with the Advertising Code is monitored by the non-state Reclame Code Commissie

(Advertising Code Committee). In general, participating in the Advertising Code Foundation is voluntary, but the Mediawet (Dutch Media Act) obliges both public and private broadcasters to affiliate with the Dutch Advertising Code if they want to include advertisements in their programmes.

#### *3.1.2.14.2. Task of non-state regulation*

The Dutch Advertising Code is divided into a general section and a special section. The general section stipulates, among other things, that advertisements may not be misleading or untrue. The special section contains rules for specific products and services. All parties affiliated with the Dutch Advertising Code must respect the regulations regarding form and content of advertising. This code is drawn up by the Advertising Code Foundation in which eight organizations associated with the advertising branch in the Netherlands participate. Compliance with the Dutch Advertising Code is monitored by the Advertising Code Committee, to which every citizen or organisation can submit complaints. The Advertising Code Committee decides on every complaint about advertising regardless if the advertiser or the medium concerned is affiliated with the Advertising Code Foundation.

#### *3.1.2.14.3. Connection between the non-state regulatory system and the state regulation*

The Dutch Media Act obliges both public and private broadcasters to affiliate with the Dutch Advertising Code if they want to include advertisements in their programmes. Both public and private broadcasters are required to ensure, either through direct membership or through an interest group, that they are covered by the Dutch Advertising Code or some other comparable scheme established by the Advertising Code Foundation and, in that context, are subject to the supervision of the Foundation. They are required to prove this by submitting a written statement from the Advertising Code Foundation to the state regulator, the Commissariaat voor de Media (CvdM, Dutch Media Authorithy).

#### *3.1.2.14.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

The regulatory process itself is not regulated by the state. If the system of non-state regulation no longer functioned the government would be able to intervene. According to art. 169 of the Dutch Media Act the Minister shall lay down rules implementing European advertising rules in so far as one or more of these rules have not been incorporated, or have been incorporated insufficiently, incorrectly or late, into the Dutch Advertising Code or some other comparable regulation established by the Advertising Code Foundation, or if the Advertising Code Foundation fails in its supervisory duties.

#### *3.1.2.14.5. Enforcement, sanctions*

Following a complaint the Advertising Code Committee can issue a recommendation to the advertiser to stop using it in its current form. In the event of a repeated offence or a serious violation of the code, the media will be asked to stop publishing the advertisement concerned.

The organizations that are members of the Dutch Advertising Code pursuant to the Dutch Media Act are obliged to reject advertisements against which such a type of ban has been issued.

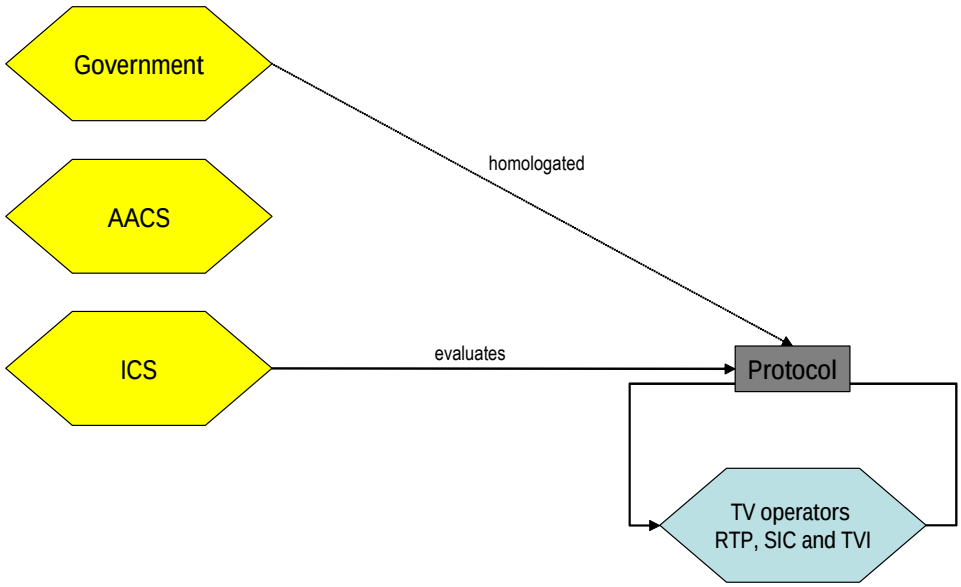
The Advertising Code Committee can moreover:

- set conditions on the broadcast time of the radio and/or TV commercial submitted for evaluation;
- stipulate for the party whose advertising is found to violate the Dutch Advertising Code a term during which the recommendation of the committee is to be complied with;
- impose measures as described in the contracts concluded between the Advertising Code Foundation and the organizations in consultation with which a Special Advertising Code was laid down.

### 3.1.2.15. Portugal: Broadcasting protocol (including advertising rules)

- Medium: broadcasting
- Public policy objective: protection of consumers by advertising rules (on advertising time limits)
- State regulator involved: Instituto da Comunicação Social (ICS, Institute for the Media); *Alta Autoridade para a Comunicação Social* (AACS, High Authority for the Media) is not actively involved)
- Non-state organisations involved: there is no non-state organisation involved
- Task of non-state regulation: setting up of a protocol (similar to a code) which amongst other rules contains specific advertising time limits
- Legal connection: Protocol was „homologated" by the Government (see below 3.1.2.15.3)
- Regulatory resources used by the state to influence the outcome of the regulatory process: The Protocol was „homologated" by the Government (see below 3.1.2.15.3).
- Enforcement, sanctions: with regard to the specific provisions of the protocol there is no organisation involved which could impose sanctions; broadcasters have to report to the Ministry of Presidency; according to the Protocol failing to comply with any of the quantified obligations of the Protocol shall determine its accumulation with those of the next trimester

## Portugal: Broadcasting Protocol (including advertising rules)




#### *3.1.2.15.1. Overall description of the system including public policy objective the system aims to achieve*

On 21 August 2003, TV operators RTP (Rádio e Televisão de Portugal, public service broadcaster), SIC (Sociedade Independente de Comunicação) and TVI (Televisão Independente) signed a Protocol. The Protocol contains the setting of special advertising time limits for some of RTP's programmes.

#### *3.1.2.15.2. Task of non-state regulation*

In return for the setting of stricter advertising time limits on the public broadcaster RTP in the Protocol, the private broadcasters agreed on supporting and financing independent produc-

tions, providing content for RTP's international programme services, transmission of cultural programming and offering support to people with hearing disabilities.

#### *3.1.2.15.3. Connection between the non-state regulatory system and the state regulation*

The Protocol was „homologated" by the Government. Homologation is a concept existing in the Portuguese administrative law, which is understood as an administrative act that absorbs both the grounds and conclusions of a concrete proposal or opinion presented by other organs.

In addition, the time limits contained in the Protocol were confirmed in the Public Service Concession Contracts signed with the Portuguese State in September and November 2003.

#### *3.1.2.15.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

The Protocol was „homologated" by the government (see above).

#### *3.1.2.15.5. Enforcement, sanctions*

Under the terms of the Protocol, compliance with obligations shall be evaluated in meetings of RTP, SIC and TVI taking place every three months, and based on monthly reports presented by each of the television operators to the cabinet of the Ministry of Presidency, to other TV operators and to the state regulatory authorities of the sector within ten days after the end of each month. Instituto da Comunicação Social (ICS, Institute for the Media), a public body that can be seen as a state organisation, receives on a regular basis the necessary reports for the evaluation of the obligations of the Protocol.

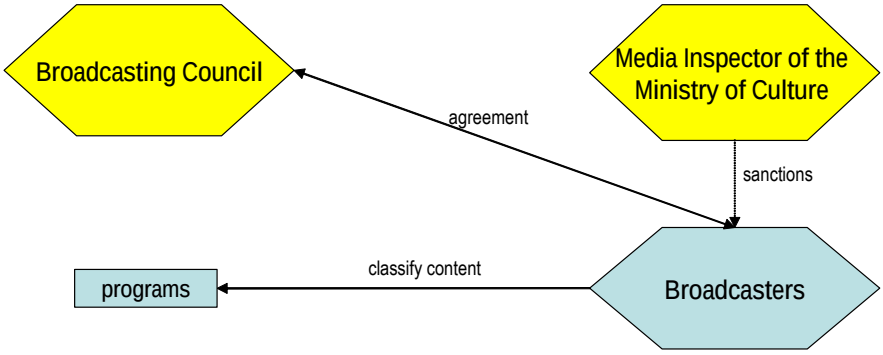
Without prejudice to other sanctions established in legislation concerning television activity, failure to comply with any of the quantified obligations of the Protocol shall determine its accumulation with those of the next trimester. However, there is special rule for accumulation with regard to the limits of advertising.

State regulator Alta Autoridade para a Comunicação Social (AACS, High Authority for the Media) stated that since it had not taken part in the preparation and signature of the Protocol, it could not assume responsibilities either for its monitoring or for mediating possible disputes on the interpretation and application of its content.

### 3.1.2.16. Slovenia: Protection of minors in broadcasting

- Medium: broadcasting
- Public policy objective: protection of minors
- State regulator involved: Sveta za Radiodifuzijo (SRDF, Broadcasting Council), Inšpektor (Inspector of the Ministry of Culture)
- Non-state organisations involved: there are no non-state organisations involved
- Task of non-state regulation: agreement between the broadcasters of TV programmes and state body Broadcasting Council that introduces two types of visual symbols for TV programmes aired between 5 a.m. and midnight depending on how suitable the programmes are for minors under fifteen; rating of programmes is performed by the broadcasters themselves.
- Legal connection: the agreement was signed by the President of the Broadcasting Council; the agreement to some extent follows provisions of zakon o medijih (Mass Media Act).
- Regulatory resources used by the state to influence the outcome of the regulatory process: the agreement was signed by the President of the SRDF
- Enforcement, sanctions: Inšpektor can impose sanctions

## Slovenia: Protection of minors in broadcasting




#### *3.1.2.16.1. Overall description of the system including public policy objective the system aims to achieve*

The Agreement between the Sveta za Radiodifuzijo (SRDF, Broadcasting Council) and the broadcasters of TV programmes (TV stations with national coverage, including public service broadcasting, and one local TV station) regarding the television programmes unsuitable for minors was signed on 2 July 2003. The SRDF is an independent expert body in the broadcasting regulation field that assists state regulator Agencije za pošto in elektronske komunikacije Republike Slovenije (APEK, Agency for Post and Electronic Communication). APEK is responsible for telecommunications, broadcasting and post services. The SRDF can be seen as a state organisation.

#### *3.1.2.16.2. Task of non-state regulation*

The Agreement includes recommendations to television stations regarding structuring and editing of their programmes. It introduces two types of visual symbols for TV programmes broadcast between 5 a.m. and midnight depending on how suitable these programmes are for minors under fifteen.

Programmes that contain scenes of violence or erotic material have to be clearly and understandably designated by two visual symbols – a small circle for programmes that are not suitable for children and minors under fifteen, and a small triangle for programmes that are suitable for children and minors only if they watch television in company of parents or other adults. When deciding about classification the broadcasters should consider not only violence and erotic content, but also abuse of alcohol and drugs, fear, discrimination and swearing. These principles are valid also for animated programmes.

A visual or acoustic warning has to be aired before the beginning of the programme with violent or erotic scenes and after each commercial or similar break of the respective programme.

Special attention has to be given to programmes broadcast in the time period when a lot of minors watch television. At that time the broadcasters should avoid violent and other harmful programming.

Classification of programmes is undertaken by the broadcasters themselves.

#### *3.1.2.16.3. Connection between the non-state regulatory system and the state regulation*

On the state side, the agreement was signed by the President of the SRDF. The agreement follows provisions of the Zakon o medijih (Mass Media Act), adopted in 2001.

#### *3.1.2.16.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

The agreement was signed by the President of the SRDF.

#### *3.1.2.16.5. Enforcement, sanctions*

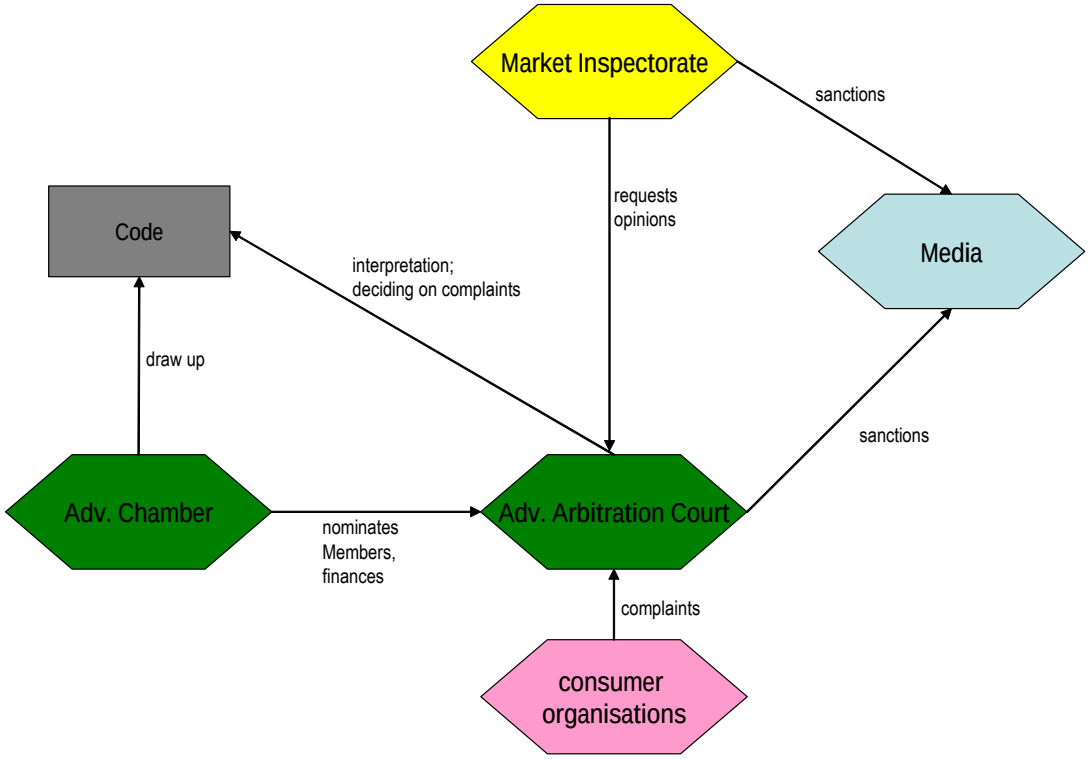
The final provision of the agreement refers to its implementation by saying that „in the case of non-respect for provisions of the Agreement and in the cases of complaints regarding the designations of the programming, it will be discussed among the signatories of the Agreement, if the SRDF finds such proceeding necessary“.

Since the Inšpektor (Inspector of the Ministry of Culture) supervises the implementation of the Mass Media Act it is possible to submit complaints to the Inšpektor. The Inšpektor does not perform a regular monitoring of programmes but he or she can make proposals to the SRDF to introduce monitoring. The Inšpektor can act on oral or written requests for correction of the deficiency, and can also impose fines.

### 3.1.2.17. Slovenia: Advertising Regulation

- Medium: all kinds of media
- Public policy objective: protection of consumers by advertising rules
- State regulator involved: tržni inšpektor (Market Inspector)
- Non-state organisations involved: Slovenska Oglasevalska Zbornica (SOZ, Slovenian Advertising Chamber), Oglaševalsko razsodišče (Advertising Arbitration Court)
- Task of non-state regulation: SOZ: code-making (Slovenski oglaševalski kodeks, Slovenian Code of Advertising Practice); Advertising Arbitration Court: decisions on complaints regarding the code, opinions on infringements of state law on advertising
- Legal connection: Zakon o varstvu potrošnikov (ZVPot, Act on Protection of Consumers) from 2003 empowers the SOZ to give (on own initiative or on the request of state bodies or consumer associations) an opinion whether certain advertising is improper or misleading; the Act also gives power to the *SOZ* to sue any member who uses advertising practices contrary to the regulation and good manners, and request abandoning of such practices
- Regulatory resources used by the state to influence the outcome of the regulatory process: the state does not influence the code-making or the work of the Advertising Arbitration Court; however, the Tržni inšpektor can overrule decisions by the Advertising Arbitration Court as there is no legal obligation for the Tržni inšpektor to respect the opinion of the Advertising Chamber and the Advertising Arbitration Court
- Enforcement, sanctions: actions of the Advertising Arbitration Court: correction of the advertisement; public call for withdrawal of the advertisement, public call to stop the advertising action, initiative to the Tržni inšpektor or other state bodies to take measures, initiative for penal proceedings, exclusion from membership; the Tržni inšpektor is responsible for enforcement of the state law

## Slovenia: Advertising Regulation




#### *3.1.2.17.1. Overall description of the system including public policy objective the system aims to achieve*

When the state regulator, the Tržni Inšpektor (Market Inspector), decides whether certain advertising is indecent or misleading it requests an opinion from the Slovenska Oglasevalska

Zbornica (SOZ, Slovenian Advertising Chamber). The General Assembly of the SOZ adopted the Slovenski oglaševalski kodeks (Slovenian Code of Advertising Practice) in 1994. The Code represents a supplement to the existing legal acts regulating advertising practices. The non-state Oglaševalsko razsodišče (Advertising Arbitration Court) decides on complaints regarding advertising practices and on requests for opinions whether certain advertising is improper or misleading according to the Code.

#### *3.1.2.17.2. Task of non-state regulation*

The Code applies to all natural persons and legal entities engaged in the advertising process in Slovenia, including the advertiser, advertising agencies and the media. It includes general principles like provisions on decency, privacy and the protection of minors. There is also a chapter of the Code called „Special provisions" (e.g. for advertisements on alcoholic drinks and tobacco products).

The Advertising Arbitration Court interprets the Code, decides on complaints regarding advertising practices and on requests for opinions whether certain advertising is improper or misleading i.e. whether it is in accordance with the principles and provisions of the Code. The opinion can be requested by the advertiser before the advertisement is published, The opinion requested by state bodies or consumer associations based on the Zakon o varstvu potrošnikov (ZVPot, Act on Protection of Consumers) is free of charge and is not available to the public until the proceeding initiated by a state body or consumer association is over.

The Court consists of seven members appointed by the SOZ for a term of three years.

#### *3.1.2.17.3. Connection between the non-state regulatory system and the state regulation*

The ZVPot from 2003 empowers the advertising chamber to give on its own initiative or on the request of state bodies or consumer associations an opinion whether certain advertising is improper or misleading. The Act also gives power to the SOZ to sue any member who uses advertising practices contrary to the regulation and good manners, and request abandoning of such practices.

#### *3.1.2.17.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

The state does not influence the code-making or the work of the Advertising Arbitration Court. However, the Market Inspector can overrule decisions by the Advertising Arbitration Court as there is no legal obligation for the Market Inspector to respect the opinion of the Advertising Chamber and the Advertising Arbitration Court.

#### *3.1.2.17.5. Enforcement, sanctions*

When the Court decides that complaint on certain advertisement is justified it can request one of the following actions: correction of the advertisement if it is already published, public call for withdrawal of the advertisement, public call to stop the advertising action, initiative to the

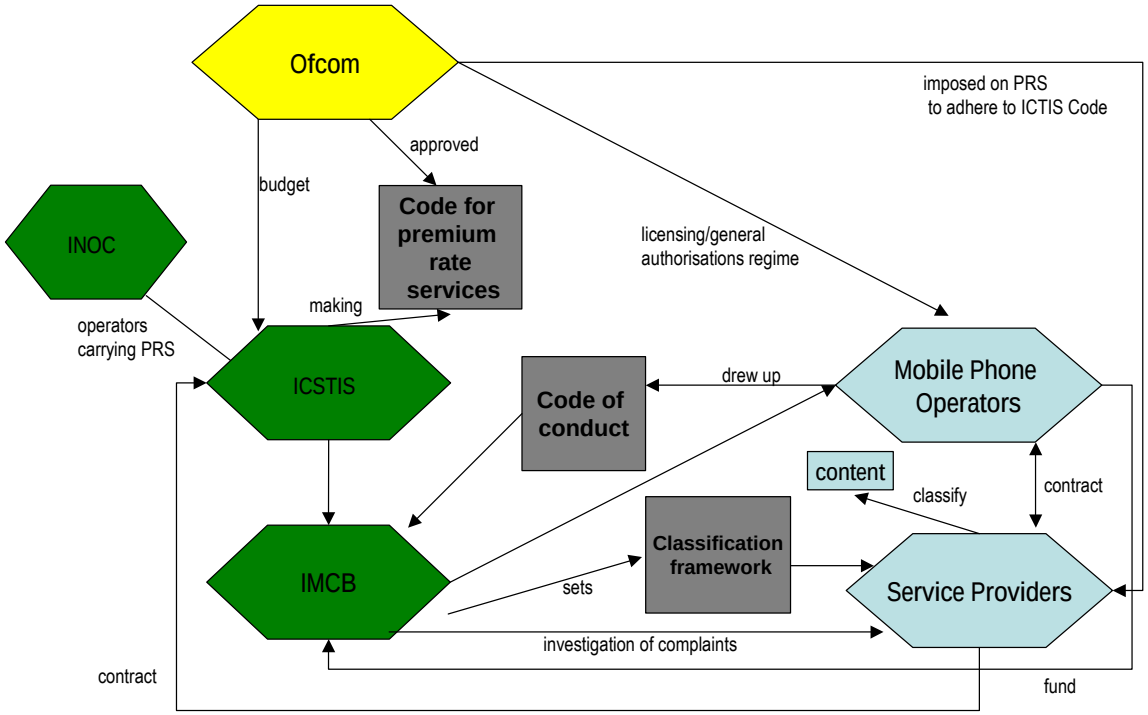
Market Inspector or other state bodies to take measures, initiative for penal proceedings. If the decision of the Arbitration Court is not observed by a member of the SOZ the ultimate sanction is exclusion from membership.

The Market Inspector is responsible for enforcement of the state law. As said above the Tržni inšpektor is not bound to the opinion of the SOZ and the Advertising Arbitration Court.

### 3.1.2.18. United Kingdom: Protection of minors in mobile services

- Medium: mobile services
- Public policy objective: protection of minors
- State regulator involved: Office of Communications (Ofcom)
- Non-state organisations involved: Independent Mobile Classification Body (IMCB), subsidiary of the Independent Committee for the Supervision of Standards of the Telephone Information Services (ICSTIS)
- Task of non-state regulation: code-making: IMCB has set a classification framework according to which content providers may self-classify their content; IMCB also investigates complaints about misclassification; providers of premium rate services have also to comply with the ICSTIS code (enforced by ICSTIS)
- Legal connection: Communications Act 2003; with regard to premium rate services: approval of ICSTIS code
- Regulatory resources used by the state to influence the outcome of the regulatory process: approval of codes of conduct: Ofcom has approved the ICSTIS code; the code of IMBC has not officially been approved
- Enforcement, sanctions: If the service is a premium rate service, the provider must also comply with the ICSTIS code: ICSTIS has the power to fine operators; compliance with the ICSTIS code is also a specific condition imposed by Ofcom on premium rate operators

**United Kingdom: Protection of minors in mobile services**



#### *3.1.2.18.1. Overall description of the system including public policy objective the system aims to achieve*

The Independent Committee for the Supervision of Standards of the Telephone Information Services (ICSTIS), the non-state body regulating premium rate telephony content in the UK, has established a subsidiary to deal with content accessed via mobile phones, the Independent Mobile Classification Body (IMCB). This development was at the request of the six mobile telephony operators in the UK, which together established a code of conduct in January 2004.

#### *3.1.2.18.2. Task of non-state regulation*

The IMCB has responsibility for still pictures; video and audiovisual material; and mobile games, including java-based games. It excludes text, audio and voice-only services; gambling services (covered by other UK legislation); moderated and unmoderated chat rooms; location-based services (subject to a separate mobile operator code of practice); content generated by subscribers, including web logs; and content accessed via the internet or WAP where the mobile operator is providing connectivity only. In the introduction to its Classification Framework, the IMCB emphasised that the rationale for the system was to protect children from unsuitable content (whilst facilitating the use of new mobile services).

The main function of the IMCB is to set a classification framework according to which content providers may self-classify their content. Where content within the framework is provided by premium rate service, the operator must comply with the ICSTIS code also. IMCB does have the function of investigating complaints about misclassification. However, complaints in the first instance should be made to the mobile operator. Contacting the mobile operator is a pre-requisite of making a complaint under the Classification Framework unless the complaint is made by another mobile operator.

The IMCB Framework also introduces the Classification Framework Appeals Body (CFAB), which is a body of persons independent of IMCB appointed to hear appeals against decisions made by IMCB under the IMCB Complaints and Dispute Procedures.

Although a subsidiary of ICSTIS, IMCB is funded and run separately.

#### *3.1.2.18.3. Connection between the non-state regulatory system and the state regulation*

Under the Communications Act 2003, the state regulator Office of Communications (Ofcom) is required to review its own activities to ensure that it does not impose unnecessary regulatory burdens on telecommunications operators and to consider whether self-regulation or co-regulation is appropriate. As regards premium rate services, the Communications Act 2003 envisages that there be an approved code of conduct and that there be an „enforcement authority“, being a body that under the code has the responsibility for enforcing it. Ofcom has approved the ICSTIS code, as did former state regulator Ofcom under the previous licensing regime. Compliance with the ICSTIS code is a specific condition imposed by Ofcom on premium rate operators.

Ofcom and ICSTIS have recently agreed a Memorandum of Understanding (MoU) which reflects the criteria Ofcom has adopted in relation to co-regulation, and which sets out the scope, nature and operation of the relationship between Ofcom and ICSTIS.

#### *3.1.2.18.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

When it comes to premium rate services a regulatory resource can be seen in the approval of the ICSTIS code by Ofcom. Compliance with the ICSTIS code is a specific condition imposed by Ofcom on premium rate operators.

The MoU between Ofcom and ICSTIS is not a legally binding document.

#### *3.1.2.18.5. Enforcement, sanctions*

On receiving a complaint the matter is considered by an IMCB board member. The board member will ask for information from all relevant parties and any other information needed to determine the case and make its decision. IMCB publishes its adjudications on its web page.

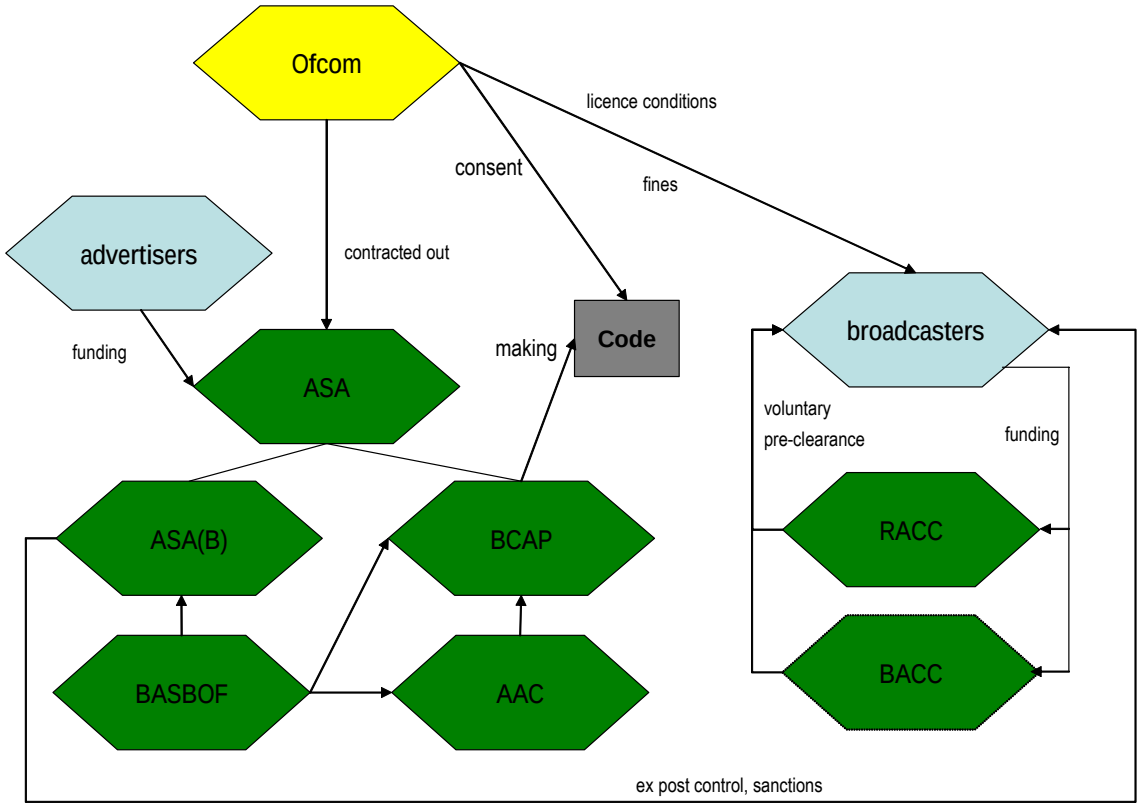
If the service is a premium rate service, the provider must also comply with the ICSTIS code: ICSTIS has the power to fine operators; compliance with the ICSTIS code is also a specific condition imposed by Ofcom on premium rate operators

Ofcom also retains the power to impose sanctions, and may also withdraw a service provider's licence. Ofcom has, as required by the Communications Act, drawn up guidelines on penalties. In it, the guidelines state that Ofcom should bear in mind a number of factors when imposing any penalties, including the fact that the company in question has already been subject to sanction in relation to the same conduct by another regulatory body.

### 3.1.2.19. United Kingdom: Advertising regulation in broadcasting

- Medium: broadcasting
- Public policy objective: protection of consumers by advertising rules
- State regulator involved: Office for Communications (Ofcom)
- Non-state organisations involved: Advertising Standards Authority Broadcast (ASA(B)), Broadcast Committee of Advertising Practice (BCAP)
- Task of non-state regulation: BCAP: code-making; ASA(B): enforcement of the code
- Legal connection: Communications Act, parts of the Deregulation and Contracting Out Act 1994 (DCOA); Ofcom has contracted out its advertising standards codes function to BCAP and has contracted out enforcement powers to ASA(B)
- Regulatory resources used by the state to influence the outcome of the regulatory process: Ofcom has contracted out its advertising standards codes function to BCAP; any changes in the codes require the consent of Ofcom; there is also a memorandum of understanding (MoU) between Ofcom and ASA
- Enforcement, sanctions: ASA(B) has enforcement powers contracted-out by Ofcom; however, Ofcom retains powers to impose sanctions; the terms of the code are imposed on broadcasters via licence conditions

**United Kingdom: Advertising regulation**




#### *3.1.2.19.1. Overall description of the system including public policy objective the system aims to achieve*

The Communications Act 2003 requires the state regulator Ofcom to have regard to the „desirability of promoting and facilitating the development and use of effective forms of self-regulation“. Responsibility for advertising content regulation (but not frequency or sponsorship) has been devolved to the non-state Advertising Standards Authority Broadcast (ASA(B)) and Broadcast Committee of Advertising Practice (BCAP), although ultimate re-

sponsibility remains with Office of Communications (Ofcom). ASA(B) and BCAP are part of the „one-stop-shop“ of the non-state Advertising Standards Authority (ASA).

#### *3.1.2.19.2. Task of non-state regulation*

The Communications Act 2003 requires Ofcom to set, and from time to time review and revise, codes containing such standards for the content of television and radio services as appear to Ofcom to be best calculated to secure the standards objectives. Ofcom has contracted out its advertising standards codes function to the BCAP. Such function is to be exercised in consultation with and with the agreement of Ofcom. Any changes in the codes require the consent of Ofcom.

BCAP has adopted the codes of the former state regulator Independent Television Commission and Radio Authority (ITC): BCAP Television Advertising Standards Code (including teleshopping and other non-advertising content), BCAP Radio Advertising Code, BCAP Rules on the Scheduling of Advertising, BCAP Code for Text Services, BCAP Guidance to Broadcasters on the Regulation of Interactive Television Services and BCAP Advertising Guidance Notes.

BCAP is assisted in its role by an advisory committee, the AAC. The AAC was established in January 2005 and represents the views of citizens and consumers and have independent expert or lay members. The Broadcast Advertising Standards Board of Finance (Basbof) was created to fund these new bodies within ASA via a levy on broadcast advertising expenditure.

Ofcom has contracted-out its powers of handling and resolving complaints about breaches of the BCAP Codes to ASA(B).

ASA(B) has therefore responsibility for adjudication on complaints.

Neither Ofcom nor the ASA(B) has the right to review advertising in advance of the broadcast. Any complaints and control procedures operate ex post facto.

However, there is a system in place whereby adverts may be cleared prior to broadcast. Almost all TV advertisements are vetted before broadcast by the Broadcast Advertising Clearance Centre (BACC). Similarly, all national and certain special categories of local and regional radio advertisements are vetted before broadcast by the Radio Advertising Clearance Centre (RACC). Clearance is not required by any legal provision. ASA and RACC/BACC meet regularly to exchange information and to try to minimise differences in approach between the clearance centres and the ASA.

#### *3.1.2.19.3. Connection between the non-state regulatory system and the state regulation*

Ofcom proposed that the regulation of advertising should be contracted out, under the Communications Act, which applies parts of the Deregulation and Contracting Out Act 1994 (DCOA) to Ofcom. An order under DCOA was required to allow Ofcom to delegate the specified functions: The Contracting Out (Functions relating to Broadcast Advertising) and Specifications of Relevant Functions Order 2004. Following this, Ofcom identified the party

(ASA) to whom it was delegating functions together with those functions in an authorisation. Ofcom and ASA entered into a Memorandum of Understanding (MoU) to elaborate the division of responsibilities.

#### *3.1.2.19.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

Any changes in the codes require the consent of Ofcom. There is also a Memorandum of Understanding (MoU) between Ofcom and ASA.

#### *3.1.2.19.5. Enforcement, sanctions*

The terms of the code are imposed on broadcasters via licence conditions. Compliance is mandatory.

Although Ofcom remains ultimately responsible for its regulation, the ASA(B) now has day-to-day responsibility for the regulation of broadcast advertising; Ofcom has undertaken not to interfere save in exceptional circumstances.

Depending on the seriousness of the complaint, ASA(B) might resolve the matter informally, or refer it to the Council, in which case a formal investigation is involved and the Council's decision is published as adjudication.

Ofcom has contracted-out its enforcement powers such that ASA(B) has these powers

(a) to require a licence holder to exclude from its programme service a particular advertisement or to exclude it in particular circumstances;

(b) to require a licence holder to exclude from its service certain descriptions of advertisements and methods of advertising (whether generally or in particular circumstances), such power to be exercised by ASA(B) only for misleading advertisements or impermissible comparative advertisements or impermissible medical advertisements;

(c) to require, from any person who to ASA(B) seems to be responsible for an advertisement, provision of evidence relating to the factual accuracy of any claim and to deem a factual claim inaccurate if such evidence is not so provided.

Ofcom retains the powers

(a) to direct the broadcast of a correction or statement of findings;

(b) to impose a financial penalty or shorten a licence period and

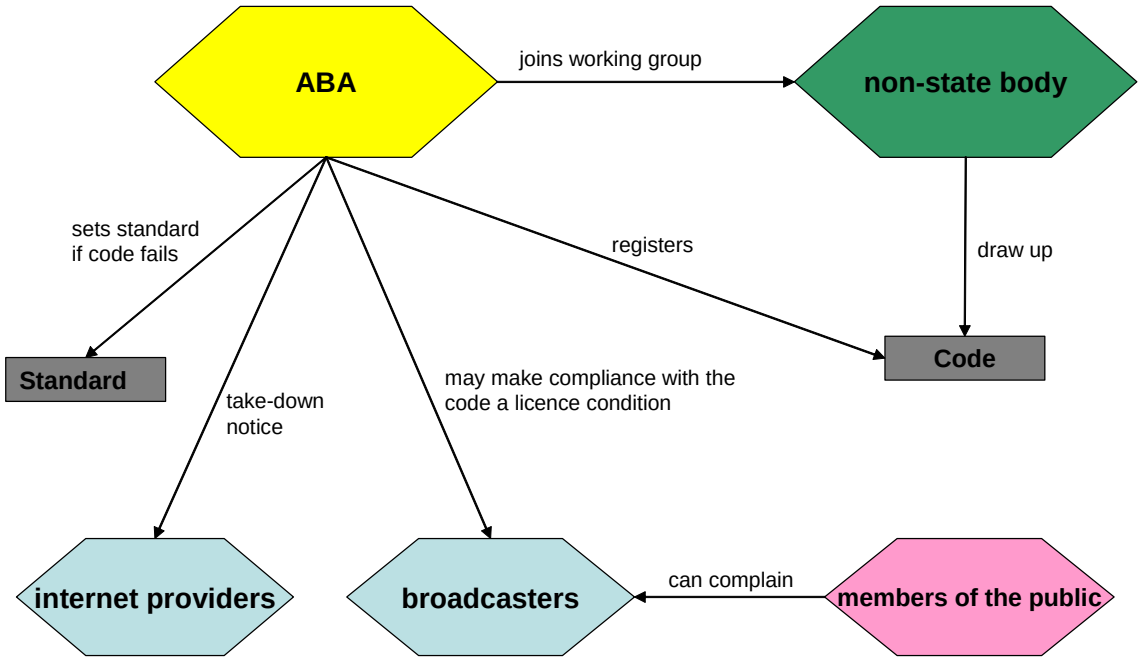
(c) to revoke a licence.

## 3.1.3. Co-regulatory systems in the chosen Non-EU-countries

### 3.1.3.1. Australia: Protection of minors in broadcasting and Internet services

- Medium: broadcasting and internet services
- Public policy objective: protection of minors
- State regulator involved: Australian Broadcasting Authority (ABA)
- Non-state organisations involved: broadcasting: Free TV Australia (FTA), Commercial Radio Australia (CRA), Australian subscription television and radio association (ASTRA), Community Broadcasting Association of Australia (CBAA); internet: Internet Industry Association (IIA)
- Task of non-state regulation: code-making, administration of a system of complaints from members of the public
- Legal connection: Broadcasting Services Act 1992
- Regulatory resources used by the state to influence the outcome of the regulatory process: registration of codes; reserve power of ABA to set standards instead of codes
- Enforcement, sanctions: broadcasting: no direct remedy of ABA; however, ABA may make compliance with a code a condition of a broadcaster's licence; internet: ABA: take down notice

**Australia: Protection of minors in broadcasting and internet services**




#### *3.1.3.1.1. Overall description of the system including public policy objective the system aims to achieve*

Co-operative regulatory systems in the broadcasting sector were first introduced in 1992 through the Broadcasting Services Act 1992. The new Act created a new state regulatory authority called the Australian Broadcasting Authority (ABA). A key aspect of content regulation is the development of industry codes of practice approved by the ABA and then admini-

stration of a system of complaints from members of the public. Youth protection is one important issue of these codes. Each sector of the broadcasting industry has developed a representative group for developing codes: Free TV Australia (FTA), Commercial Radio Australia (CRA), Australian subscription television and radio association (ASTRA), Community Broadcasting Association of Australia (CBAA).

For online services, the government opted for co-regulation as well. This principle became the basis for the Broadcasting Services Amendment (Online Services) Bill 1999. The industry body responsible for developing the codes is the Internet Industry Association (IIA).

#### *3.1.3.1.2. Task of non-state regulation*

In the codes developed by the broadcasting industry, youth protection is dealt with through various measures; the main one being program classification systems and the related broadcast time restrictions for certain classified material. Parts of the codes deal with classification of programs according to the film classification system (administered by a separate state body, the Office of Film and Literature Classification Board).

IIA has developed three Internet Content Codes of Practice These include taking reasonable steps to ensure internet access accounts are not provided to persons under the age of 18 years, encouraging content providers to label content that is unsuitable for children and taking reasonable steps to inform users how to supervise and control access by children to internet content. The IIA is responsible to monitor the operation of its own codes and make sure they are working so as to avoid the ABA reaching the conclusion that it needs to impose standards. The codes have been refined since first being introduced and new codes addressing issues relating to Internet content on mobile devices have recently been developed by the IIA.

#### *3.1.3.1.3. Connection between the non-state regulatory system and the state regulation*

The entire legal basis for this cooperative regime is legislative. A key section is section 123 of the Broadcasting Services Act 1992 which provides that it is the intention of the Parliament that radio and television industry groups representing providers of broadcasting services (commercial broadcasting licensees; community broadcasting licensees, providers of subscription broadcasting and narrowcasting services; providers of open narrowcasting services) develop, in consultation with the ABA and taking into account any relevant research conducted by the ABA, codes of practice that are to be applicable to the broadcasting operations of each of those sections of the industry.

Certain matters are still left regulated by stricter regulation, by way of standards made by the ABA itself and directly enforceable as licence conditions. The amount of Australian content and content suitable for children on television is regulated by standards.

When it comes to online services, legislation (Broadcasting Services Amendment (Online Services) Bill 1999) required the ABA to introduce binding standards on industry participants unless the industry developed, and had registered by the ABA, codes of practice which dealt

with the relevant issues by 1 January 2000. This deadline was met by the industry and no standards have been introduced by the ABA.

The scheme on internet regulation contains four elements: an Internet content complaints scheme administered by the ABA, a classification scheme for Internet content based on the system for films and computer games under the Classification (Publications, Films and Computer Games) Act 1995, enforcement powers given to the ABA against persons who host content on a server in Australia and the Internet Industry codes of practice, containing obligations for Internet Service Providers (ISPs) and Internet Content Hosts (ICHs) and mechanisms and procedures to assist users to filter unsuitable material hosted overseas.

#### *3.1.3.1.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

Once an industry group has developed a code of practice, the ABA must include that code in its Register of Codes (and it comes into force) if the ABA is satisfied that:

- the code of practice provides appropriate community safeguards for the matters covered by the code; and
- the code is endorsed by a majority of the providers of broadcasting services in that section of the industry; and
- members of the public have been given an adequate opportunity to comment on the code.

Once a code is included in the Register of Codes it applies to all licensees in that section of the broadcasting industry regardless of whether they have had a part in its development or not; thus making participation in the code system mandatory.

The ABA reserves the power to make industry standards at any time if a request for an industry code is not complied with. This power may be exercised even if there is partial failure of an industry code.

#### *3.1.3.1.5. Enforcement, sanctions*

Members of the public can complain about a breach of registered codes. The Act requires that the complaint must be made in the first instance to the relevant broadcaster. Only if the complainant has not received a response within 60 days after making the complaint, or receives a response that the person considers to be inadequate, may the person make a complaint to the ABA.

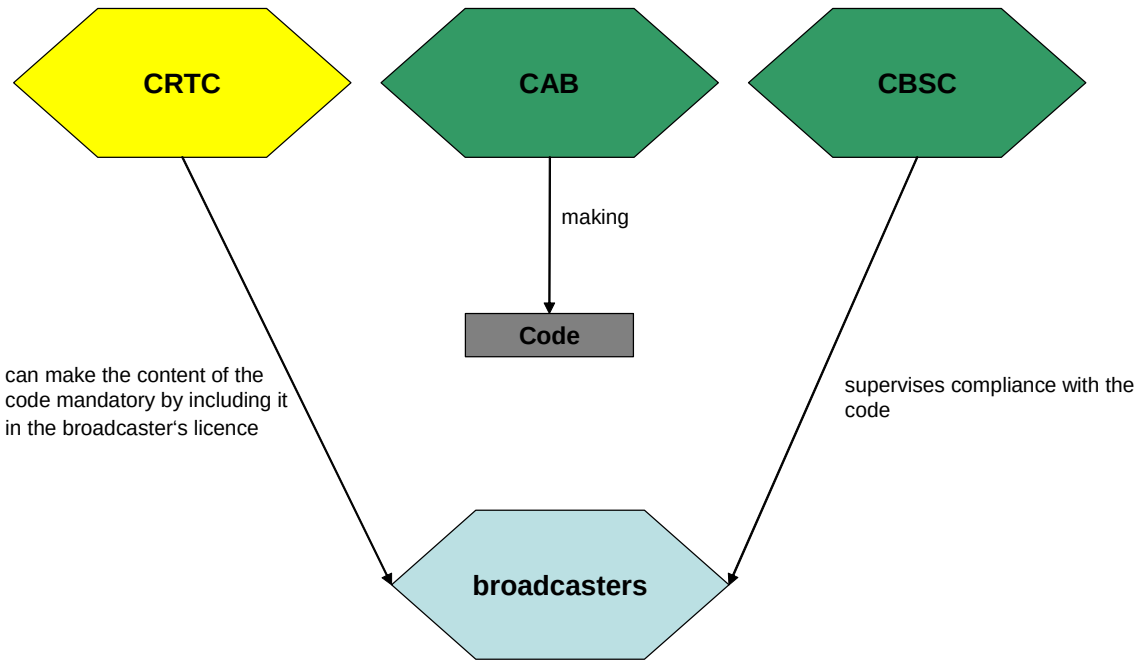
If the ABA finds that a code of practice has been breached, it has no direct remedy available to it although the ABA may make compliance with a code a condition of a broadcaster's licence where it considers this appropriate. If that licence condition is subsequently breached then the ABA can issue a notice to remedy that breach within a period up to a month. If that notice is not complied with then an offence under the Act has been committed for which a significant fine may be imposed by a court of law.

With regard to the Internet, the tasks of ABA are as follows: If the ABA identifies prohibited content, it must issue a take down notice to the ICH if it is based in Australia. For prohibited content hosted outside Australia, the ABA notifies all suppliers of approved Internet content filters of the URL of the prohibited content and they configure their filters so that the prohibited content is filtered out for a person using their filter. If the prohibited content is sufficiently serious, the ABA refers the matter to the relevant police force either in Australia or overseas.

#### 3.1.3.2. Canada: Programme ethics and protection of minors in broadcasting

- Medium: broadcasting
- Public policy objective: programme ethics, protection of minors
- State regulator involved: Canadian Radio-television and Telecommunications Commission (CRTC)
- Non-state organisations involved: Canadian Association of Broadcasters (CAB), Canadian Broadcasting Standard Council (CBSC)
- Task of non-state regulation: code-making and enforcement
- Legal connection: Public Notice CRTC 1987-9: Guidelines for developing Industry Standards
- Regulatory resources used by the state to influence the outcome of the regulatory process: CRTC laid down specific requirements that every non-state regulatory body should meet to be accepted by the CRTC
- Enforcement, sanctions: CBSC decides on complaints; as the content of some of the codes was made mandatory by including it in the broadcaster's licence; CRTC is also responsible for enforcement

**Canada: Programme ethics and protection of minors in broadcasting**



#### *3.1.3.2.1. Overall description of the system including public policy objective the system aims to achieve*

The formal adoption in 1987 of a generalised co-regulatory scheme in Canadian broadcasting regulation emerged from the gradual involvement of industry bodies in three separate areas in the 1980s: sex role stereotyping in broadcast content, adult programming in discretionary subscription-based content, and health issues in advertising. With regard to sex role stereotyping, state regulator Canadian Radio-television and Telecommunications Commission (CRTC) formed a task force which mixed Commission staff with representatives of industry and the public; and its 1981 report set out Sex-Role Stereotyping Guidelines and called on broadcasters to ensure that their programming comply with them. A two-year self-regulatory trial period designed to test a less interventionist approach to compliance began on 1 September 1982, and included published guidelines and a complaints procedure operated by the Canadian Association of Broadcasters (CAB), the private-broadcaster industry group. After evaluation by CRTC there was a shift from a pure self-regulatory to a co-regulatory approach. The Canadian Broadcasting Standard Council (CBSC) is an independent, non-governmental organization created by the CAB to administer the codes established by its members, Canada's private broadcasters.

#### *3.1.3.2.2. Task of non-state regulation*

The CAB formulated codes on programmes guidelines and the protection of minors. Compliance with these codes and guidelines is supervised by the CBSC.

#### *3.1.3.2.3. Connection between the non-state regulatory system and the state regulation*

There is no formal obligation for the self-regulatory bodies of the industry to be registered. In practice, CRTC laid down specific requirements that every self-regulatory body should meet to be accepted by the CRTC.

#### *3.1.3.2.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

CRTC laid down specific requirements that every self-regulatory body should meet to be accepted by the CRTC. A characteristic feature of the Canadian model is that the content of some of the codes was made mandatory by including it in the broadcaster’s licence.

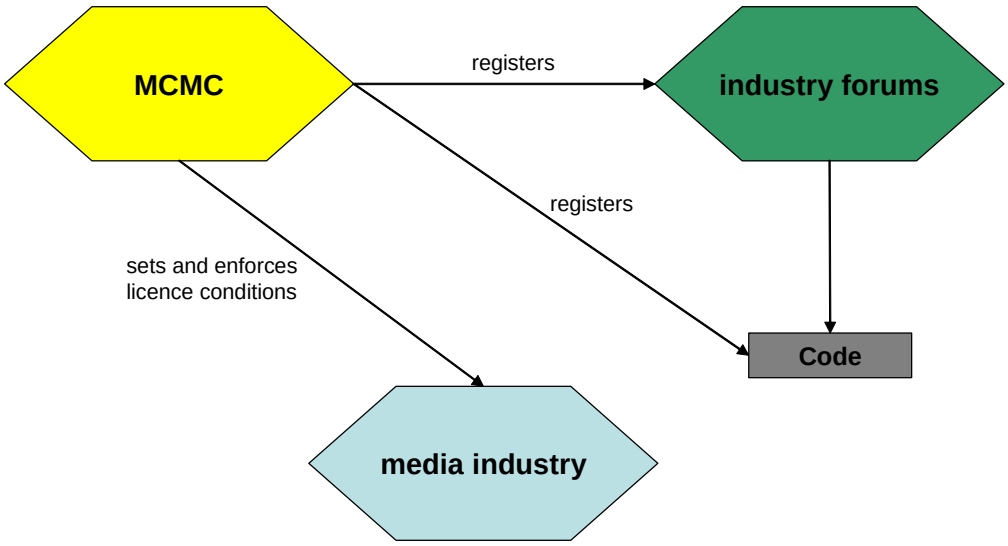
#### *3.1.3.2.5. Enforcement, sanctions*

CBSC decides on complaints. As the content of some of the codes was made mandatory by including it in the broadcaster’s licence; CRTC is also responsible for enforcement.

### 3.1.3.3. Malaysia: Protection of minors (and other objectives) in the media

- Medium: broadcasting, telecommunications and internet services
- Public policy objective: protection of minors and others
- State regulator involved: Malaysian Communications and Multimedia Commission (MCMC)
- Non-state organisations involved: Access Forum, Technical Standards Forum, Consumer Forum, Content Forum
- Task of non-state regulation: code-making
- Legal connection: Communications and Multimedia Act 1998 (CMA), Communications and Multimedia Commission Act 1998 (CMCA)
- Regulatory resources used by the state to influence the outcome of the regulatory process: registration of non-state organisations and registration of codes
- Enforcement, sanctions: not complying with the industry forum codes may be considered as a failure to comply with the Communications and Multimedia Act 1998 (CMA) or the terms of the individual license; enforcement is then task of MCMC

**Malaysia: Protection of minors (and other goals) in the media**




#### *3.1.3.3.1. Overall description of the system including public policy objective the system aims to achieve*

Since 1999 the regulation of broadcasting, telecommunication and online media has been gradually combined under the framework of the Communications and Multimedia Act 1998 (CMA). A state regulatory body named the Malaysian Communications and Multimedia Commission (MCMC) was also created under the Communications and Multimedia Commission Act 1998 (CMCA). The CMA establishes a formal structural framework of co-regulation of the industry by providing forums for industry members to create and manage codes of conduct for the industry. The existing industry forums in the co-regulatory system are the Access Forum, the Technical Standards Forum, the Consumer Forum, and the Content Forum. The matters addressed by the Code of the Content Forum include the protection of minors.

#### *3.1.3.3.2. Task of non-state regulation*

The primary function of a designated industry forum is to formulate and to implement voluntary industry codes which should serve as a guide for the industry to operate. The membership of the forums has to represent fairly and adequately the supply and the demand side of the relevant communications sectors.

The matters addressed by the Code of the Content Forum include:

- Restrictions on the provisions of unsuitable content;
- Methods of classifying content;
- Procedures for handling public complaints and for reporting information about complaints to the Commission;
- Representation of Malaysian culture and national identity;
- Public information and education regarding content regulation and technologies for the end user control of content and;
- Other matters of concern to the community.[110]

#### *3.1.3.3.3. Connection between the non-state regulatory system and the state regulation*

The new communications and media legislation established the industry self-regulation regime and supported it by having fallback provisions administered by the MCMC.

#### *3.1.3.3.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

An industry body which is called a „forum" is constituted when it is designated or appointed. This will be the case if the MCMC is certain that the following criteria have been fulfilled:

- The membership of the body is open to all relevant parties;
- The body is capable of performing as required under the CMA; and
- The body has a written constitution.

In addition, the MCMC will only register the body as an industry forum if the body agrees in writing to be such an industry forum.

The industry codes may be developed on the forum's own initiative or upon request by the MCMC. The Code will come into force after its registration. The MCMC is empowered to refuse registration if there is no opportunity for public consultation during the development of the Code. The MCMC is obligated to register the code if it is consistent with the objects of, relevant instruments under, and provisions of the CMA. Compliance with the voluntary indus-

[110] Section 213(2) of the CMA.

try code is not mandatory but may be used as a defence against prosecution in relation to a matter dealt in the Code. Because the compliance with a (voluntary) code is not mandatory, it will be the task of the courts to interpret the Codes when judging about a complaint.

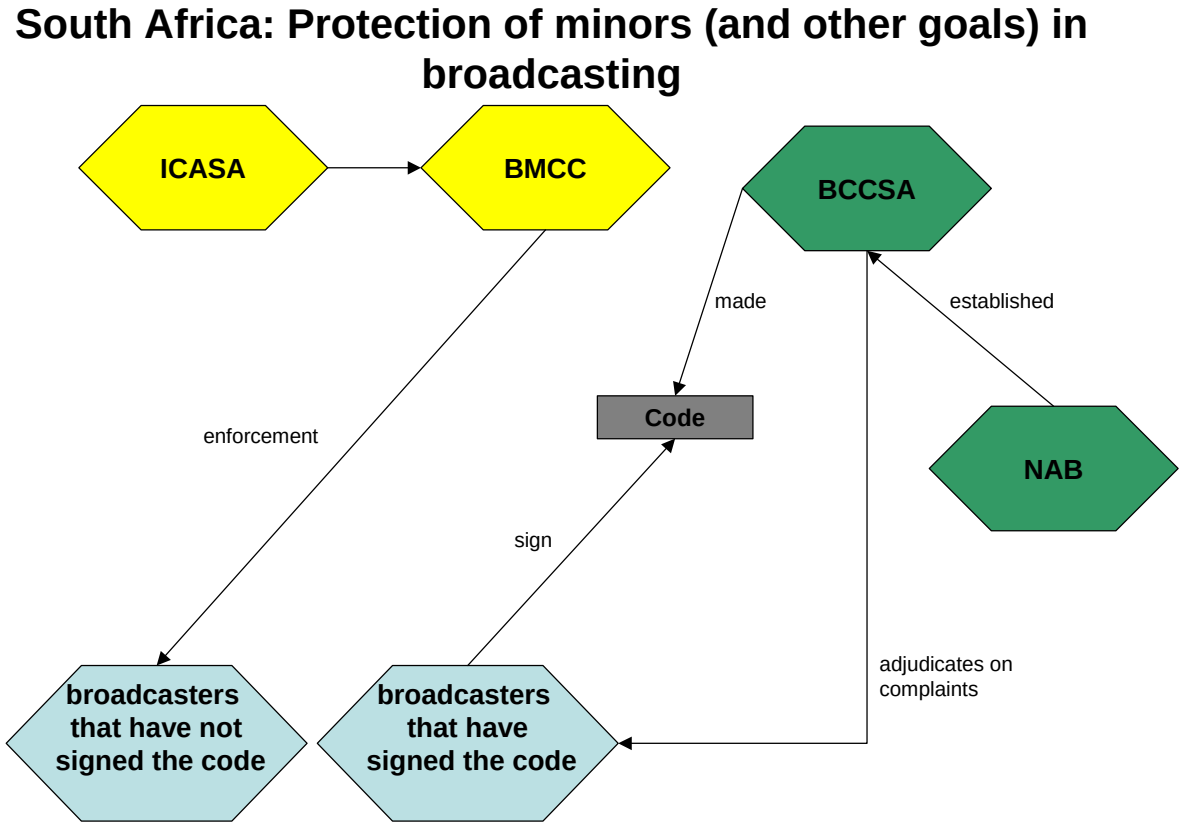
The Content Code and General Consumer Code of Practice are only effective if they are registered by the Commission.

#### *3.1.3.3.5. Enforcement, sanctions*

It is not mandatory to comply with the code requirements although it constitutes a defence against any prosecution, action or proceeding whether in court or otherwise if a person complies with the code. However, not complying with the industry forum codes may be considered as a failure to comply with the CMA or the terms of the individual license.

### 3.1.3.4. South Africa: Protection of minors (and other objectives) in broadcasting

- Medium: broadcasting
- Public policy objective: protection of minors and others
- State regulator involved: Independent Communications Authority of South Africa (ICASA) (took over the functions of the South Africa Telecommunications Regulatory Authority and the Independent Broadcasting Authority (IBA)); Broadcasting Monitoring and Complaints Committee (BMCC)
- Non-state organisations involved: Broadcasting Complaints Commission of South Africa (BCCSA)
- Task of non-state regulation: code-making, enforcement of the code
- Legal connection: according to the IBA Act all broadcasters that have not signed the Code of Conduct of BCCSA fall under the jurisdiction of the BMCC
- Regulatory resources used by the state to influence the outcome of the regulatory process: the state does not influence the code-making and the enforcement of the codes by BCCSA
- Enforcement, sanctions: BCCSA; all broadcasters that have not signed the Code of Conduct of BCCSA fall under the jurisdiction of the BMCC




#### *3.1.3.4.1. Overall description of the system including public policy objective the system aims to achieve*

In South Africa, the Independent Communications Authority of South Africa (ICASA) is the state regulator of the telecommunications and broadcasting sectors. It was established in 2000 and took over the functions of the Independent Broadcasting Authority (IBA). The IBA Act contains provisions for two committees: one of them is the Broadcasting Monitoring and Complaints Committee (BMCC). All broadcasters that have not signed the Code of Conduct of the non-state Broadcasting Complaints Commission of South Africa (BCCSA) fall under

the jurisdiction of the state body BMCC. Amongst other provisions, the code contains rules on the protection of minors.

#### *3.1.3.4.2. Task of non-state regulation*

The BCCSA was established by the National Association of Broadcasters of Southern Africa (NAB) in 1993. The purpose of the BCCSA is to adjudicate on and mediate complaints against broadcasters who have signed BCCSA's Code of Conduct. Commissioners are appointed by an independent panel and chaired by a retired Judge of the Appellate Division of the Supreme Court. The objectives of the BCCSA are to ensure adherence to high standards in broadcasting.

The code contains provisions on the broadcasting of material depicting violence or pornography, material containing hate speech or offensive language and material unsuitable for children. There are also provisions for news programs, comments, controversial issues of public importance and elections. The code also contains privacy rules.

#### *3.1.3.4.3. Connection between the non-state regulatory system and the state regulation*

The IBA Act contains provisions for two committees: one of them is the BMCC. According to the law, all broadcasters that have not signed the Code of Conduct of the BCCSA fall under the jurisdiction of the BMCC.

#### *3.1.3.4.4. Regulatory resources the state uses to influence the outcome of the regulatory process*

The state does not influence the code-making and the enforcement of the codes by BCCSA.

#### *3.1.3.4.5. Enforcement, sanctions*

All broadcasters that have not signed the Code of Conduct of the non-state BCCSA fall under the jurisdiction of the state body BMCC.

### 3.1.4. Analytical dimensions and models for Co-Regulation

The aim of the study is not to evaluate individual systems in place in European Member states but to generate more general knowledge on co-regulation. Therefore, the next step is to analyse the similarities of and differences between the co-regulatory approaches found within the Member States and thus to distinguish between different models of co-regulation. The following dimensions can be used to characterise a model, orientated at the criteria which already distinguish co-regulation from other forms of regulation (See above 2.1.4):

- What is the goal the system aims to achieve?
- Which are the steps of the regulatory process (rulemaking, implementation, enforcement) where non-state regulation is involved?

- What are the main resources the state uses to influence the outcome of non-state regulation?
- What is the legal connection between state and non-state regulation?

When it comes to the goals the co-regulatory system aims to achieve most of the existing co-regulatory systems focus on the protection of minors or the protection of consumers by advertising rules:

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

The regulatory process can be divided into the following steps: rulemaking, implementation and enforcement. Enforcement can be divided into ex-ante control and ex-post control. At each step regulation can be state and/or non-state regulation. As in most co-regulatory systems non-state codes exist (i.e. non-state rulemaking) the different approaches are mainly characterized by the involvement of non-state organisations in the enforcement of rules (ex ante, ex post or no non-state enforcement (i.e. state enforcement or no enforcement, at all)):

| Integration of non-state organisations into the enforcement of rules | |
|---|---|
| Ex-ante enforcement (advance clearance, external classification) | Germany (Protection of minors in movies and video games, partly protection of minors in broadcasting (with regard to material that can be submitted to FSF before the material is broadcast)) Austria (Protection of minors in movies), Italy (Pharmaceutical advertising regulation), France (Advertising regulation) |
| Ex-post enforcement (including ex-post control of internal ex-ante classification) | Netherlands (Protection of minors), United Kingdom (Protection of minors in mobile services), Greece (Advertising regulation in broadcasting), United Kingdom (Advertising regulation), Italy (Protection of minors in television, protection of minors in internet services, TV sales regulation), Netherlands (Advertising regulation in broadcasting), Germany (Protection of minors in internet services); Slovenia (Advertising regulation) |
| No non-state enforcement (state enforcement or no enforcement at all) | Italy (protection of minors in mobile services: the Guarantee Committee is not responsible for enforcement, only self-disciplinary measures), Germany (Advertising regulation in broadcasting; when it comes to actions against broadcasters, rules are enforced by state media authorities),: Portugal (Broadcasting protocol (including advertising rules)); Slovenia (Protection of minors in broadcasting) |

When it comes to the protection of minors in television in Italy, it has to be mentioned that the non-state code has been incorporeted into state law. That is why the state regulator is now responsible for the enforcement of the code. However, the non-state regulator is still responsible for the enforcement, as well. As the state still uses regulatory resources to have an influence on the non-state organisation (by the appointment of members), the co-regulatory system still includes the enforcement of the code by the non-state organisation.

With regard to the main resources the state uses to influence the outcome of non-state regulation, there are organisations-orientated and code-orientated approaches.[111]

| | | |
|---|---|---|
| Regulation of organisations | certification | Germany (Protection of minors in broadcasting, protection of minors in internet services), Netherlands (Protection of minors), (United Kingdom: Advertising regulation (contracting out)) |
| | appointment of members | Germany (Protection of minors in movies and video games), Austria (Protection of minors in movies), Italy (Protection of minors in television, protection of minors in internet services, protection of minors in mobile services, TV sales regulation) |
| | Financing | Austria (Protection of minors in movies), Italy (Protection of minors in television, protection of minors in mobile services, TV sales regulation); Netherlands (Protection of minors) |
| Regulation of codes/ agreements | Certification | United Kingdom (Protection of minors in mobile services; Advertising regulation (also MoU between ICSTIS/ASA and Ofcom)), Portugal (Broadcasting protocol (including advertising rules)) |
| | signed by state organisation/ representative | Italy (Protection of minors in internet services), Slovenia (Protection of minors in broadcasting) |
| | implementation of code into state law | Italy (Protection of minors in television), Germany (Advertising regulation in broadcasting) |

With regard to the legal connection, the following approaches can be distinguished:

| | | |
|---|---|---|
| legal connection within the state act | direct inclusion by law | Italy (Protection of minors in television); Slovenia (Advertising regulation); some Bundeslaender (states) of Austria (Protection of minors in movies) |
| | and implemting public authority act (including agreements between different provinces/states) | Germany (Protection of minors in broadcasting, protection of minors in internet services); Netherlands (Protection of minors); United Kingdom (Protection of minors in mobile services: approval of ICSTIS code); United Kingdom (Advertising regulation: contracting out); Germany (Protection of minors in movies and video games) |
| | legal obligation for providers to follow non-state regulation | Greece (Advertising regulation in broadcasting); Netherlands (Advertising regulation in broadcasting) |

[111] See Wolfgang Schulz and Thorsten Held, Regulated Self-Regulation as a Form of Modern Government, Eastleigh: 2004 , pp. 68+.

| | | |
|---|---|---|
| legal connection not within the state act | legislative decree | Italy (Pharmaceutical advertising regulation) |
| | ministerial decree: condition for state aid | Italy (TV sales regulation) |
| | guidelines of the state regulator | Germany (Advertising regulation in broadcasting) |
| | signing of the non-state code by a state representative and ministerial decree | Italy (Protection of minors in internet services) |
| | Contract between providers and state regulator | Slovenia (Protection of minors in broadcasting) |
| | administrative action („homologation") | Portugal (Broadcasting protocol (including advertising rules)) |
| | code of non-state organisations under the auspices of a state representative | Italy (Protection of minors in mobile services) |
| | letters | France (Advertising regulation) |
| | state regulators follow decisions of non-state bodies in practice | some Bundeslaender (states) of Austria (Protection of minors in movies) |

However, these differences with regard to the legal connection cannot be used to distinguish between different models of co-regulation. Concrete configuration of the legal connections depends on regulatory cultures in the different countries: Instruments which seem to be different (like ministerial decrees, state acts, contracts) might have similar impact within the different states. In addition, differentiating between these legal connections would lead to a strong fragmentation (as certain kinds of legal connections can just be found in one country).

To gain models of co-regulation the following dimensions are grouped:

- Advertising regulation or regulation for the protection of minors
- Involvement of non-state organisations into the enforcement of rules (ex ante, ex post or no non-state enforcement (state enforcement or no enforcement at all)
- Ressources the state used to influence the non-state regulatory process: Regulation of organisation or regulation of codes/agreements or not regulated (process of non-state regulation is not regulated by the state)

The grouping is done to get model which have at least two systems representing it to allow for an intra-model comparison.

This leads to the following models:

| | Policy objective andinvolvement of non-state regulation in the enforcement of rules | State regulation of non-state regulation[112] | Models | |
|---|---|---|---|---|
| 1) | Advertising-advance-clearance[113] | Not-reg | Italy (Pharmaceutical advertising regulation), France (Advertising regulation) | 2 |
| 2) | Advertising-ex-post-enforcement[114] | Org | Italy (TV sales regulation) | 1 |
| | | Org and code | United Kingdom (Advertising regulation) | 1 |
| | | Not-reg | Greece (Advertising regulation in broadcasting), Netherlands (Advertising regulation in broadcasting), Slovenia (Advertising regulation) | 3 |
| 3) | Advertising-without-enforcement | Code | Germany (Advertising regulation in broadcasting), Portugal (Broadcasting protocol (including advertising rules)) | 2 |
| 4) | Minors-external-classification[115] | Org | Germany (Protection of minors in movies, protection of minors in video games, protection of minors in broadcasting), Austria (Protection of minors in movies) | 4 |
| 5) | Minors-internal-classification-with-external-non-state-ex-post-enforcement[116] | Org | Germany (Protection of minors in internet services), Netherlands (Protection of minors) | 2 |
| | | Code | United Kingdom (Protection of minors in mobile services) | 1 |
| | | org-and-code | Italy (Protection of minors in television, protection of minors in internet services) | 2 |
| 6) | Minors-internal-classification-without-non-state-ex-post-enforcement | code | Slovenia (Protection of minors in broadcasting) | 3 |
| | | org | Italy (Protection of minors in mobile services), | 1 |

112 Reg: Regulation of organisation, code: regulation of codes or agreements, not-reg: process of non-state regulation is not regulated by the state.

113 Advance Clearance: Ex-ante enforcement.

114 Enforcement means ex-post enforcement in this context.

115 External classification: Classification (ex ante enforcement) is done by a non-state organisation.

116 Internal classification: Classification is done by the providers of media content themselves.

# 4. IMPACT ASSESSMENT

## 4.1. Assessing the Impact of regulatory systems

### 4.1.1. General considerations

An impact assessment must be conducted in order to come up with well-founded suggestions about where and how regulatory systems might be of advantage.

The conducting of Regulatory Impact Assessments (RIA) has become a means to promote better regulation in several OECD countries[117] and at European level[118]. Both new forms of regulation, notably for the environment, health and safety, and the deregulation of industrial sectors have evoked an increasing need to know more about the consequences of planned changes in regulation.[119] Therefore, one could be led to assume that there are generally accepted methods to measure the real world impacts of regulation. However, the impact assessment as such is only part of the RIA tool, and academic debate focuses rather more on the effect the implementation of RIA has on the regulatory process than on the methodology used to measure the impact itself. Hence, for the objective we wish to achieve RIA is not as constructive as anticipated. A paper edited by the European policy centre acknowledges that analytical methods, e.g. on the evaluation of the impact of regulation on innovation or small and medium enterprises SMEs, are „not well developed"[120]. Each assessment is a unique[121] which creates an obstacle for comparative studies.

Consequently, this study will – in line with governmental RIA and academic field research – make use of approaches from the economic analysis of law, political economy and criminology to develop criteria to measure the impact of co-regulatory concepts and instruments.

It has to be stressed that impact analysis tends to see regulation as a mechanical, unidirectional process, a supposition which is rather antiquated.[122] However, in order to measure impact one has to „freeze" the process and focus on a chain of cause and effect. Nevertheless, the oversimplification within such an approach has to be kept in mind.

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117 Organisation for Economic Co-Operation and Development (OECD), *Regulatory Impact Analysis – Best Practices in OECD Countries*, Paris: 1997.

118 The European Policy Centre, Regulatory Impact Analysis: Improving the Quality of EU Regulatory Activity, Brussels: 2001.

119 Peter Newman (ed.), The New Palgrave Dictionary of Economics and Law – Volume 3, London: 1998, p. 276+.

120 The European Policy Centre, Regulatory Impact Analysis: Improving the Quality of EU Regulatory Activity, Brussels: 2001, p. 9.

121 Carl Böhret, Guidelines on regulatory impact assessment – Speyerer Forschungsberichte, Speyer: 2004.

122 See Ian Ayres and John Braithwaite, Responsive Regulation, Oxford: 1992.

## 4.1.2. Methodology

### 4.1.2.1. Basic approaches

Different basic approaches are used to measure the effectiveness and efficiency of regulation. These include (to name but a few)[123]:

- Cost effectiveness
- Cost assessment
- Benefit assessment
- Benefit-cost analysis
- Risk assessment

The first three approaches just focus on one side of the possible effects and are, therefore, only recommended if the task is merely to single out unacceptable options. If the analysis needs to be more comprehensive, the task is too complex for such approaches. Benefit-cost analysis is seen as the most comprehensive method.[124] The risk assessment focuses on just one policy effect: the risks that can be reduced. As the reduction of risks can be a benefit, this analysis may be seen as a special case of the benefit-cost analysis.

However, these basic approaches do not account for the specific knowledge that one needs to prepare the yardsticks to measure impact and answer significant questions such as:

- What will be assumed as a benefit, what as a cost?
- How to weigh costs and benefits?
- What is the relevant time scale to measure benefits and costs?
- How to deal with multiplicity of objectives and risks?
- What is the baseline?
- If a development has to be predicted: Shall a best, worst or most likely case scenario be chosen?

Since sufficient answers cannot be found on this level of abstraction we will try to gain some knowledge from impact analyses that have already been done.[125]

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123 Organisation for Economic Co-operation and Development (OECD), *Regulatory Impact Analysis – Best Practices in OECD Countries*, Paris: 1997, pp. 180+.

124 Ibid, p. 180.

125 The following text shows the result of just a preliminary survey of the studies already done and will be completed before conducting the impact assessment.

#### 4.1.2.2. Approaches in existing impact analyses

##### *4.1.2.2.1. Empirical studies*

Assessing regulatory impact can be comparatively easy if it is focused on a specific objective which can be measured numerically. To take an example, the hypothesis that the US 1984 Cable Act benefited the industry can be assessed by analysing the share prices of cable companies assuming that they reflect the investor's anticipation of profits.[126] Other examples are the distribution of access to electricity in developing countries[127] or the service prices and number of self-employed craftsmen when it comes to different concepts of trade regulation[128] or production and price of different products in relation to the rate of taxes on fertilisers.[129]

Where the specific target value is not as obvious it has to be worked out before evaluating the regulation. Clear indicators which are measurable have to be defined for the purpose of evaluation. Indicators which can be found in case studies have been the level of service quality in telecommunications[130] to measure side effects of telecom regulation, and the delay in market entry of chemical products to assess the impact of regulation on innovation.[131] However, this process of defining indicators is in itself an assessment of benefits and depends on political appreciations.[132]

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126 Anne M. Hoag, „Measuring Regulatory Effects with Stock Market Evidence: Cable Stocks and the Cable Communications Policy Act of 1984", *Journal of Media Economics* 2002: pp. 259+.

127 Antonio Bojanic and Michael Krakowski, Regulation of the Electricity Industry in Bolivia: Its Impact on Access to the Poor, Prices and Quality, Hamburg: 2003.

128 Wilma Pohl, Regulierung des Handwerks – eine ökonomische Analyse, Wiesbaden: 1995, p. 128+ and passim.

129 Heinrich Becker, Reduzierung des Düngemitteleinsatzes – Ökonomische und ökologische Bewertung von Maßnahmen zur Reduzierung des Düngemitteleinsatzes – Eine quantitative Analyse für Regionen der Europäischen Gemeinschaft, Münster: 1992.

130 The definition of service quality in Telecommunication by Noel D. Uri can serve as an example (Noel D. Uri, „The Impact of Incentive Regulation on Service Quality in Telecommunications in the United States", *Journal of Media Economics* 2003: pp. 265+.). His indicator consists of (1) average interval for installation, (2) percentage of installation commitments met, (3) total trouble reports and (4) average repair interval. The article analyses the service quality during a time period in which the FCC implanted a new price cap of interstate access service. It draws the conclusion that a decline in service quality has been an unintended consequence of the regulatory change. Bent Lüngen uses consumer prices as an indicator for regulatory success in regulating mobile communications in Eastern Europe, cf. Bent Lüngen, Mobilkommunikation in Osteuropa –Die Gestaltung der Regulierungsrahmen und deren Auswirkungen auf die Entwicklung der Mobilkommunikation in Transformationsländern – eine empirische Analyse aus Sicht der Neuen Politischen Ökonomie, Frankfurt am Main: 1996.

131 Manfred Fleischer, Regulierungswettbewerb und Innovation in der chemischen Industrie, Berlin: 2001.

132 For criteria to do so cf. S. Ramamoorthy/E. Baddaloo, Evaluation of environmental data for regulatory and impact assessment, Amsterdam: 1991, pp. 446+.

While effects on the economy can be judged by well-established indicators like productivity indices, the achievement of social goals is more challenging. Even where indicators exist, like in protection of labour or chemical risks, the comparison is limited or not feasible at all.[133]

Where there is a clear indicator or when such an indicator can be constructed, it is possible to evaluate even complex regulatory arrangements. Yet several case studies are simply limited to measuring the indicator before and after the change of regulation.[134] However, this procedure obviously does not take into account that intervening variables could account for changes of the indicator's development.[135] It is not in every case methodologically feasible to extract the regulatory element within the bundle of causes.[136] However, even this unsophisticated approach requires data from a point in time before and after a regulatory change which will often not be available.

At least for some fields of regulation economic approaches have been elaborated to analyse costs and benefits.[137] However, mostly quantification is not feasible when it comes to specific regulatory arrangements and so those methods are considered too complex to be applied.[138]

Very seldom does one find approaches, among studies of this kind, which consider the reaction to regulation as a possible cause for regulatory measures and, therefore, see regulation as a circular process rather than a one-way street. *Duso* was able to show in a comparative study that price regulation in the US cellular industry led to lobby activity which succeeded in countervailing the regulatory objective and that as a result state regulation did not ultimately have a significant impact.[139] Such empirical designs respond to new theoretical understandings of regulation.[140]

Apart from the evaluation of indicators, expert interviews or interviews with actors[141] are considered appropriate means to judge the outcome of regulation.[142]

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133 Ibid.

134 Ibid.

135 Some studies on the effect of deregulation just measure indicators before and after deregulation without adequately considering other possible causes, cf. Friedrich Schneider and Markus F. Hofreiter, Privatisierung und Deregulierung öffentlicher Unternehmen in westeuropäischen Ländern – Erste Erfahrungen und Analysen, Wien: 1990.

136 For the field of labour market policy cf. Brigitta Rabe, Wirkungen aktiver Arbeitsmarktpolitik. Evaluierungsergebnisse für Deutschland, Schweden, Dänemark und die Niederlande, Berlin: 2000.

137 Kenneth J. Arrow et al, Benefit-Cost Analysis in Environmental, Health and Safety Regulation: A Statement of principals. Washington: 1996.

138 Manfred Fleischer, Regulierungswettbewerb und Innovation in der chemischen Industrie, Berlin: 2001, p. 17.

139 Tomaso Duso, Lobbying and Regulation in a Political Economy: Evidence from the US Cellular Industry, Berlin: 2001.

140 See Ian Ayres and John Braithwaite, Responsive Regulation, Oxford: 1992.

141 For the latter see Thomas Wein, Wirkungen der Deregulierung im deutschen Versicherungsmarkt – Eine Zwischenbilanz, Karlsruhe: 2001, pp. 191+.

#### *4.1.2.2.2. Rational choice approaches*

The behaviour of the objects of regulation and third parties is included in non-empirical approaches more often than in studies using indicators. This non-empirical type of study is based on a rational-choice approach. The relevant actors are identified and plausible assumptions are made about their individual behaviour and interaction in view of the stimulus the regulation evokes. The intention in doing this is to come up with a kind of prediction about effects in the respective field.

This kind of approach needs both an analytical model of the regulation in place and the intended change and of the social field in which the regulation is designed to cause changes. Since empirical research is limited for methodical reasons, some studies are restricted to analytical – non-empirical – approaches, or both methods are combined.[143]

#### *4.1.2.2.3. Economic theory*

Economic theory can help to identify the distribution of benefits and costs. Developed approaches can be seen, to take an example, with regard to the behaviour of price-regulated companies.[144] With such an approach advantages and disadvantages will be as far as possible be reformulated into numerical benefits and costs.

A study on German Copyright Law serves as a model. Based on economic theory, the analysis of the effects of § 32 German Copyright Law (Urhebergesetz) shows not only that the assumptions of the lawmakers are wrong, but also that the redistribution of income is likely to produce inefficiencies. This study also identifies the costs and benefits for different regulatory approaches to interactive product placement in television and draws the conclusion that transparency rules are best as they support the regulatory objective and produce the best result from a welfare economy point of view.[145]

### 4.1.3. Learning from existing impact analyses in the field of Co-Regulation in the media

In the studies on co-regulation analysed so far, there is no empirical approach using numerical indicators. Instead, studies use interviews with experts and/or actors to verify hypotheses derived from analytical methods.

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142 See below 3.3.

143 For the latter cf. Manfred Fleischer, Regulierungswettbewerb und Innovation in der chemischen Industrie, Berlin: 2001.

144 See a case study by Paola Prioni, Effizienz und Regulierung im schweizerischen öffentlichen Regionalverkehr, Zürich: 1997.

145 Christian Jansen, The German Motion Picture Industry – Regulations and Economic Impact, Berlin: 2002, p. 61+, 90+.

For their study on self- and co-regulation in the media and telecommunications sector,[146] *Latzer, Just, Saurwein* and *Slominski* of the Austrian Academy of Science (Oesterreichische Akademie der Wissenschaften – OeAW) analysed existing studies, collected data from co-regulatory organisations in the media and telecommunications sector, and carried out interviews and workshops with experts.[147] *Latzer, Just, Saurwein* and *Slominski* point out the difficulties of operationalising and measuring non-financial regulatory tasks. They also stress that evaluation depends on the perspective adopted: while one can evaluate whether regulatory concepts are appropriate to fulfil public policy goals, industry players may judge the success of these regulatory concepts in a different way. Besides other issues, *Latzer, Just, Saurwein* and *Slominski* asked in their interviews for indicators to evaluate self- and co-regulation.[148] The most-mentioned indicators were:

- Approving and differing decisions of state regulators
- Number of complaints
- Number of members of self- or co-regulatory organisations
- Promptness of decisions
- Constant supervision
- Prices
- Recognition and acceptance
- „Takedowns" by online providers after illegal content has been pointed out to them
- Number of approvals and withdraws of approvals
- Press reactions to decisions
- Feedbacks by the industry and costumers.

The study conducted by *Latzer* et al points, then, to numerical indicators (number of complaints, prices), even though they do not measure them.

By contrast, *Schulz* and *Held* distinguish the levels of „adequacy" and „compliance".[149] To judge adequacy, the written law (acts, guidelines set up by regulatory agencies, codes of conduct set up by self-regulatory organisations) is examined to discover whether it is appropriate and sufficient to fulfil the regulatory tasks. In order to make assumptions about „compliance" the observance of rules enacted would have to be evaluated, an empirical task which they only perform by a general expert survey in their study. Nevertheless, the study does indicate the evaluations that have been made in the countries included in the case studies. In addition, performance appraisals gained from the expert interviews are given in the report. Their study suggest to consider the clear devision of work between state and non state actors and the „regulatory cultrure" when assessing systems which combine state and non state regulation.

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146 Michael Latzer et al., Selbst- und Ko-Regulierung im Mediamatiksektor, Wiesbaden: 2002.

147 Ibid, p. 102.

148 Ibid, p. 161+.

149 Wolfgang Schulz and Thorsten Held, Regulated Self-Regulation as a Form of Modern Government, Eastleigh: 2004, p. 10+.

*Jarren, Weber, Donges, Dörr, Künzler* and *Puppis* compared broadcasting regulation in different states by analysing documents and interviewing experts.[150] Experts agree on the assumption that there are shortcomings in rule enforcement (lack of sanctions) when it comes to pure self-regulation and that evaluation has to provide results on rule enforcement by means of co-regulation.[151]

The *PCMLP* performed a so-called codes analysis which included a study of Codes of Conducts and background research (expert interviews, historical and archive material and secondary analysis conducted by other researchers).[152] As a result, the *PCMLP* presented 18 recommendations on media self-regulation, which can specifically help the effective development of media Codes of Conduct.

In conclusion one can say that a lot of research has already be done but no uniform method has evolved nor have there been comprehensive comparative studies so far.

## 4.1.4. Conducting the field research

### 4.1.4.1. Pragmatic approach

As shown above there is no well-established methodology simply waiting to be adopted. Therefore we make use of the knowledge gained from the studies as far as possible, and design a pragmatic method to assess the effects of concepts and instruments of co-regulation. Whether a co-regulatory system in place is working efficiently and effectively, and whether a specific model should be implemented, can be assessed using a cost-benefit analysis.

In order to include all relevant aspects, the terms „costs“ and „benefits“ must be understood in the broadest sense. Costs generally comprise undesirable side effects. What should be regarded as a benefit and what as a cost, and how to weigh up different benefits or costs, depends on the specific objectives the regulator wants to achieve and can to some extend be understood as being constructed within the regulatory system.

To move towards a method for assessing co-regulation, a draft flow chart might be helpful.

Flow chart of an impact assessment [153]

[150] Otfried Jarren et al., Rundfunkregulierung – Leitbilder, Modelle und Erfahrungen im internationalen Vergleich, Zurich: 2002, p. 289+.

[151] Ibid, p. 349 and 356.

[152] PCMLP, Self-Regulation of Digital Media Converging of the Internet: Industry Codes of Conduct in Sectoral Analysis, Oxford: 2004.

[153] For the terms used please see above .

When it comes to benefits, the objectives of the regulation compose the yardstick for measuring achievements. There are objectives that might be considered true for all regulation, such as transparency, clearness, acceptability and coherence and, some of which are aspects of legal principles (primarily the principle of the rule of law). Specific objectives can be judged by the intention the regulator has, and can be elaborated on by the standard legal interpretation methods.

Following a suggestion in a study already conducted, the process of assessing the real world impact of regulatory measures can be broken up into an adequacy and a compliance component. The former assessment can be conducted by analysing the regulation as such and the social area where it is intended to function. Here, the theories mentioned above might be useful to understand the processes and interactions (especially macro and „meso" approaches, see above p. 14).

When it comes to projecting compliance with the regulation to be enacted, it will depend on the results of analysis of the social field whether or not there might be numerical indicators at hand, and, thus, whether quantitative research seems possible. If that is not the case, this has to be substituted by assessments of experts or prognosis based on game theory or economic theory.

#### 4.1.4.2. Research questions and conducting of the survey

As described above (see chapter 1.2.3), the methodology of the impact assessment to evaluate compliance rests on two pillars, these being the expert survey and desk research conducted by our correspondents. On the face of it this approach seems to be the „second best option", compared with a study using media content analysis and assessing the results by using well-defined empirical indicators. However, on closer view it is revealed that regarding co-regulation especially a methodological mix might be more adequate. As shown in the chapter dealing with the theoretical background, in opting for co-regulation the state opens regulation to a certain extent for private regulation – most likely done by the industry. With such an approach the process itself is likely to become an essential part of the game. Therefore, the implementation of sustainable structures becomes important.

Additionally, defining the benefits and costs within a complex regulatory arrangement is part of the process as well. To give an example, the effectiveness of advertising content regulation might simply not be evident when dividing the amount of advertisements published in a given period by the advertisements that do not comply with the legal obligations. The pace with which the rules can be amended under changing conditions might be seen as an important variable as well. A content analysis conducted within a specific time period is not able to deal with this way of posing the problem.

Both the expert survey and the desk research are based on an examination of the functionality of each of the analysed systems. This enables us to identify „linchpins" which we evaluated very closely. At the same time it allows for assessing the adequacy of the systems by pointing to inherent flaws which hinder the working of the system.

When analysing the results of the expert survey, naturally we did not take the assumptions of the experts at face value. That, to take an example, the managing director of a non-state-regulatory body financed by the industry stated that the industry very seldom fails to submit material, in this sense, would not come as a surprise. Therefore, the first part of the analysis is to see whether answers to the questions have been consistent with experts from a different background or whether surprising results could be observed: such as the above-mentioned managing director seeing problems with the compliance of the respective industry. According to our point of view, highly consonant views indicate that the system in place is highly accepted and internalized. Given the fact that co-regulatory systems are based on the cooperation of different actors involved this leads to a higher rating of a given system according to our impact assessment.

What kinds of assumptions can be made and how solid the results are depends on the return rate for a given system. With a small number of questionnaires there is no comprehensive and valid assessment to be made. Nevertheless if, to take an example, representatives of state and non-state organisations disagree on a key point where co-operation between both of them is needed, this has to be regarded as a significant flaw within the system and is, therefore, an important result irrespective of the number of answers obtained. Systems where due to an insignifant number of questionnaires no assumptions are to be made are not included into the impact assessment at this stage of the study.

Since all actors involved are living with and to some extent upon the system the perspective of the external experts have been compared with those of the internal ones. The members of consumer groups belong to this group of exterts as well.

Both the expert survey and the desk research focussed on general questions as well as specific ones. In the general part process objectives were subject of the study. The issues cover the requirements the European Court of Justice has set regarding the implementation of directives (see below 5.2) as well as generally accepted process values which indicate good regulation. The questions focus on:

- Transparency of the system
- Openness of the system
- Clarity of rules

Furthermore, key functionalities learned from the theoretical research have been asked; especially whether all applicable issues suggested in the study by *Latzer, Just, Saurwein* and *Slominski* and by *Schulz* and *Held* (see above 4.1.3) have been considered, since they have an empirical approach.

- Clarity of devision of work
- Pace of decision making
- Participation of the industry
- Incentives to participate
- Represenation of relevant stakeholders
- Evaluation of the system

The analysis of theoretical findings on co-regulation points to the necessity for sufficient incentives for the industry to participate, therefore, one question focuses on the adequacy of incentives within a given system.

Furthermore, theoretical reasoning shows that the development path of a system matters. Therefore, changes within the system in place have been investigated. Finally, regulatory theory shows that sufficient enforcement powers such as sanctions are necessary for a co-regulatory system to function properly. Therefore, this point is included in the general questions as well. Therefore, the following issues were included into the general part of the questionnaire as well:

- Effective, proportionate and deterrent enforcement mechanisms
- Sustainability of the system

Moreover, in a special part specific performance indicators have been called for.

Each questionaire asked for an estimation of a quasi-empirical data measuring the impact:

- For protection of minors: The system [..] intends that programmes which might impair the development of minors should not be accessible for them. How often do you believe is a program broadcast at the wrong time?/ How often do you believe distributed content is classified in a way that there might be an impairment of the development of minors?
- For adverstising content regulation: The Advertising regulation intends that only advertisements complying with the Code are published. How often do you believe advertisements are published which do not comply with the Code?/How often do you believe the rules laid down in the Code are infringed?

Those questions have been formulated in a similar way for all systems, however, when analysing the results one has to consider different understandings of the experts due to different cultural and legal traditions. The latter can restrict comparative analysis.

Moreover, the identified lynchpins have been exposed to the experts for assessment (for a specimen questionnaire see Annex 3). Open questions invited the experts to give reasons for there judgement and to indicate specific strengths and weaknesses of the respective system.

The results of the document research served as a background for interpretation of all answers given by the experts.

In the following part the findings are given, beginning with general findings concerning co-regulation as such as defined within the study. After that the findings regarding the identified models (see above 4.2.1.5) are given. Finally, we present some remarks concerning specific national systems. Regarding the latter it should be mentioned that no evaluation of national regulation as such has been intended. They just serve as examples for co-regulatory settings.

## 4.2. Results

The analysis of the impact assessment has been done upwards, i.e. from the assessment of individual systems to more general findings. However, since the purpose of the study is not to evaluate regulatory systems in place but to gain as far as possible comprehensive answers the findings are presented in reverse order.

### 4.2.1. General findings

First and foremost on the basis of the empirical impact assessment as well as on theoretical findings, there is no reason to believe that co-regulatory models as defined within this study are not sufficiently effective to implement European Directives. In some cases the experts mainly agreed on the assumption that the shift to co-regulation make the regulation even more effective than rule-making, implementation or enforcement lying completely in the hand of a Member State. There are even specific advantages to a co-operation of the state and non-state regulation such as:

- The chance of higher industry accountability
- Faster pace of decision-making
- Greater sustainability

However, co-regulation will generally be more complex than pure state regulation and involves by definition parts of the regulatory process not completely under the control of state actors. The latter leads to a number of factors that have to be considered to make a co-regulatory model work properly.

#### 4.2.1.1. Conditions for co-regulation

##### *4.2.1.1.1. Regulatory culture*

Co-regulation depends to a large extent on „weak“ factors like the regulatory culture within a state or among the industry within the respective branch. This is especially true for models of co-regulation that depend on industry associations, for example to draft codes or enforce rules. Therefore, it comes with no surprise that countries that are known for innovative regulatory concepts which are worked out in collaboration with industry get a high rating in the conducted impact assessment; such as the United Kingdom or the Netherlands and – to some extent – Germany.

Regulatory theory pointing to those weak factors is backed by our empirical findings since there are differences in systems performance for which different structures of the model do not account.

##### *4.2.1.1.2. Incentives for co-operation and enforcement*

Since co-regulation depends on industry commitments the incentives for the industry to co-operate have to be adequately high. This again is both theoretically plausible and result seen

in the impact assessment. According to the experts' views many of the systems evaluated lack sufficient incentives.

In most cases the incentive lies in the avoidance of state regulation. However, this incentive only lures industry players on two conditions: The State must reduce its regulatory power significantly, and it must be likely that the state implements its own regulation in case non-state regulation fails. Another incentive could be the legal obligation (imposed by law or by licence conditions) to join non-state regulatory systems. We also found innovative incentives such as following non-state regulation being a condition for receiving state aid.

Furthermore, sufficient means to enforce the regulation, such as adequate and proportional sanctions seem to be necessary for a co-regulatory system to be workable. If it is to non-state organisations to enforce rules they must have a set of effective and graduaded sanctions at their disposal. In addition, several experts' answers suggest that a strong state regulator in the background is supportive even if it very seldom uses its formal powers. Therefore, systems where regulators are established which are regarded as rather strong – like Ofcom in the United Kingdom, or the CSA in France – get comparatively high ratings for the impact of the co-regulatory system. Even members of non-state organisations point out the necessity of effective state sanctions in the background in order to convince the industry to participate in the co-regulatory system.

#### *4.2.1.1.3. State resources used to influence the outcome of the non-state regulatory process*

In co-regulatory systems the state remains responsible for the archievement of the public policy goals (like the protection of minors). Therefore it must have resources at its disposal to ensure that the non-state regulatory process leads to a sufficient protection level and to intervene if sufficient protection is at risk. In most co-regulatory systems in EU member states the state has an influence on the non-state organisations or on the non-state codes. It can be observed that models perfom rather well where certification of organisation or codes are used to have an impact on the non-state regulatory process (like the Protection-of-minors-model in the Netherland or the Protection-of-minors-models in broadcasting and internet services in Germany or the contracting-out-approach in the Advertising-regulation-model in the United Kingdom). If non-state regulation fails, certification can be withdrawn. One can learn from theoretical findings that sanctions have to be efficient and appropriate. As the withdrawal of a certification is a very severe sanction it it not very likely to be used by the state regulator in most cases. Some experts support the assumption that graduated sanctions are necessary.

However, other models where certification requirements do not exist, but where the state has an influence on the composition of the non-state organisations seem to be functioning as well (like the Protection-of-minors-in-movies-model in Germany). The experts in the different countries have different views on the question whether the fact, that the state delegates representatives to a non-state-organisation or appoints the members of this organisation has an influence on the non-state regulatory process. However, if experts affirm such an influence they rate this as positive or neutral with regard to the achievement of the public policy goals. Pure

financing of organisation seems not to lead to a significant influence on the non-state regulatory process.

#### *4.2.1.1.4. Clear legal basis and clear division of work*

Often experts point out that there are some uncertainties within the legal basis with regard to the division of work between non-state regulators and state-regulators. In which cases does non-state regulation substitute state regulation? In which cases can state regulators overrule non-state decisions? An unclear devision of work causes a lack of transparency as well as a lack of sufficient incentives for the industry to participate.

### 4.2.1.2. Process objectives

The impact assessment shows very clearly that several co-regulatory systems lack sufficient safeguards for what we call process objectives. It can be regarded as one of the strengths of the established legal systems of the Member States that objectives like proportionality, openness, transparency and clarity of regulation are sufficiently guaranteed regarding state regulation. To ensure that those objectives are met is common practice for a constitutional state. However, when it comes to private forms of regulation, the observation of those process objectives is by no means guaranteed. Therefore, if such procedural objectives have to be secured, the state part of the regulatory setting has to set respective requirements.

The previously mentioned weakness of co-regulatory systems is especially true for transparency. Most of the assessed systems lack transparency in the view of the experts. That assumption is even true for systems which have a high performance based on the expert's assessment and evaluation done on national level. Even internal experts who to some extent live on the system often indicate that weakness. The Interinstitutional Agreement, consequently, refers to the necessity to ensure transparency for co-regulatory systems.[154] However, the systems „Germany: Protection of minors in movies", „Netherlands: Advertising regulation in broadcasting", „Netherlands: Protection of minors" and „United Kingdom: Advertising regulation" are regared as sufficiently transparent by the majority of the experts.

Another finding true for a significant number of systems is the lack of openness This regards both, openness to relevant stakeholders like civil society groups and for companies entering the market. While the former is first and foremost a problem for media policy the latter might lead to infringements of national and European competition law (see below 5.3, 5.4, 5.5).

### 4.2.1.3. Regulatory objectives suitable for co-regulation

While there is no objective that can, based on the theoretical findings or empirical impact assessment, be singled out as unsuitable for co-regulation, some prove to be especially promising for this form of regulation. According to our findings those objectives are:

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[154] 2003/C 321/01.

- Protection of minors
- Advertising content regulation

There are several reasons for this assumption, such as both being direct forms of content regulation which, given the rapidly of changes in programming and advertising and the inherent weaknesses of external control, can be especially well dealt with by non-state-actors. Furthermore, new concepts of regulation can tie in with existing professional ethics or even self-regulatory organizations that already deal with media content-matters on a voluntary basis.

However, within the regulatory framework of the different Member States both above mentioned objectives are combined with other objectives (protection of minors with, to take an example, protection of human dignity) and are subclassified. Regarding the latter advertising regulation can concern the content or the identification of advertising as such. When it comes to the content general aspects of decency can be the objective of the regulation or safeguarding against specific risks triggered by advertising for special products (e.g. pharmaceuticals, drugs). For the last mentioned objectives the theoretical insight[155] might apply that for some extremely important objectives a level of security has to be maintained which only can be achieved by specific means by state control.

As regards the protection of minors the expert survey suggests a generally high performance of the systems assessed. Assuming that a consonant evaluation by the experts reflects the actual functioning of the system and that the frequency-threshold of „from time to time" for infringement of the rules (i.e. the legal basis or the code depending on the respective system) indicates effectiveness performance can be compared. The following table gives the anwers to the specific performance question asked to assess the frequency of material shown not in line with the obligations in relation to the material published (only systems where we regard the number of analysed expert questionaires as sufficient are shown, „uncertain" as answer not shown)

### Specific Performance of the Selected Systems
(Number of Experts Choosing the Category of Frequeny of Infringents)

| Systems / Categories | Germany: Protection of minors in movies and video games | Germany: Protection of minors in broadcasting | Austria: Protection of minors in movies | Slovenia: Protection of minors in broadcasting | Netherlands: Protection of minors |
|---|---|---|---|---|---|
| Never | | | | | ■ |
| Extremely seldom | ■ | | ■■ | ■ | ■ |

[155] Wolfgang Schulz and Thorsten Held, Regulated Self-Regulation as a Form of Modern Government, Eastleigh: 2004, p. 61.

| | | | | | |
|---|---|---|---|---|---|
| Seldom | ■■ | ■■ | ■ | | ■■■■■■■ |
| From time to time | ■■■ | ■■■ | ■ | | ■■ |
| Often | | | | ■ | |
| Very often | | | | ■ | |

This can only provide an indication for a concluding judgement since different media might need different levels of protection since, to take an example, the social control of reception by minors is different. Furthermore it has to be observed that different types of experts have returned answers for the systems assessed. However, if even experts involved in the system regard the performance as being below the threshold – like for the Slovenian system – that is a strong indicator for malfunctioning. For the case of Slovenia we found no reason to believe that it is a systematic flaw of a model of co-regulation that gives rise to that result.

In contrast, if all experts, including independent ones and representatives from consumer groups, regard the system as performing better than the threshold it indicates sufficient level of protection.

It is noteworthy that the intermediary frequency of infringement is higher with regard to systems that are designed to control advertising content compared with systems to protect minors in the media. However, asked directly the experts often regard the system as sufficiently effective nevertheless. Therefore we regard our theoretical hypothesis as valid which says that the yard sticks of regulation are rather a result of the interaction within the system than an objective fact.

#### 4.2.1.4. Types of media suitable for co-regulation

Comparing the different media within the scope of the study one can say that no medium is as such unsuitable for co-regulatory models. However, there are few systems of co-regulation to be found which are specifically designed for the press. This medium is traditionally governed by pure self-regulation with a separate legal framework.

For broadcasting one can observe that industry commitment and incentives for the industry to participate are relatively high judged over all assessed systems. The reason for that is most likely that broadcasting is the medium which is in all European states traditionally subject to heavier regulation than all other types of media. Therefore, there is a different starting point for the establishment of co-regulatory systems. Establishing co-regulation will typically mean that regulatory powers are handed over from the state to the industry, not that pure self-regulation is combined with state regulation. Furthermore, there is a comparatively small set of industry actors that are generally well organized and therefore able to enter into joint decisions. In addition, one could emphasize that very model of television broadcasting is basend on the central role of the broadcaster, i.e. him assuming editorial responsibility. This means

that content distributed has to pass through that control, hence the influence on what is assessed by the viewer is centralized and in the hands of a comparably small amount of persons (as opposed to content on the internet, for instance). Moreover, the actors are mainly economically well off and can afford the establishment of co-regulatory structures which, as a rule, mean that regulatory burdens are shifted from the state to the industry.

That does not mean that non-linear services like online services are unsuitable for co-regulation. However, the findings suggest that different models of co-regulations for broadcasting on the one hand and Internet services on the other hand might be preferable. The German case shows that within a generally uniform framework of regulation, the actual working of the system can be completely different when it comes to broadcasting on the one hand and online services on the other.

The large amount of online services would hamper approaches that require submission of all material for rating to an external body. Therefore one can find respective approaches with an external rating organisation in broadcasting, film and video games, but almost never with regard to online services. It is also economically reasonable to delegate enforcement to non-state regulators in the Internet sector.

#### 4.2.1.5. Findings regarding the identified models

The grouping that has been done (see above chapter 3.1.4) has lead to six models of co-regulation. This model-building has been undertaken in order to allow for a broad evaluation, which refers to more than one specific system in a given country. This approach allows for two different ways of analysing the results of the evaluation, first an intra-model-analysis that asks for similarities and differences regarding systems belonging to one and the same model, and a cross-model comparison. However, since up until now only a limited number of questionnaires have been returned for each model a comprehensive comparison is not possible.

The following chapter gives an overview over the comparative analysis.

##### *4.2.1.5.1. Intra-model analysis*

For systems in which non-state codes on advertising are enforced ex-post by non-state organisations, the main finding is that the systems in the UK and in the Netherlands show a comparatively consonant and rather positive rating given by the experts whereas the system in Greece shows a rather divided opinion regarding the system. For the latter the pace of decision-making and the openness is primarily under critique. This finding might be explained by remarks given by the experts in answering the open questions. Here it shows that the systems in UK and the Netherlands can build on a regulatory or, in the case of the UK, self-regulatory culture. Such a culture obviously leads at least to the smooth running and therefore to the pace of a regulatory system that is regarded by the experts as especially important when it comes to advertising content-regulation.

Regarding models that rely on non-state codes it is important that openness and transparency are guaranteed. Therefore a lack of openness is a critical point for such a system. If non-state

organisations are also responsible for the enforcement of the codes, the existence of effective sanctions is crucial. However, in addition to the effectiveness of enforcement the pace of decision making is an important factor as well. UK-advertising regulation seems to be a positive example for this.

Regarding systems in which age classification of content is performed by the providers themselves and in which there is an ex-post control by non-state organisations in order to ensure the protection of minors, the ratings given by the experts are relatively positive. The Dutch protection-of-minors system can serve as an example. However, the UK-mobile-system shows some uncertainty in the evaluation of the experts since it is a relatively recently-established system. The same goes with the protection-of-minors-system for so-called media services (mainly Internet services) in Germany which lacks in the view of several experts transparency, sufficient pace of decision-making and sufficient incentives. Obviously, this points to weaknesses in the new German system in protecting minors in the media, which nevertheless gets over all a positive rating. However, it is too early to make a definite judgement at this stage of the analysis.

For systems in which ex-ante age classification of content is done by external non-state organisations in order to ensure the protection of minors it is noteworthy that the rating overall is rather positive, as well. Apart from that one can note that the German system regarding television has been criticized especially when it comes to the pace of decision-making and transparency. Yet this is to a certain extent a weakness of the German legal framework itself, since it is mentioned for other German systems as well which are not minors-rating models. It seems possible that the protection of minors in movies system in Germany being well established for several decades and the consonantly mentioned incentives for the industry to participate account for the extremely positive rating for that system. Furthermore, the system is not that complex and might therefore not create problems of transparency and pace which are seen as weaknesses of other systems. Classification models are reliant on incentives for the industry to submit material to rating organisations before this material is presented to the public. Such incentives can lie in the avoidance of rating performed by the state or of state sanctions or in the high reputation of the rating in society. An unclear division of competences between state and non-state regulators can hamper the effectiveness of such a model.

We found only two co-regulatory systems in which age classification of content is performed by the providers themselves and in which there is no ex-post control by non-state organisations. These systems depict a completely different picture – which makes it hard to perform an intra-model-comparison. The reason might be that the regulatory culture and therefore the starting point for the establishment of the two co-regulatory systems have been completely different.

#### *4.2.1.5.2. Comparison between the models*

Comparison between the different models shows that systems in which there is a non-state code on advertising without non-state enforcement seem to be less effective than systems in

which there is non-state enforcement of non-state codes. This reinforces the theoretically plausible assumption that non-state-regulation needs at least to some extent enforcement mechanisms within the system itself.

The characteristics of the legal connection did not constitute a model but was considered above as a significant indicator of a system (see 3.1.4). It is worth mentioning that in the field of protection of minors models where a regulator - on its own (contracting out) or on request (certification of non-state regulators) – based on a legal act initiates non-state regulation perform high. Generally speaking this seems to be a feasible way to put up co-regulation in this policy field. Theoretical finding back this assumption: A strong regulator as a relevant actor within the market is regarded as a benefit to stimulate industry commitment.

## 4.2.2. Remarks concerning specific national systems

### 4.2.2.1. Austria: Protection of minors in movies

*Model: Minors-external-classification(-org)*

*Number of analysed questionnaires: 5*

Efficiency of the film classification system in Austria including the non-state organisation JMK[156] is calculated quite differently amongst the experts. While experts involved in the system point out that it is capable of fulfilling the targets it was designed for, an independent expert (university professor) doubts that this is the case. However, even this expert stresses that the disadvantages are correctable and not inherent to the system.

The independent expert criticizes a lack of incentives for the industry to participate, a lack of sanctions and uncertain standards for the recommendations of JMK. One expert who is involved in the system is also uncertain whether the system offers enough incentives for the industry. Other experts recognize the incentive for the industry that films that are not submitted to JMK or a provincial authority receive a 16 years rating automatically. While most experts estimate the amount of participation to be 50 %, one expert who is involved in the system estimates it to be just 5 %. One expert assumes that there is a 100 %-participation.

While the independent expert is uncertain whether the process objectives are sufficiently guaranteed, other experts stress that a complaint procedure is guaranteed, classification is performed by independent experts and transparency is guaranteed through publication of the decisions. Most experts agree that sufficient transparency exists. However, one expert involved in the system points out that the division of work between state regulators and non-state JMK is not sufficiently clear. This expert and the independent expert doubt that the system is transparent even for those subject to the regulatory regime.

All experts see it as disadvantageous that there is no legal basis for JMK classification. Some stress also that the Bundeslaender (states) are not obliged to follow JMK's decisions.

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156 For the abbriviations in this Chapter see above 3.1.1.

Most experts answered that seldom or extremely seldom, films receive ratings by the Jugendmedienkommission that may lead to the risk that minors are exposed to potentially undesirable material. The independent expert is uncertain about this. However, overall the performance is regarded as high.

The frequency with which the state authorities of the Bundeslaender (states) diverge from ratings given by the Jugendmedienkommission is estimated to be 10 % by some experts and 2 % by one of the experts. One reason for the divergence lies in the different existing provincial rules. For example in Lower Austria there is no 6 years rating. If the JMK classifies a film as being suitable for minors who are 6 years old or older, the person in charge in Lower Austria has to decide whether the film is suitable „for all ages“ or for those minors who are ten years old or older.

There are different views on the question whether members of the Jugendmedienkommission that are officials delegated by the Federal Ministry have a significant influence on the ratings. Some experts affirm this and estimate to the impact on the protection of minors to be neutral. One expert involved in the system and the independent expert do not affirm that such a significant influence exists.

However, almost all experts agree that the Federal Ministry has a significant influence on ratings by appointing members (that are not officials delegated by the Ministry) of the Jugendmedienkommission. Most experts estimate this to be neutral with regard to the protection of minors; however, the independent expert is uncertain about this. One expert who is involved in the system doubts that the Federal Ministry has a significant influence by appointing members of the Jugendmedienkommission.

Contradictory opinions exist also concerning the question of whether the Federal Ministry has a significant influence on ratings because it partly funds the Jugendmedienkommission. Most experts doubt this. However, the independent experts points out that financing leads to a significant influence by the state. The expert is uncertain whether this is positive, negative or neutral with regard to the protection of minors.

#### 4.2.2.2. France: Advertising regulation

*Model: Advertising-advance-clearance(-not-reg)*

*Number of analysed questionnaires: 4*

It should be noted that there were only four experts who answered the questionnaire. But those who did respond were all influential parties: BVP, the state regulator CSA, the French TV Advertising Trade Association and a private TV broadcaster. From the evaluation of the answers one can assume that the system satisfies the players involved. Though the legal link between BVP and CSA was judged as rather weak, and the system of monitoring for TV advertisements by BVP and CSA can be described rather as nonchained (BVP ex-ante control, CSA ex-post) than deeply geared, they assess the division of labour between BVP and CSA to be extremely clear for all involved players and that the system meets the public policy goals.

The experts congruently assessed the frequency of infringements to be extremely seldom. The CSA almost never overrules decisions of BVP to sanction TV advertisements. According to the BVP representative the broadcaster follow BVP appraisal at 99% of the cases. This assumption is backed by the annual reports of CSA[157] and especially of BVP[158].

The experts name several advantages of the system in place. It provides enough incentives for the industry to participate. The majority of respondents name the higher sense of responsibility of the parties at stake and the CSA as state regulator involved in order to ensure compliance with the laws as strengths. The safeguards (sanctions) are appraised as deterrent, effective and proportionate. Some respondents call the relationship between CSA and BVP a weakness. Some see a lack of transparency for the public.

#### 4.2.2.3. Germany: **Protection of minors in broadcasting**

*Model: Minors-external-classification(-org)*

*Number of analysed questionnaires: 6*

In addition to the six expert questionnaires a report on the system by the KJM[159] and the annual report of the non-state regulator FSF – but no independent evaluation so far – were available for conducting the assessment. Regardless of some weaknesses of the current configuration of the system, the experts judge the co-regulatory regime in the television sector as effective. Most experts state that it is even more effective than the former system, which was based mainly on pure state regulation, although reports of self-regulatory bodies were taken into consideration (however, one expert says that it is too early to judge whether this system is better than the old one). Weaknesses are seen as typical „teething problems", which are correctable and not inherent in the system. All experts also agree on the point that although the system is understandable for its participants, it is not transparent for the public. A lack of precise wording in the law is stressed as well.

However, almost all experts see weaknesses when it comes to incentives for the industry to participate. Although FSF's classification leads to a kind of protective shield against state sanctions under the law, it is estimated that broadcasters are not greatly interested in participation. While members of state regulators point out that it is not sufficiently clear which types of programmes have to be submitted to FSF before being broadcast, members of FSF say that the effectiveness of the above-mentioned protection is too weak because distribution of responsibility between state regulators and FSF is unclear, and the state regulators have retained too much power.

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157 CSA, „Rapport d'activité 2004" available at http://www.csa.fr/upload/publication/IN_web_001_228.pdf.

158 BVP, „Rapport Moral du BVP 2003", available at http://www.bvp.org/html/portail_public/textes_reference/rapport_moral/rapport_moral.php.

159 „Erster Bericht der Kommission für Jugendmedienschutz (KJM) über die Durchführung der Bestimmungen des Staatsvertrags über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien – April 2005" – the report has not been published yet.

Members of the state regulators and of a state ministry are uncertain if the available sanctions are effective. Members of the state regulators are also uncertain if the pace of problem solving is sufficient.

When it comes to the certification of FSF all experts stress the rapidity of this process. However, a member of FSF points out that there could have been more communication and co-operation between state regulators and FSF. A lack of communication between state regulator Kommission fuer Jugendmedienschutz and FSF is also pointed out in the annual report 2004 of FSF.[160]

A crucial point of a rating system is the amount of programs being submitted to the rating organisation in relation to the programs that should be submitted. Here the state regulators and FSF have completely different views: According to FSF, about 80 % of the programs that should be submitted are actually submitted. The state regulators have the impression that only 20-25 % of the programs are submitted to FSF before being broadcast. Members of the state regulator stress that a canon should be compiled with a list of the different types of content that have to be submitted to FSF. One expert from a state ministry extimates that 50 % of the programs are submitted to FSF before being broadcast.

Despite these different views, no expert has the opinion that there are high risks for the protection of minors. Members of state regulators and of a state ministry say that from time to time or seldom programs are broadcast at the wrong time. According to members of FSF programs are seldom broadcast at the wrong time. One member of a state media authority doubts that most programs that were submitted to FSF are broadcast in accordance with prior FSF ratings.

Almost all experts agree that FSF's classifications are appropriate in most cases (one member of a state media authority is uncertain about this). Very rarely KJM has decided that FSF has acted beyond its discretionary power. The report of the KJM of April 2005[161] contains just one case in which KJM overruled FSF: a program on plastic surgery. This case evoked a debate in public as well. The broadcaster moved for a preliminary injunction and the court at first instance ruled partly in favour of the broadcaster. However, the appeal court decided that the program is likely to impair the development of children.

Differences can be observed with regard to the number of complaints: While some members of the state media authorities and of FSF state that there are less complaints compared with the former system, KJM and members of one state media authority observe an increase in complaints. An expert from a state ministry is uncertain about this.Complaints play an important role: According to the report of the KJM of April 2005, 80 % of the cases examined by KJM were initiated by complaints.

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160 .Freiwillige Selbstkontrolle Fernsehen e.V., FSF-Jahresbericht 2004, pp. 85+ available from http://www.fsf.de/fsf2/ueber_uns/bild/download/FSF_Jahresbericht2004_druck.pdf

161 See p. 81 of the report,

#### 4.2.2.4. Germany: **Protection of minors in movies**

*Model: Minors-external-classification(-org)*

*Number of analysed questionnaires: 6*

Without exception, the experts rate the film rating system in Germany positively. All experts agree that the system is widely accepted. One reason for this can be seen in the pluralistic composition of FSK. It is also stressed that the system is economically reasonable for both industry and the state. Almost no disadvantages are seen (apart from a high workload for FSK, which was mentioned by one expert). Clarity of rules and transparency of the system are highlighted. The same goes for fair procedural guarantees (applicant's right to be heard, three instances, publication of decisions). One expert highlighted the fact that there have been no lawsuits against FSK decisions since FSK was founded in 1949.

As state authorities have never diverged from FSK decisions in practice (which they could do in theory) there are strong incentives for industry participation. Therefore this is high (over 83 %). However, one expert points out that the state authorities that are responsible for the protection of minors can request a second examination of a film by FSK. In this case, a so-called „Appellationsausschuss" of FSK decides on the rating of a film. According to this expert, this happens about two times a year. In a lot of cases, the former decision is upheld.

According to members of FSK it very seldom occurs that films are rated in a way that could lead to the risk of minors being exposed to material which might be harmful to them. Experts from the state side estimate this happens from time to time. Another expert answers that this happens seldom.

Statements differ when it comes to the question of whether the fact that the state nominates members of FSK has a significant influence on FSK decisions. However, most of the experts agree that such an influence exists. All experts judge the participation of the state as positive.

It is worth mentioning that all experts are uncertain about the amount of films that are shown which are not in accordance with FSK ratings.

#### 4.2.2.5. Germany: **Protection of minors in internet service**

*Model: Minors-internal-classification-with-external-non-state-ex-post-enforcement(-org)*

*Number of analysed questionnaires: 7*

In addition to the seven expert questionnaires a report on the system by the KJM[162] and the annual report of FSM[163] – but no independent evaluation so far – were available for conduct-

[162] „Erster Bericht der Kommission für Jugendmedienschutz (KJM) über die Durchführung der Bestimmungen des Staatsvertrags über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien – April 2005" – the report has not been published yet., In its report of April 2005, KJM stated that it examined 118 cases from April 2003 to April 2005. In 79 cases it came to the conclusion that minor protection law provisions had been infringed. In most of these cases, pornography or right-wing extremist content had

ing the assessment. However, an impact assessment of the co-regulatory system in the Internet sector is hampered by the fact that the self-regulatory body FSM only gained its certification in October 2005. Therefore there is less experience so far with the co-regulatory system in place.

All experts agree however, that the system is more effective than the former one, which was mainly based on pure state regulation (although, for a provider, to adhere to a self-regulatory body provided for supension from the obligation to set up an internal appointee for the protection of minors.) Fair procedural guarantees are in place according to the experts.

Almost all experts also agree that the system is not transparent for the public (one expert is uncertain about this). Some even doubt that it is transparent for those being subject to the regime. Additionally, they emphasize a lack of precise wording in the law. One expert suggests that sanctions imposed by state media authorities/KJM should be excluded if a provider trusts in a FSM decision even though FSM has acted beyond its discretionary power.

Members of the state regulatory bodies are uncertain if the available sanctions are effective and if the pace of problem solving is sufficient.

In theory, the system aims at handing over rule enforcement to a self-regulatory body. However, participation in the co-regulatory system is voluntary. If a provider is not affiliated with FSM, and is not willing to follow FSM's decisions, the state regulators control this provider and can impose sanctions.

The number of those providers affiliated with FSM is rather small compared with the number of German providers of online services. However, FSM stresses that its members are the important players and they also play a major role traffic-wise. All experts agree that there are not enough incentives for the industry to participate. A FSM representative points out that although the system has in theory the incentive for FSM-members to be „protected" from prosecution by the KJM, this incentive does not work because the KJM does not prosecute many breaches against non-FSM-members.

Almost all experts stress the fact that it took over two years to certify FSM. They agree that the communication between KJM and FSM regarding the details to do with the compliance with the legal requirements of the certification was difficult.

Members of the state regulators hint to the fact that there are no tiered provisions for sanctions against the self-control organisations. The only possible measure is to revoke the certification („very hard!").

Except for one expert, there is unanimity with regard to jugendschutz.net, an organisation founded by the state authorities responsible for the protection of minors, and entrusted with

been provided. In four cases content that was not pornographic but could impair children's development was provided without sufficient safeguards.

163 Freiwillige Selbstkontrolle Multimedia-Diensteanbieter, Jahresbericht 2004, availble from http://www.fsm.de/ inhalt.doc/FSM_Jahresbericht_2004.pdf

assisting KJM by monitoring Internet services. Both state regulators and FSM rate positively the legal obligation that when jugendschutz.net detects a breach of minor protection provisions they first inform the provider, and then FSM respectively if the provider is an affiliate. However, one expert states that most offenders ignore jugendschutz.net.

#### 4.2.2.6. Greece: **Advertising regulation in broadcasting**

*Model: Advertising-ex-post-enforcement(-not-reg)*

*Number of analysed questionnaires: 4*

It should be noted that there were four experts who answered the questionnaire regarding the chosen Greek system. The answers were given by SEE, the regulator NCRTV and two external experts (scientists); questionnaires from the industry have not yet arrived.

The evaluation of the answers leads to a differentiated – and partly contradictory – evaluation of the system by the experts involved in the system. Many questions concerning the appraisal of the efficiency of the system and the existence of fair trial procedures were answered contrarily: in the main the representative of the SEE gave a rather positive assessment; the representative of the regulator tended to a rather negative assessment of certain aspects.

The SEE representative and the external expert agreed about the advantage of industry involvement. The SEE representative named additional aspects such as efficiency, pace of decision-making, transparency and the daily monitoring of TV advertisements. The experts assessed weaknesses of the systems differently. One external expert mentioned the non-participation of consumer groups and state bodies. The SEE representative highlighted among other weaknesses the public's lack of knowledge of the system. The NCRTV representative noted among other things the absence of a procedure of public hearings for any interested persons. Instead, the external experts and the SEE representative mention the existence of fair trial procedures like hearings and complaint procedures. Those experts assess the existing procedural guarantees as sufficient. The majority of experts agree that there are sufficient safeguards to ensure compliance.

The performance is judged as satisfactory: All experts agree that infringements of the Code's rules happen never, seldom or from time-to-time. The state regulator NCRTV supervises the system and may overrule decisions, which – based on SEE's answer (the other experts were uncertain) – does not seem to happen.

But, there are inconsistent answers concerning appraisal of sanctions exist: One external expert and SEE representative assess sanctions as effective, proportionate and deterrent. The other external expert and NCRTV's representative were unsure concerning these points. (though not an linchpin of the system because according to SEE's answer there are no moral sanctions imposed by SEE (the other experts were uncertain).

All in all, the system is marked by an uncertainness. E.g., contradicting answers concerning the appraisal of transparency of the system (SEE's expert negates this, one external expert

approves, the others are uncertain) or sustainability of the system (one expert agrees, one negates and two are uncertain).

#### 4.2.2.7. Netherlands: **Protection of minors**

*Model: Minors-internal-classification-with-external-non-state-ex-post-enforcement(-org)*

*Number of analysed questionnaires: 11*

From the evaluation of the answers one can assume that NICAM is a highly reflective system internalized by the actors. Experts across all relevant groups of actors agree to a high extent on the way the NICAM system functions. This is in line with the national evaluation by the Commissariaat voor de Media and – based on external assessment – by the Dutch Government which state that the NICAM system provides for a good basis for regulation and supervision.[164] Even where weaknesses are seen – such as the need for more incentives for non-broadcasting industry – most of the experts agree on their nature. This is especially true for process objectives referred to in the general part. Only one expert sees weaknesses in transparency and proportionality. No expert sees the pace of the decision making process as inadaequate. Furthermore the system is consonantly seen as sustainable and adaequatly evaluated. Disagreement is to be observed over the question whether the sanctions within the system are sufficiently deterrent.

Judging by the experts' answers, the performance of the NICAM system is generally high. This is true for both the outcome of avoiding in general the accessibility of content unsuitable for minors and for the consistency of rating.

For the acceptance of the system there is data from a research published in 2003 which shows that 77% of the parents use the advice of „Kijkwijzer" under the NICAM system.[165] However, national evaluation reports as well as some experts state that the age categories might be finer.[166] From the answers one can learn that the system works differently for different media. While for broadcasting and film, according to all experts, potentially harmful content is seldom (or even less often) exposed to minors, some experts are not so positive about video content. The same seems to be true for self-classification, which is a core feature of this kind of model. Broadcasting seems to create the most incentives for industry to participate since the legal link is strong (in fact obligatory). Some experts opt for more incentives for other parts of the industry as well (e.g. regarding the retail branch). Where mentioned, the cross-media approach of NICAM is appreciated.

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164 Commissariaat voor de Media, 2002; Meningen van ouders over Kijkwijzer, Intomart, 2003; Wizer Kijken, Committee Youth, Violence and Media 2005.

165 Meningen van ouders over Kijkwijzer, Intomart, 2003; only about 50% of US-amercan partents have once made use V-Chip TV-ratings in the USA, Henry J. Kaiser Family FoundationParents, Media and Public Policy

166 Wizer Kijken, Committee Youth, Violence and Media 2005.

Overall NICAM is seen as a co-regulatory system created by the state with strengths and weaknesses inherent in that. However, at this point there are disagreements between the experts to be observed. While some regard this as problem for the allocation of responsibility and the flexibility of the system, others see a high degree of industry commitment nevertheless. National evaluation in this respect suggests including more independent representatives in the board of NICAM.[167] An often-mentioned weakness is that the system focuses on harmfulness rather than suitability. Again, this corresponds with evaluation done on national level.[168] The certification of a self-regulatory body, which is a feature of the model, is not being criticied by the experts; however this concept seems to profit by an incentive for the industry to co-operate as given in the case of broadcasting.

#### 4.2.2.8. Netherlands: **Advertising regulation in broadcasting**

*Model: Advertising-ex-post-enforcement(-not-reg)*

*Number of analysed questionnaires: 5*

It is noteworthy that the number of returned questionnaires is rather low considering that three experts from different institutions submitted identical answers. Regarding the general considerations the support for the system seems to be relatively high. According to only one of the experts the incentives for the industry to participate are not high enough. The same spread is to be observed for the issue of sanctions being proportionate and the transparency and sustainability of the system. This is in line with the assessment of the Dutch Minister of Justice who saw in face of some controversial cases dealt with by the Assossiation no reason to adapt the system.[169] However, only one expert asserts that the sanctions within the system are a sufficiently high deterrent. It should be mentioned that the answers of the expert with the dissenting assessment mostly refer to advertising for alcoholic beverages and, therefore, do not affect the system as a whole. However, that the national union of independent liquor stores are not bound by the code might point to a general weakness.

Asked for assessing the specific performance – that is the quota of content published which does not comply with the code - the experts state that it is often or at least from time to time. However, four of the five experts regard that as being sufficient for the system to work properly. Consequently the same picture is to be seen for the necessity of more state intervention; the expert with a dissenting view opts for that while the others see more benefit in industry taken over responsibility.

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[167] See NICAM Annual report 2004; the suggestions for improvement mentioned there are a result of a critical debate provoked by an article written by Jan Kuitenbrouwer on 10th January 2004 in Volkskrant.

[168] Wizer Kijken, Committee Youth, Violence and Media 2005.

[169] Questions Parliament and Answers Aanhangsel Handelingen II 2004/2005 Nr. 1702 SDU.

#### 4.2.2.9. Portugal: **Broadcasting protocol (including advertising rules)**

*Model: Advertising-without-enforcement(-code)*

*Number of analysed questionnaires: 5*

The basis for the analysis is just five questionnaires but from various actors, thus they form an adaequate basis for assessment. However, there is no evaluation report available for the public since the system has only been established rather recently. Evaluation is complicated by the fact that the protocol does not only serve different policy objectives but also has a specific role in balancing the sphere of activity of public service broadcasters and private broadcasters especially as regards financing.

Only one expert is opposed to the assumption that the incentives for the broadcasters to participate are sufficiently high. For the other process objectives the picture is divided. However, the metioned strengths and weaknesses mainly reflect the different interests of the respective experts within the system. Three out of five experts state the system lacks transparency and openness, the majority is uncertain about its sustainabilty.

On the appropriateness of the protocol the views of the experts are devided. However, they largely applaud the governments' participation and regard the power of ICS as sufficient and as are the obligations to be fulfilled by the private braodcasters.

Apart from one expert all agree that more legal intervention would not be beneficial especially because the system in place involves negotiation and therefore more flexibility than legal enforcement.

#### 4.2.2.10. Slovenia: **Protection of minors in broadcasting**

*Model: Minors-internal-classification-wothout-non-state-ex-post-enforcement(-code)*

*Number of analysed questionnaires: 3*

It should be noted that only three experts answered regarding this model, one of whom only filled in the specific part. Therefore, the basis for evaluation is rather small, but the system is assessed because one external and one internal expert answered the questionnaires. Furthermore there has been no independent evaluation or any assessment made by the involved parties so far.

In answering the questions on the process-related objectives, the independent and state-related expert takes a rather negative view. The assessment of incentives in place, openness and safeguards are negative. Regarding the weaknesses the independent expert states:

„No unified criteria for defining violent and pornographic programming (no consideration of pornography as a genre as opposed to sexual scenes in other genres, the same is true for violence: slasher films as opposed to violent scenes in war and crime films); inconsistencies in the text of the Agreement. It is not clear when (in what time frame) pornography and violent programming is allowed."

According to this expert the discourse of the Agreement is ambivalent because of its divergence with the Zakon o medijih (art. 84/1 & 84/3) and its official authentic interpretation: it is obvious to this expert that the ambivalences of the Agreement are intentional and are functional for the broadcasters. The possible divergence has been subject of public debates.[170]

Regarding the specific performance indicators there is no consistent picture. While one expert states that incorrect programming happens extremely seldom, the other hold that is very often or often. However, they agree that the monitoring of the system is generally insufficient, which is a crucial criterion for this model of co-regulation.

According to one expert a redraft of the legal basis is necessary and already envisaged. However, in another expert's view amendments of the law are not likely to change things for the better.

#### 4.2.2.11. Slovenia: **Advertising regulation**

*Model: Advertising-ex-post-enforcement(-not-reg)*

*Number of analysed questionnaires: 2*

It is important to note that there were only two experts answering regarding this model. Therefore the basis for evaluation is rather small. There is no evaluation report available.

Regarding the process objectives that are the subject of the general part of the questionnaire, the assessment of the experts is overall rather positive. One gets the impression that the system is accepted but needs some improvement to run smoothly. There are, according to both experts, sufficient guarantees established to implement the regulation. However, both experts identify weaknesses when it comes to industry participation. One expert mentions the absence of involvement of the civil society. The desire to participate has been stated, but currently there is only the chance to participate as regards enforcement. Both experts agree that the system is not open enough to cater for the entry of newcomers. When it comes to transparency the opinions are divided.

With regard to the system-specific performance indicators, the experts judge that publishing of advertisements that are not in line with regulations occurs from „time to time" or even „often". However, this does not seem to influence the generally affirmative attitude to the systems' performance. The frequency of the Market Inspector following the Chamber's opinion is moderate to high – thus at this lynchpin of the system there are no obstacles identified by the experts.

Both experts obviously believe that there is no adequate alternative solution to such a model for advertising regulation, given the need to adjust to changing styles of advertising and the benefit of maintaining advertising ethics. Therefore, a shift to more state regulation is not seen as a way to improve the regulation.

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[170] See Media Watch journal March, October 2003 and March/April 2004.

#### 4.2.2.12. United Kingdom: **Advertising regulation**

*Model: Advertising-ex-post-enforcement(-code)*

*Number of analysed questionnaires: 9*

The experts' views on the system are rather consistent, which indicates the system is being internalised within the policy field. However, one independent expert obviously has a critical attitude towards the approach as such and, therefore, grades the system lower both in general and specific performance aspects. There has been no independent evaluation so far, Government's and regulators' reports contain general descriptions.[171]

Even when including the critical expert's opinion, the systems are consonantly seen as efficient and fast. Apart from the critical expert there is – notwithstanding weaknesses in detail – agreement on the system fulfilling the relevant process objectives such as openness and sustainability. However, for two of the experts sufficient transparency is lacking.

The system is largely seen as one to establish accountability of industry, based on extensive tradition in this field. However, depending on the respective point of view, the strengths of such an approach, for instance the speed of decision-making or the potential weaknesses such as the state „passing the buck" or the lack of sanctions are put forward. There seems to be agreement on the assumption that avoiding more state influence is an incentive to co-operate with the system: No expert rejects the assumption that the incentives for the industry to participate are sufficient.

Concerning the performance in detail the experts assume that advertisements not in line with the regulation are published seldom, from time to time or often (one expert). However, since the experts regard this as sufficient (only two are uncertain about that) we believe that the British experts see performance of advertising regulation as a function of the pace of decision and the effectiveness of enforcement. Overall, the system pertaining to the advertising-code-enforcement models sufficiently enforces the code according to the experts' views. In over 75 % of the cases (lowest assessment) or more ASA(B) meets the evaluation benchmarks. Consyequently, only one expert demands more state intervention within this field.

Additionally, there are hints pointing to where the system might be improved: such as that BACC and RACC (the TV and radio clearance bodies) are now separate from BCAP in terms of organisation and funding. Based on the recent change of regulation some experts state the view that the new structure brings broadcast and non-broadcast advertising within the remit of one regulator, which might improve consistency. It might be worth noting that one expert indicated that the system is more established in the advertising industry than in the media branch.

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[171] Ofcom, Ofcom Annual Report 2004/2005, available from http://www.ofcom.org.uk/about/accoun/reports_plans/annrep0405/0405b.pdf; ASA/CAP, The Annual Statement of the Advertising Standards Authority, Committee of Advertising Practice and Broadcast Committee of Advertising Practice, available from http://www.asa.org.uk/NR/rdonlyres/9AD11230-7CAA-4A53-B110-F8B4112704EC/0/Annual_Statement_20052006.pdf.

#### 4.2.2.13. United Kingdom: **Protection of minors in mobile services**

*Model: Minors-internal-classification-with-external-non-state-ex-post-enforcement(-code)*

*Number of analysed questionnaires: 2*

It has to be mentioned that for the evaluation of this system the statements of only one expert belonging to the state regulator and one from the self-regulatory body could be used. Therefore, the basis for assessment is rather limited. In December 2004 Ofcom issued a report on the regulation of premium rate services which offered additional data for this assessment.[172]

Both experts assume that the system fulfils the relevant process objectives. However both also agree that it is too early to judge whether there are enough incentives for the industry to participate and whether the implementation will be sufficiently effective.

When it comes to the complaint system (non-sate regulator IMCB has the function of investigating complaints about misclassification; however, complaints in the first instance should be made to the mobile operators) the member of Ofcom is uncertain whether this system is effective and appropriate. The members of IMCB estimate this system as effective and apporiate.

Regarding existing incentives the expert from the state regulators' side has a discriminatory view: Non-state-regulation of PRS is in his opinion largely voluntary. However, according to its answer Ofcom has stated that it may look to extend to the statutory regulation where it feels that the voluntary arrangements are ineffective. In relation to PRS, the expert assumes that incentives are generally sufficient, through Ofcom's PRS condition, which gives Ofcom the power to fine networks for non-compliance with ICSTIS directions. Furthermore, the expert from the state regulator is uncertain about the openness of the system. The Ofcom report on the regulation of premium rate services states with regard to ICSTIS that Ofcom does not believe that it is necessary at this stage to alter the current co-regulatory approach. There are several recommendations given to improve the system. As one key reason for current problems with the smothrunninmg of the system the growth of the telecommunications market – partly triggered by the changes of the regulatory regime for telecommunications as a whole – is refer to.[173]

The picture given for the general part is true for the system-specific answers as well. While the expert from the non-state-regulatory body shows a positive attitude to the performance, the other expert states that the answers to this set of questions are currently uncertain. However, there is no negative judgment for any of the performance indicators. The question whether there are sufficient safeguards to guarantee compliance with the code is answered affirmatively by both experts, which is important for this code-based model of co-regulation. Therefore neither expert sees grounds to involve more legal rules at this stage which is in line with Ofcom's official postion as shown above.

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172 Ofcom, The Regulation of Premium Rate Services, 2004.

173 Ofcom, The Regulation of Premium Rate Services, 1.15 and 1.19, 2004.

# 5. IMPLEMENTATION

One main task of this study is to show whether there is a potential for and restriction to implementing Eurpean directives into national law by allowing for or establishing co-rergulatory system. Therefore, legal restrictions have to be evaluated.

## 5.1. Co-regulation under the European Convention on Human Rights

The European Convention on Human Rights does not only constitute binding law for the states parties to the convention but is by virtue of art. 6 para. 2 EUC part of Eurpean Community Law as well.[174] Under Arts. 1-18 ECHR civil liberties are granted to the citizens of the convention states. In regard to media, the right of respect for private and family life (art. 8 ECHR) is of major importance. The fundamental rights are supplemented by procedural guarantees. Art. 6 ECHR grants a right to a fair trial and art. 13 a right to an effective remedy. While art. 6 is focussed on court procedures in regard to the rights guaranteed, art. 13 obliges the convention states to implement effective means under their national regulation to deal with cases of violations of basic freedoms. However, art. 13 ECHR is seen as an accessory right a violation of which can only be claimed in connection with the violation of basic liberties or of one of the protocols.[175]

Under art. 13 ECHR convention states are obliged to provide an „adequate remedy".[176] The national body granting the remedy might be a court; however, this is not mandatory under the ECHR.[177] According to the European Court of Human Rights an administrative body or a government agency as well as a parliamentary body[178] or a commission[179] may decide on remedies. However, the body has to be an independent and impartial one.[180]

Furthermore, the national body must be empowered to make binding decisions and must not be restricted to the publishing of recommendations.[181] There has to be a sufficient competence to control and to make decisons.[182]

As regards the procedure the person affected must have the opportunity to receive satisfaction without delay.[183] The barrier of admission must not be so high that there is no real control of

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174 ECJ 29/69 OJ 1969, pp. 419, 425.

175 Mark E. Willinger, Handbuch der Europäischen Menschenrechtskonvention (EMRK), 1993, para. 624.

176 ECHR, 19.2.1998, KAYA RJD 1998-I, para. 106.

177 ECHR, 21.2.1975 Golder, Serie A 18; ECHR, 25.3.1983, Silver et al., Serie A 61.

178 Cf. Christoph Grabenwarter, Europäische Menschenrechtskonvention, 2005, p. 355, para. 173.

179 Cf. Jens Meyer-Ladewig, Konvention zum Schutz der Menschenrechte und Grundfreiheiten, Handkommentar, 2003, S. 192, para. 15.

180 ECHR, 25.3. 1993, Silver u.a., Serie A 61; ECHR, 12.5.2000, Kahn, *RJD* 2000/V, para. 44+.

181 Christoph Grabenwarter, Europäische Menschenrechtskonvention, 2005, p. 356, para. 174.

182 ECHR, 26.3.1987, Leander, Serie A, para. 77.

183 Cf. Christoph Grabenwarter, Europäische Menschenrechtskonvention, 2005, p. 356, para. 176.

breaches of the ECHR. Therefore, it is not sufficient for an appealing body to refrain from substantial control because of a scope of discretion for the administrative body deciding the case; there has to be scrutiny of whether the decision was proportionate and justified.[184]

Regarding the case „Peck v the United Kingdom“ in 2003 the European Court of Human Rights had to decide on the question whether co-regulatory bodies are sufficient to meet the right to an effective remedy under art. 13 ECHR.

Regarding art. 13 ECHR the Court states:

- The Court notes that the Government submitted that the proceedings before these commissions provided the applicant with an opportunity to assert and vindicate his rights. However, they accepted that those bodies were not „intended to provide a legal remedy, in the sense of making pecuniary compensation available to an aggrieved individual who may have been injured by an infringement of the relevant codes.“[185]
- The Court finds that the lack of legal power of the commissions to award damages to the applicant means that those bodies could not provide an effective remedy to him. It notes that the ITC's power to impose a fine on the relevant television company does not amount to an award of damages to the applicant. While the applicant was aware of the Council's disclosures prior to the *Yellow Advertiser* article of February 1996 and the BBC broadcasts, neither the BSC nor the PCC had the power to prevent such publications or broadcasts.[186]

Consequently, art. 13 ECHR is of major relevance ti co-regulatory systems within the media sector. However, this is restricted to co-regulatory models, which are designed to protect rights which are granted by the ECHR. As far as we can see this is not the case with the co-regulatory systems assessed in chapter 4 of this study. This assumption is based on the decisions of the European Court of Human Rights; it is not implausible to assume that there might be an obligation for convention states based on art. 8 ECHR to the effect that the convention states have to establish adequate means to protect minors. However, as far as we can see such a doctrine has not yet been established. Even assuming that there is such an obligation for convention states it is unlikely that it constitutes individual rights. However, co-regulatory systems which aim to protect such rights – to take an example to protect individuals against press violation of privacy – have to be constructed in accordance with the above mentioned requirements.

184 ECHR, III. Sect., 2.10.2001, Hatton et al., 36022/97, para. 115.

185 ECHR, 28.1.2003, Peck, no. 44647/98, para. 108.

186 ECHR, 28.1.2003, Peck, no. 44647/98, para. 109.

## 5.2. Co-Regulation within the European Union Law

When it comes to the implementation of models of Co-Regulation it has to be ensured that these models are in line with the provisions of the European Union Law.

### 5.2.1. Principle - Freedom to choose form, method and national authority

According to art. 249 III EC a directive is binding as to the result to be achieved upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods[187]. Because directives are instruments which only define the legal framework and the objectives to be achieved[188] and the Member States are in principle free to decide about the national implementation, there is an ample choice of different regulatory concepts and instruments.

#### 5.2.1.1. Freedom to choose form

The Member States have the freedom to choose the form of the directive's transposition into national law. In this connection it is the consistent practice of the European Court of Justice that the transposition of a directive into national law does not necessarily require its provisions to be formally incorporated verbatim in express, specific legislation.[189] It derives from that provision that the implementation of a directive does not necessarily require legislative action in each Member State.[190] In addition to that, transposing a directive into national law does not necessarily require the provisions of the directive to be enacted in precisely the same words.[191] Therefore the Member States have the freedom to choose the wording of the national

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187 ECJ, 163/82, para. 9; 14/83, para. 15; C-298/89, para. 16; C-10/95, para. 29; C-233/00, para. 76; C-296/01, para. 55; ECJ, *EuZW* 2001, p. 437 (438); Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 43, 46; Rudolf Geiger, EUV/EGV, Art. 249 EGV, para. 9+; Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 133, 152; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hetmeier, Art. 249 EGV, para. 9; Jürgen Schwarze (ed.), EU-Kommentar, Biervert, Art. 249 EGV, para. 23, 28; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Schmidt, Art. 249 EGV, para. 38+.

188 COM (2003) 784 final, p. 26.

189 ECJ, 29/84, para. 23; 247/85, para. 9; 363/85, para. 7; 131/88, para. 6; 361/88, para. 15; C-59/89, para. 18; C-433/93, para. 18; C-96/95, para. 35, 40; C-217/97, para. 31; C-392/99, para. 80; C-233/00, para. 76; C-296/01, para. 55; C-58/02, para. 26; ECJ, *EuZW* 2001, 437 (438); Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 51; Rudolf Geiger, EUV/EGV, Art. 249 EGV, para. 9; Jürgen Schwarze (ed.), EU-Kommentar, Biervert, Art. 249 EGV, para. 28; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Schmidt, Art. 249 EGV, para. 40.

190 ECJ, 29/84, para. 16, 23; C-365/93, para. 9; C-144/99, para. 17; C-233/00, para. 76; C-296/01, para. 2; ECJ, *EuZW* 2001, p. 437 (438); Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 51; Rudolf Geiger, EUV/EGV, Art. 249 EGV, para. 9.

191 ECJ, 29/84, para. 23; C-96/95, para. 40; Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 51; Rudolf Geiger, EUV/EGV, Art. 249 EGV, para. 9; Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 140; Jürgen Schwarze (ed.), EU-Kommentar,

law as long as the content of the national provision corresponds with the content of the relating directive.[192]

Even a general legal framework may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.[193]

#### 5.2.1.2. Freedom to choose method

Besides the freedom to choose the form, the Member States also have discretionary power to choose the methods for transposing a directive into national law.

According to art. 249 III EC the Member States are free to choose the ways and means of ensuring that the directive is implemented.[194] Since under art. 249 III EC a directive is binding as to the result to be achieved upon each Member State to which it is addressed, it leaves to the national authorities the choice of methods.[195] Thus the national authorities can choose the economic and socioeconomic methods according to which they prefer to transform the certain directive into national provisions.[196] Thus it is left to the Member States to follow political and legal traditions and cultures when transposing directives into national law.[197]

Particularly with regard to the Media Sector the questions relating to media content are, by their very nature, mainly national, given their direct and close link to the cultural, social and democratic needs of a given society.[198] In accordance with the principle of subsidiarity, regulation of content is thus mainly the responsibility of the Member States.[199]

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Biervert, Art. 249 EGV, para. 28; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Schmidt, Art. 249, para. 40.

192 Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249, para. 140.

193 ECJ, 29/84, para. 23; 247/85, para. 9; 363/85, para. 7; 131/88, para. 6; 361/88, para. 15; C-59/89, para. 18; C-433/93, para. 18; C-96/95, para. 35; C-217/97, para. 31; C-392/99, para. 80; C-233/00, para. 76; C-296/01, para. 55; C-58/02, para. 26; ECJ, *EuZW* 2001, 437 (438); Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 51; Rudolf Geiger, EUV/EGV, Art. 249 EGV, para. 9; Jürgen Schwarze (ed.), EU-Kommentar, Biervert, Art. 249 EGV, para. 28; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Schmidt, Art. 249 EGV, para. 40.

194 ECJ, 14/83, para. 15.

195 ECJ, 163/82, para. 9; 14/83, para. 15; C-298/89, para. 16; C-10/95, para. 29; C-233/00, para. 76; C-296/01, para. 55; Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 43, 46; Rudolf Geiger, EUV/EGV, Art. 249 EGV, para. 9+; Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 133, 152; Lenz/Borchard, EUV/EGV, Hetmeier, Art. 249 EGV, para. 9; Jürgen Schwarze (ed.), EU-Kommentar, Biervert, Art. 249 EGV, para. 23, 28; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Schmidt, Art. 249 EGV, para. 38+.

196 Jürgen Schwarze (ed.), EU-Kommentar, Biervert, Art. 249 EGV, para. 28.

197 Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249, para. 140.

198 COM (2002) 778 final, p. 40.

It has to be seen against this background that the Commission promotes greater use of different policy tools like Co-Regulatory mechanisms.[200] Those mechanisms at both national and Community level can therefore be a good example of application of the principle of subsidiarity.[201]

#### 5.2.1.3. National Authorities

According to art. 249 III EC a directive leaves the choice of form and methods to the national authorities.[202] On this account each Member State is free to delegate the powers to its domestic authorities as it considers fit[203] and to implement a directive by means of measures adopted by regional or local authorities[204].

With regard to the media sector national authorities could be ministries or also independent authorities.[205]

### 5.2.2. Limitation – Implementation has to fulfil certain criteria

However, the freedom to choose methods, form and national authority is limited[206] because the choice of form and methods can only operate in compliance with the stipulations and prohibitions in Community law. Therefore the implementation of a directive has at least to fulfil the following criteria.

#### 5.2.2.1. Specific provisions of a directive

National authorities in the Member States are only free to choose form and method of implementation as far as the directive does not make specific provisions.[207] Therefore the national

199 COM (2001) 9 final, p. 14; COM (2002) 778 final, p. 40.

200 COM (2001) 428 final, p. 5; COM (2002) 278 final, p. 13 +.

201 COM (1999) 657 final, p. 13.

202 ECJ, 163/82, para. 9; 14/83, para. 15; C-298/89, para. 16; C-10/95, para. 29; C-233/00, para. 76; C-296/01, para. 55; ECJ, *EuZW* 2001, p. 437 (438); Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 43, 46; Rudolf Geiger, EUV/EGV, Art. 249 EGV, para. 9+; Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 133, 152; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hetmeier, Art. 249 EGV, para. 9; Jürgen Schwarze (ed.), EU-Kommentar, Biervert, Art. 249 EGV, para. 23, 28; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Schmidt, Art. 249 EGV, para. 38+.

203 ECJ, C-96/81, para. 12.

204 ECJ, C-96/81, para. 12.

205 COM (1997) 523 final, p. 3; (2001) 9 final, p. 16; COM (2002) 778 final, pp. 8, 13.

206 Jürgen Schwarze (ed.), EU-Kommentar, Biervert, Art. 249 EGV, para. 28.

207 Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 133, 140, 152.

authorities always have to ensure that the transposition of a directive into domestic law corresponds with the specificity of the directive.[208]

In this regard the transposition of a numeric standard in an uncertain legal concept is, to take an example, not allowed.[209]

Against this background a transposition in precisely the same words is always the safest way for transposing a directive.[210]

#### 5.2.2.2. Full application in a clear and precise manner

According to the case-law of the European Court of Justice, the transposition of a directive into domestic law has to guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, a basis for a claim before the national courts is provided.[211] Only the proper transposition of the directive will bring the state of uncertainty to an end and it is only upon that transposition that the legal certainty – which must exist if individuals are to be required to assert their rights – is created.[212] So only a complete, clear and precise transposition creates certainty of the law.[213] In specific cases it could be necessary to transpose a directive in a complete, sufficiently clear and precise manner to enact the directive – apart from the principle of freedom to choose form – in precisely the same words.[214]

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208 Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 140.

209 Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 140.

210 Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 140.

211 ECJ, 29/84, para. 23, 28; 247/85, para. 9; 252/85, para. 5; 262/85, para. 9; 363/85, para. 7; 116/86, para. 21; 339/87, para. 6+; 360/87, para. 11+; 131/88, para. 6; 361/88, para. 15+, 24; C-58/89, para. 13; C-59/89, para. 18; C-190/90, para. 17; C-208/90, para. 18+; C-365/93, para. 9; C-433/93, para. 17+; C-365/93, para. 9; C-221/94, para. 22; C-96/95, para. 35; C-217/97, para. 32; C-38/99, para. 53; C-144/99, para. 17; C-417/99, para. 38; C-478/99, para. 18; C-429/01, para. 40, 83; ECJ, *EuZW* 2001, p. 437 (438); ECJ, *NJW* 2001, p. 2244; ECJ, *EuZW* 2002, p. (465) 466; Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 48+; Rudolf Geiger, EUV/EGV, Art. 249 EGV, para. 9; Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 140; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hetmeier, Art. 249 EGV, para. 9+; Jürgen Schwarze (ed.), EU-Kommentar, Biervert, Art. 249 EGV, para. 28; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Schmidt, Art. 249 EGV, para. 40.

212 ECJ, C-208/90, para. 21+; Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 58.

213 ECJ, C-144/99, para. 21; ECJ, *EuZW* 2001, p. 437 (438); Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 47; Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 140.

214 Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hetmeier, Art. 249 EGV, para. 10.

In addition to that, the Member States have to choose such form and method of transposition that the general public is definitely able to take notice of the relevant provisions.[215]

However, the European Court of Justice has held that it is not mandatory for a Member State to transform the annex of a directive directly into national law but completely into the preparatory work for the national law implementing the Directive, provided those affected by it are able to take notice of its provisions.[216]

#### 5.2.2.3. Effectiveness

The freedom to choose form and method does not affect the obligation imposed on all Member States to which a directive is addressed, to adopt, in their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues.[217] Therefore the Member States are obliged to choose, within the scope of the freedom left to them by art. 249 III EC, the most appropriate forms and methods to ensure the effective functioning („effet utile") of the directives, taking account of their aims.[218]

This obligation to ensure the full effectiveness of the directive, in accordance with its objective, also means that the Member States are obliged to adopt transposing measures where they consider their national provisions more effective than the Community provisions with regard to ensure that the objective pursued by the directive is achieved.[219]

##### *5.2.2.3.1. Binding character*

The Member States have also the obligation to give effect to the provisions of the directive by means of national provisions of a binding nature.[220]

It is true that each Member State is free to delegate powers to its domestic authorities as it considers fit and to implement the directive by regional or local authorities. That does not however release it from the obligation to give effect to the provisions of the directive by means of national provisions of a binding nature.[221] On the contrary, in constant jurisprudence

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215 ECJ, C-478/99, para. 22; ECJ, *EuZW* 2002, p. 465 (466).

216 ECJ, C-478/99, para. 22; ECJ, *EuZW* 2002, p. 465 (465+).

217 ECJ, 14/83, para. 15; C-336/97, para. 19; C-478/99, para. 15; C-97/00, para. 9; ECJ, *EuZW* 2002, p. 465 (466).

218 ECJ, 48/75, para. 73; 14/83, para. 15; C-54/96, para. 43; C-233/00, para. 76; C-296/01, para. 55; ECJ, *NJW* 1976, p. 2065; ECJ, *EuZW* 2001, p. 437 (438); Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 39; Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 152; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hetmeier, Art. 249 EGV, para. 9; Jürgen Schwarze (ed.), EU-Kommentar, Biervert, Art. 249 EGV, para. 27+; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Schmidt, Art. 249 EGV, para. 39+.

219 ECJ, C-194/01, para. 39.

220 ECJ, 96/81, para. 12; C-59/89, para. 34; ECJ, *EuZW* 2001, 437 (438).

221 ECJ, 96/81, para. 12; C-59/89, para. 34; ECJ, *EuZW* 2001, 437 (438).

the Court requires a transposition of a directive in binding external legal norm.[222] Because the Court has consistently held that in order to ensure that directives are fully applied in fact as well as in law, Member States must provide a binding legal framework in the field in question, by adopting rules of law capable of creating a situation which is sufficiently precise, clear and transparent to allow individuals to know their rights and rely on them before the national courts.[223] Thus the legal nature of the implementation shall further the objectives referred to above („clear and precise manner"). On this account a binding nature of provisions is also necessary to satisfy the requirements of legal certainty.[224]

In constant jurisprudence the Court rejects conformity with European Union law if directives are transposed in regulatory orders of the internal administration, at least if the directive is intended to create rights for individuals.[225] Whether a certain directive creates rights for individuals has to be determined by legal interpretation.[226] Administrative provisions only comply with the requirements of a binding transposition in national law if the evidence of their external effect is provided.[227]

It should be added in this respect that also mere administrative practices, which by their nature may be altered at the whim of the authorities, lacking appropriate publicity, cannot be regarded as a valid fulfilment of the obligation imposed by art. 249 III EC on Member States to which the directives are addressed.[228] In addition to that a Member State cannot discharge its obligations under a directive by means of a mere circular which can be also changed by the

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222 Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 55; Rudolf Geiger, EUV/EGV, Art. 249 EGV, para. 9; Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 141+

223 ECJ, 361/88, para. 24; C-220/94, para. 10; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hetmeier, Art. 249 EGV, para. 10.

224 ECJ, C-59/89, para. 34; C-80/92, para. 20; C-151/94, para. 18; C-296/01, para. 54; C-415/01, para. 21; ECJ, *EuZW* 2001, 437 (438).

225 ECJ, 361/88, para. 20; C-96/95, para. 38; Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 56; Rudolf Geiger, EUV/EGV, Art. 249 EGV, para. 9; Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 142; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hetmeier, Art. 249 EGV, para. 10; Jürgen Schwarze (ed.), EU-Kommentar, Biervert, Art. 249 EGV, para. 28.

226 Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 142.

227 ECJ, 361/88, para. 20; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hetmeier, Art. 249 EGV, para. 10.

228 ECJ, 102/79, para. 10+; 96/81, para. 12; 97/81, para. 12; 300/81, para. 10; 145/82, para. 10+; 160/82, para. 4; 29/84, para. 17; C-220/94, para. 10+; C-242/94, para. 6; C-96/95, para. 9; C-311/95, para. 7; C-83/97, para. 9; C-159/99, para. 32; C-354/99, para. 28; C-394/00, para. 11; C-75/01, para. 28; C-296/01, para. 2; ECJ, *EuZW* 2001, 437 (438); Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 55; Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 141; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hetmeier, Art. 249 EGV, para. 10; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Schmidt, Art. 249 EGV, para. 40.

administration at will.[229] Furthermore a draft regulation[230] or a basis of authorization is not capable of transposing a directive in national law.[231]

It also cannot be regarded as effecting a transposition of a directive if a national provision refers to a prescription, which is to be legislated at a later date.[232]

Moreover the European Court of Justice has held that a national judge cannot carry out the transposition of a directive into domestic law, because his or her sentence is only binding upon the two parties in the particular cause.[233] Also the non-application of contradictory national law by the judgments cannot be considered as a full, clear and precise transposition of a directive by the Member State.[234]

On the other hand a transposition of a directive into a municipal statute is basically capable of fulfilling the criteria of clarity, precision and binding nature.[235] Also, agreements between the state and private persons or organisations can constitute a valid transposition of European Union law in domestic law if they are sufficiently clear, precise and binding and the content of the directive is fully applied.[236]

#### *5.2.2.3.2. Sufficient safeguards to ensure the compliance with these rules*

Since each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the aims it pursues,[237] the Member States have to implement sufficient safeguards to ensure the compliance with these rules.

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229 ECJ, 160/82, para. 4; 239/85, para. 7; C-220/94, para. 10; C-96/95, para. 38; C-311/95, para. 7; C-354/99, para. 28; Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 141; Jürgen Schwarze (ed.), EU-Kommentar, Biervert, Art. 249 EGV, para. 28; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hetmeier, Art. 249 EGV, para. 10; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Schmidt, Art. 249 EGV, para. 40.

230 ECJ, C-221/94, para. 22; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Schmidt, Art. 249 EGV, para. 40.

231 ECJ, C-263/96, para. 26; Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 141; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hetmeier, Art. 249 EGV, para. 9.

232 ECJ, C-327/98, para. 26; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hetmeier, Art. 249 EGV, para. 9.

233 Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 141.

234 Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 141.

235 Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 54.

236 Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 52.

237 ECJ, 48/75, para. 69+; 14/83, para. 15; C-54/96, para. 43; C-336/97, para. 19; C-478/99, para. 15; C-97/00, para. 9; C-233/00, para. 75+; C-194/01, para. 38; C-296/01, para. 55; C-72/02, para. 18; ECJ, *NJW* 1976, p. 2065; ECJ, *EuZW* 2001, p. 437 (438); ECJ, *EuZW* 2002, p. (465) 466; Christian Calliess and Matthias Ruffert (eds.), EUV/EGV, Ruffert, Art. 249 EGV, para. 46; Eberhard Grabitz and Meinhard Hilf (eds.), EUV/EGV, Nettesheim, Art. 249 EGV, para. 152; Carl Otto Lenz and Klaus-Dieter Borchard (eds.),

That means where a Community directive does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, the Member States have to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and deterrent.[238]

The Member States are in principle free in regard to the choice of the particular sanctions.[239] In this context they can choose penal, administrative and other sanctions according to criminal and civil law or combinations of them.[240]

Particularly with regard to the Media Sector the Court holds that there is a clear division of obligations between the Member States from which programmes originate and those receiving them.[241] So the Court has confirmed the principle of control of broadcasters by only the Member State under whose jurisdiction they come (the transmitting State, i.e., the State where the broadcaster is established).[242] The receiving State's competence is basically limited to ascertaining that the programmes in question originate from another Member State.[243]

If there is a system with division of work between state and non-state regulation and the non-state-part does not cover all addressees of regulation which have to be governed according to the directive, there has to be state regulation for those addressees which do not join the non-state-regulatory system.

#### *5.2.2.3.3. Effective legal protection*

Following the principle of the national autonomy of proceeding, the Member States are generally free to lay down their national procedural law.[244] Therefore it is also left to the national legal system of each Member State to regulate the procedural rules governing the actions which are to ensure respect for the rights which individuals derive from a directive.[245]

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EUV/EGV, Hetmeier, Art. 249 EGV, para. 9; Jürgen Schwarze (ed.), EU-Kommentar, Biervert, Art. 249 EGV, para. 27+; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Schmidt, Art. 249 EGV, para. 39+.

238 ECJ, 68/88, para. 23+; C-7/90, para. 11; C-382/92, para. 55; C-383/92, para. 40; COM (2001) 3340, pp. 1+.

239 ECJ, 14/83, para. 14; Peter Rott, Effektiver Rechtsschutz vor missbräuchlichen AGB, *EuZW* 2003, p. 5 (8).

240 Peter Rott, op.cit., p. 5 (8).

241 ECJ, C-11/95, para. 34, 86; COM (2002) 778 final, p. 9.

242 ECJ, C-11/95, para. 34, 86; COM (1997) 523 final, pp. 9+, 14; COM (2002) 778 final, p. 9.

243 COM (2002) 778 final, p. 9.

244 Peter Rott, op.cit., p. 5.

245 ECJ, C-473/00, para. 28; ECJ, *EuZW* 1997, p. 538; ECJ, *EuZW* 2003, p. 27 (29); Peter Rott, op.cit., p. 5.

However, under the principle of effectiveness,[246] the conditions for the assertion from rights that derive from the Community Law may not be created more disadvantageous than similar claims under the national law.[247] In addition to that the national procedural rules and time limits may also not complicate the legal protection excessively[248] or make them impossible in practice.[249]

## 5.3. Co-Regulation under art. 49 EC

Incorporation of non-state regulation at both national can be – as demonstrated above – a good example of application of the principle of legislating only if necessary; however, that must not lead to fragmentation of the Internal Market.[250] In this context the Member States must not violate the freedom to provide services, which is guaranteed in art. 49 EC.

### 5.3.1. Meaning of art. 49 EC

The freedom to provide services under art. 49 EC is one of the basic freedoms under the EC.[251] It is closely connected with the objective to create an open single market.[252]

Therefore art. 49 EC focuses on the possibility of providers of services to offer the respective service without restrictions on markets in any Member State.[253]

### 5.3.2. Scope of art. 49 EC

Individuals and legal persons fall within the scope of art. 49 EC if they belong to one Member State and there are receivers of the service in another Member State.[254] Therefore the service must be transnational.[255] Not only traditional trades, craftsmanship and freelancing professions

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246 Peter Rott, op.cit., p. 5.

247 Peter Rott, op.cit., p. 5.

248 ECJ, *EuZW* 1996, p. 542; Peter Rott, op.cit., p. 5.

249 ECJ, 33/76, para. 5; Peter Rott, op.cit., p. 5.

250 COM (1999) 657 final, p. 13.

251 ECJ, 279/80, para. 17; 186/87, para. 15; C-222/95, para. 21; C-348/96, para. 16; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 3.

252 Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 46.

253 ECJ, 33/74; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 20.

254 Rudolf Geiger, EUV/EGV, Art. 49 EGV, para. 3; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 2; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 21+, 45+; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Tiedje/Troberg, Art. 49 EGV, para. 6, 9, 16+, 23.

255 Rudolf Geiger, EUV/EGV, Art. 49 EGV, para. 4; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 21, 44; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Tiedje/Troberg, Art. 49 EGV, para. 12.

are covered but also other activities from the tertian sector including broadcasting,[256] telecommunication[257] and other media services[258] regardless of the method of transmission or retransmission[259]. The other Member State need not be the primary target market for the art. 49 EC to be applicable.[260]

#### 5.3.2.1. Illegal restrictions

Art. 49 EC not only forbids open but also hidden or indirect acts of discrimination.[261]

While in case of open discrimination national rules explicitly differentiate by virtue of citizenship or place of origin,[262] indirect or hidden forms lead to the same result because they are based on criteria which typically apply to service providers from foreign origin or citizenship.[263]

Additionally according to settled case-law of the European Court of Justice art. 49 EC requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is likely to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services[264]; to use a short formula –

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256 ECJ, 155/73, para. 13; 52/79, para. 17; 262/81, para. 52, 79; 352/85, para. 16; C-23/93; C-384/93; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 15; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 62, Art. 50 EGV, para. 19+; Hans von der Groeben and Jürgen Schwarze (eds.), *EUV/EGV*, Tiedje/Troberg, Art. 49 EGV, para. 13.

257 ECJ, 202/88; C-271/90; C-281/90; C-289/90; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 10; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 53.

258 Hans von der Groeben and Jürgen Schwarze (eds.), *EUV/EGV*, Tiedje/Troberg, Art. 49 EGV, para. 4, 8.

259 ECJ, C-23/93, para. 15+; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 10; Hans von der Groeben and Jürgen Schwarze (eds.), *EUV/EGV*, Tiedje/Troberg, Art. 49 EGV, para. 13.

260 ECJ, 352/85, para. 16; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 14.

261 ECJ, C-17/00; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 21.

262 ECJ, 33/74, para. 27; 36/74, para. 34; C-283/99; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 63; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Tiedje/Troberg, Art. 49 EGV, para. 35.

263 ECJ, 63/82, para. 8; C-275/92, para. 55; C-355/98; C-263/99; C-131/01; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 63, 73+; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Tiedje/Troberg, Art. 49 EGV, para. 43.

264 ECJ, C-180/89; C-353/89, para. 15; C-76/90, para. 12; C-43/93, para. 14; C-272/94, para. 10; C-3/95, para. 25; C-222/95, para. 18; C-398/95, para. 16; C-266/96, para. 56; C-376/96, para. 33; C-58/98; C-264/99; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 22; Jürgen

if any national legislation has the effect of making the provision of services between Member Staates more difficult than the provision of services purely within one Menber State.

[265] Even double regulation by the state of origin and by the country where the service is offered restricts cross border delivery of service and might therefore constitute an infringement of art. 49 EC.[266] In effect art. 49 EC constitutes an extensive prohibition of restrictions of any kind.[267]

Therefore the rules that restrict the possibility of offering a service to individuals or companies that originate in the respective Member State violate art. 49 EC.[268] Furthermore the obligation to establish oneself in the respective Member State would constitute an infringement of art. 49 EC.[269]

Therefore any rules regulating the entry to a profession such as licensing requirements might constitute a restriction under art. 49 EC;[270] the requirement to be member of a professional association like a chamber of trade might be covered as well.[271]

Since broadcasting is a service as defined by art. 49 EC restrictions regarding content regulation have been challenged under art. 49 EC as well.[272] However, today the TWF establishes the country of origin principle and there forbids double regulation within its scope.[273]

#### 5.3.2.2. Justification of restrictions

If there is a case of discrimination or any kind of other restriction under a national regulation it might be justified[274]. Firstly a case of discrimination might be justified under art. 45 or 46

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Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 58; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Tiedje/Troberg, Art. 49 EGV, para. 32, 62.

265 ECJ, C-381/93, para. 17; C-118/96, para. 23; C-158/96, para. 33; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 22.

266 ECJ, C-76/90, para. 14; C-222/95, para. 31+; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 77.

267 Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 62.

268 ECJ, C-279/00; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 20; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 64.

269 ECJ, 33/74; 205/84, para. 52; 427/85; C-76/90,e para. 13; C-58/98, para. 34; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 20; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 68.

270 ECJ, C-76/90; C-390/99; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 22; Hans von der Groeben and Jürgen Schwarze (eds.), *EUV/EGV*, Tiedje/Troberg, Art. 49 EGV, para. 65.

271 ECJ, C-58/98, para. 33+; C-215/01, para. 34.

272 ECJ, 155/73; 52/79; 62/79; 262/81; 352/85, para. 16; C-288/89; C-353/89; C-36/95, para. 50; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 23.

273 ECJ, C-222/94; C-11/95; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 23.

EC in connection with art. 55 EC.[275] Secondly, the Member State is justified if the restrictions are applied in a non-discriminatory manner, if they are justified by imperative (but not economic[276] or administrative[277]) requirements in a general interest, if they are suitable for securing the attainment of the objective which they pursue and if they not go beyond what is necessary in order to attain.[278] The respective measure is not proportionate if the respective public policy is already served by regulations of the country of origin.[279]

There are some grounds of general interest which have been regarded as fit to justify restriction such as consumer protection[280] or professional ethics.[281] Furthermore, cultural diversity is acknowledged as a relevant general interest goal as well when it comes to broadcasting regulation.[282]

In general the objectives of the co-regulatory systems assessed within this study - protection of minors in rthe media as well as consumer protection - can be regraded as relevant general interests.

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274 ECJ, C-118/96, para. 25; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 83.

275 ECJ, 2/74, para. 54; 48/75, para. 29; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 63; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Tiedje/Troberg, Art. 49 EGV, para. 40.

276 ECJ, 352/85; C-398/95, para. 23; C-158/96, para. 41; C-422/01; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 94; Hans von der Groeben and Jürgen Schwarze (eds.), *EUV/EGV*, Tiedje/Troberg, Art. 49 EGV, para. 73.

277 ECJ, 205/84, para. 54; C-493/99; Hans von der Groeben and Jürgen Schwarze (eds.), *EUV/EGV*, Tiedje/Troberg, Art. 49 EGV, para. 73.

278 ECJ, 33/74, para. 12; 52/79, para. 10; 279/80, para. 13; 205/84; para. 31; C-76/90, para. 12; C-390/90; C-19/92, para. 32; C-484/93; C-55/94, para. 37; C-3/95, para. 28, 32+; C-118/96; C-376/96, para. 33; C-58/98, para. 39; C-215/01, para. 35; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 25; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 64, 94, 105; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Tiedje/Troberg, Art. 49 EGV, para. 69, 73+

279 ECJ, 279/80, para. 17; C-180/89, para. 17; C-198/89, para. 18; C-76/90, para. 15; C-43/93, para. 16; C-272/94, para. 11; C-3/95, para. 28; C-376/96, para. 34; C-58/98, para. 35; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 64.

280 ECJ, 205/84, para. 30; C-288/89, para. 14; C-36/95, para. 53; C-222/95, para. 29; C-6/98, para. 50; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 101; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Tiedje/Troberg, Art. 49 EGV, para. 72.

281 ECJ, 110/78, para. 27; C-288/89, para. 14; C-106/91; C-148/91, para. 13; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 25; Hans von der Groeben and Jürgen Schwarze (eds.), *EUV/EGV*, Tiedje/Troberg, Art. 49 EGV, para. 69, 72.

282 ECJ, C-23/93, para. 18; C-36/95, para. 59; C-6/98; Carl Otto Lenz and Klaus-Dieter Borchard (eds.), EUV/EGV, Hakenberg, Art. 49/50 EGV, para. 25; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 108; Hans von der Groeben and Jürgen Schwarze (eds.), *EUV/EGV*, Tiedje/Troberg, Art. 49 EGV, para. 72.

#### 5.3.2.3. The addressees of art. 49 EC Treaty

Art. 49 EC is applicable to state regulation regardless of the form of action.[283] Therefore public law as well as private law can constitute infringements of art. 49 EC.[284] Even an informal administrative practice has been regarded as a violation of the freedom to provide service by the European Court of Justice.[285]

Under certain circumstances collective rules of associations fall within the scope of art. 49 EC as well, that is to say when they are of similar effect as state regulation.[286] The rules set by organisations which are empowered by the Member State to regulate such as an administrative body are covered as well.[287] In consequence the European Court of Justice has held that the rules of professional associations, which participate in an extensive manner in national businesses – like chambers of commerce[288] – have to observe the freedom to offer services under art. 49 EC.[289] In any case, if private actors are mandated by the state with the power to enact generally binding rules, the ECJ binds them to observe the freedom to deliver service.[290]

#### 5.3.2.4. Consequences for the implementation of Co-Regulation

The analysis shows that rules set within a co-regulatory framework have to observe the freedom to offer services under art. 49 EC. For the models which have the impact to transform a directive into national law it is likely that the European Court of Justice will consider the actors as addressees of art. 49 EC since the effect and not the form – such as being public or private law-based – matters. Therefore, the systems have to be designed in a way that does not constitute restrictions for service providers which are sited in another Member State. Given the fact that the effect on the market is paramount, co-regulatory settings have not only to be open to all industry players and relevant groups in a formal sense but must also avoid creating closed shops based on the regulatory culture of the respective Member State. However, similar to the argument put forward regarding competition law (see below 5.4) the establishment of standards or codes as such to which the market is hampered is justified if it is necessary on grounds of public policy and applied in a proportionate way. Futhermore, systems have to be open to companies based in other Member States without any unjustified restrictions.

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283 Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 38.

284 Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 38.

285 ECJ, 21/84, para. 13; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 38; ; Hans von der Groeben and Jürgen Schwarze (eds.), *EUV/EGV*, Tiedje/Troberg, Art. 49 EGV, para. 30.

286 ECJ, 36/74, para. 16, 19; C-415/93, para. 83; C-191/97, para. 47+; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 41, 93.

287 ECJ, C-41/90; C-55/94; Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 39; ; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Tiedje/Troberg, Art. 49 EGV, para. 30.

288 ECJ, C-58/98, para. 33+; C-215/01, para. 34+.

289 ECJ, 36/74, para. 4, 10; 13/76; C-101/97; Jürgen Schwarze (ed.), *EU-Kommentar*, Holoubek, Art. 49 EGV, para. 93.

290 Jürgen Schwarze (ed.), EU-Kommentar, Holoubek, Art. 49 EGV, para. 41.

Therefore, as far as the state of origin principle goes, there is no possibility of mandatory participation in a self-regulatory body in the receiving state. However, this is at odds with some concepts of co-regulation, which aim to create or support a specific regulatory culture and, therefore, cannot simply be substituted with another kind of control in the country of origin. Nevertheless, as far as the subject is harmonised, it is sufficient that the state of origin provides for an adequate implementation.[291]

If a company opts for voluntary joining another Member State's co-regulatory system, the country of origin remains responsible as far as the subjects harmonised by the directive is concerned. Having said that, the receiving state is free to create mandatory co-regulatory systems to force companies where separate public policy objectives are concerned.[292]

Depending on the outline of a co-regulatory system and the medium other basic freedoms might produce restrictions on Member State when creating the legal framework, such as freedom of movement of goods — art. 28 EC; the right of establishment art. 43 EC. However, our Analysis focuses on the potential legal obstacles which are most likely to emerge in regard to the models of co-regulation assessed within this study.

## 5.4. Co-Regulation under art. 81, 82 EC

The non-state-regulatory part of co-regulation might under certain circumstances distort or restrict competition. Well-established companies can – to take an example – enter into agreements within a co-regulatory framework which hinders the market entry of competitors. Therefore the restrictions for co-regulatory settings under art. 82 EC have to be analysed.

However, for art. 82 EC to be applicable there have to be agreements between undertakings or associations of undertakings which are in question. Therefore, the question has to be asked, whether rules established within a co-regulatory system are state-set laws or emerging from agreements of private undertakings. However, given the hybrid nature of co-regulatory systems the distinction between state and private rules might become difficult. If the rules which might restrict or distort competition turn out to be state-set rules, art. 81, 82 EC is not applicable. Still, the respective Member State might violate art. 3 g, 10 sect. 2 EC by establishing rules that lead to restriction or distortion of competition.

### 5.4.1. Distinction between state law and private rules

It has been elaborated that there are different models of co-regulation to be found within the European Union. Thus, there is no general answer to the question of whether rules within a co-regulatory system are the result of an agreement of undertakings or associations of undertakings as referred to in art. 81 sec. 1 EC. The European Court of Justice has decided that each

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[291] EuGH, C-111/78, para. 30; Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Tiedje/Troberg, Art. 49 EGV, para. 79.

[292] Hans von der Groeben and Jürgen Schwarze (eds.), EUV/EGV, Tiedje/Troberg, Art. 49 EGV, para. 80.

entity performing economic activity regardless of the mode of financing or legal structure is to be seen as an undertaking.[293]

According to settled case-law, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.[294] It is also settled case-law that any activity consisting of offering goods and services on a given market is an economic activity.[295]

According to the case-law of the Court, the Treaty rules on competition do not apply to activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity,[296] or which is connected with the exercise of the powers of a public authority.[297]

Regarding the status of professional associations, the Court has decided that notwithstanding their entrustment with public policy objectives they have to be regarded as associations of undertakings.[298] However, under certain circumstances the rules emanating from such associations are regarded as state law not as private rule making, especially under the following conditions:

- The deciding body consists of a majority of representatives of public organisations[299], and there are predefined specific criteria defining public interest which have to be observed.[300]
- Or the representatives do act as independent experts who are bound only to observe the public interest.
- Or the deciding body acts in accordance with public policy objectives and the state remains finally responsible for the regulation.[301]

The above-mentioned principles are applicable to co-regulatory systems as well, especially when industry associations play a vital role within the respective model. If the respective rules have to be seen as rules based on an agreement of associations of undertakings art. 81 EC is applicable.

According to its very wording, art. 81 EC applies to agreements between undertakings and decisions by associations of undertakings. The legal framework within which such agreements are concluded and such decisions taken, and the classification given to that framework

293 ECJ, C-55/96, para. 21.

294 ECJ, C-41/90, para. 21; C-244/94, para. 14; C-55/96, para. 21; C-309/99, para. 46.

295 ECJ, 118/85, para. 7; C-35/96, para. 36; C-309/99, para. 47.

296 ECJ, C-160/91, para. 18+; C-309/99, para. 57.

297 ECJ, C-364/92, para. 30; C-343/95, para. 22+; C-309/99, para. 57.

298 ECJ, C-309/99, para. 65, 66.

299 ECJ, C-96/94, para. 23.

300 ECJ, C-309/99, para. 61, 64; C-35/99, para. 37, 39.

301 ECJ, C-96/94, para. 24.

by the various national legal systems, are irrelevant as far as the applicability of the Community rules on competition, and in particular art. 81 EC, are concerned.[302]

That interpretation of art. 81 EC does not entail any breach of the principle of institutional autonomy.[303] On this point a distinction must be drawn between two approaches. So there are two distinct ways to deal with the regulatory powers of professional associations.[304]

The first way is that a Member State, when it grants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply. In that case the rules adopted by the professional association remain state measures and are not covered by the Treaty rules applicable to undertakings.[305]

The second way is that the rules adopted by the professional association are attributable solely to the association itself.[306] Certainly, in so far as art. 81 EC applies, the association must notify those rules to the Commission.[307]

The fact that these two systems described above produce different results with respect to Community law in no way circumscribes the freedom of the Member States to choose one in preference to the other.[308]

If a Member State empowers an association to regulate to achieve public policy objectives (e.g. opting for a contracting-out model) the codes issued by that association is prima facie to be seen as state law under art. 81 EC.

## 5.4.2. Actions of undertakings under art. 81 EC

### 5.4.2.1. Scope of discretion for undertakings

The Court has held that undertakings do not infringe art. 81 EC if they merely implement state regulation which forces them to restrict or distort competition.[309] However, under the above given definition of co-regulation, systems would have to be singled out which leave no discretionary power for the private regulation at all (see above2.4). If the state regulation only backs or intensifies anti-competitive behaviour but leaves discretionary power for their associations, art. 81 EC remains applicable to the actions of the private regulators.[310] Therefore,

302 ECJ, 123/83, para. 17+; C-309/99, para. 66.

303 ECJ, C-309/99, para. 67.

304 ECJ, C-309/99, para. 67.

305 ECJ, C-309/99, para. 68.

306 ECJ, C-309/99, para. 69.

307 ECJ, C-309/99, para. 69.

308 ECJ, C-309/99, para. 70.

309 ECJ, 13/77.

310 ECJ, C-198/01, para. 51; 218/78.

undertakings or associations of undertakings within systems which are co-reguatory according to our definition will as a rule be bound by art. 81 EC.

If the non-state-side body merely takes a consulting role, there is no room for art. 81 EC to be applicable.[311] However, if the non-state part is restricted to consultation there is no co-regulation within the meaning of this study.

#### 5.4.2.2. Restriction or distortion of competition as object or effect of agreements

First of all, there has to be an agreement between undertakings or associations of undertakings or concerted practice.

Decisions of the self-regulatory body or rules set by such an entity might constitute the joint intention to act in a specific way on specific market and therefore be regarded as a horizontal agreement under art. 81 EC. Even if the decisions or rules are not binding, art. 81 EC might be applicable since the regulation of the co-regulatory body might constitute a concerted practice.[312]

When it comes to the assessment whether a restriction or distortion of competition has been constituted by the respective agreement the case law on industrial standard setting might be instructive. Like industry standards, which enable the compatibility of products of different manufactures, codes enacted by a non-state regulatory-body might restrict competition by hampering the market entry of competitive systems.[313]

However, industry standards do as such not constitute an infringement of art. 81 s. 1 EC. They do not have the effect of distorting or restricting competition if they are not binding and are transparent and accessible for interested parties, not only the established market players.[314] However, there is a restriction of competition if industry players agree only to produce in accordance with the industry standard,[315] or the standard is used to single competitors out.[316] The more freedom that remains for competitors to develop alternative standards or products, the

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311 See Eberhard Grabitz and Meinhard Hilf (eds.), Das Recht der Europäischen Union, Vol. II, Schroeder, Art. 81, para. 588.

312 On this catch all element see Carl Otto Lenz and Klaus-Dieter Borchardt (eds.), EU- und EG-Vertrag, Grill, Art. 81, para. 1.

313 Eberhard Grabitz and Meinhard Hilf (eds.), Das Recht der Europäischen Union, Vol. II, Schroeder, Art. 81, para. 588.

314 See Commission Notice — Guidelines on the applicability of Article 81 of the EC to horizontal cooperation agreements, OJ 2001 C 3/02, para 163.

315 Cf. e.g. Commission Decision 78/156/EEC, Video-Cassetterecorders, OJ. 1978 No. L 47/42, para. 23; Eberhard Grabitz and Meinhard Hilf (eds.), Das Recht der Europäischen Union, Vol. II, Schroeder, Art. 81, para. 594.

316 See Commission Notice — Guidelines on the applicability of Article 81 of the EC to horizontal cooperation agreements, OJ. 2001 C 3/02, para. 163.

less likely a restriction or distortion of competition under art. 81 EC occurs.[317] In cases regarding quality marks the commission decided that they do not constitute an infringement of art. 81 s. 1 EC if (a) there are no additional restrictions regarding production or sale of the respective products, and (b) products made by competitors are entrusted to use the mark if they meet the preset objective quality standards.[318]

However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in art. 81 EC.[319] For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience.[320] It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.[321]

However, some of the voluntary regulatory agreements established by the industry within the EU are seen to be connected with anti-competitive effects.[322] However, the ECJ holds anti-competitive agreements do not infringe art. 81 s.1 EC if there are part of a broader framework which aims at improving, securing or enabling competition in the respective branch of the industry.[323] One can argue that for some cases the non-state regulation in the Media sector since regulation to protect minors or consumer interest foster the development of information markets.[324] Furthermore, the ECJ reverts to reasoning of the freedom to deliver services when

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317 See Commission Notice — Guidelines on the applicability of Article 81 of the EC to horizontal cooperation agreements, OJ. 2001 C 3/02, para 167.

318 Cf. Commission Notice, OJ 1968 No. C 75 p.3, para. II/8; see also Commission, OJ 1970 No. 153 p. 4; Commission Decision 82/371/EEC, NAVEWA/ANSEAU, OJ 1982 No. L 167, p. 39.

319 ECJ, C-309/99, para. 97.

320 ECJ, C-3/95, para. 38; C-309/99, para. 97.

321 ECJ, C-309/99, para. 97.

322 Jörg Ukrow (ed.), Selbstkontrolle im Medienbereich und europäisches Gemeinschaftsrecht, München: 2000, p. 75.

323 ECJ, 258/78; 262/81, para. 15; 46/82, para. 20; 161/84, para. 16 +; Jörg Ukrow (ed.), Selbstkontrolle im Medienbereich und europäisches Gemeinschaftsrecht, München: 2000, p. 77.

324 Council Recommendation 98/560/EC of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity OJ 1998 No. L 270, p. 48; Jörg Ukrow (ed.), Selbstkontrolle im Medienbereich und europäisches Gemeinschaftsrecht, München: 2000, p. 77+.

applying art. 81 EC.[325] As shown above (s.o.) based on *Cassis-de-Dijon*[326] the court acknowledges media policy objectives perused of the Member States as justifications for restrictions to the basic freedoms under the EC Treaty.[327] The same arguments could be put forward to make a case that art. 81 EC does not prohibit co-regulatory agreements which safeguard the respective media policy objectives.

#### 5.4.2.3. Declaration of applicability (art. 81 s. 3 EC)

If there is an infringement of art. 81 s. 1 EC, there is the possibility that the provision may be declared inapplicable under s. 3. This section is aimed at cases where an agreement restricts or distorts competition but a comprehensive economic view reveals that, all things considered, the agreement is advantageous.[328]

This might be the case for industry standards where compatibility is achieved and therefore slight restrictions of competition might be acceptable. However, it is unclear whether public policy objectives which are not of an economic nature can lead to art. 81 s. 1 EC being declared inapplicable. The wording of s. 3 does not support such an argument.[329] Regarding the EBU the commission ruled in 1993 that the public service remit is sufficient to lead to the application of s. 3 of art. 81 EC. However, the European Court of Justice has turned this decision down and argued that only economic criteria are relevant under EU cartel law.[330]

In contradiction to this academics argue that art. 81 s. 3 EC has to be construed with regard to the cultural effects of the respective agreement.[331] Whether the arguments which are put forward to support this approach are sufficient cannot be assessed within the scope of this study.

#### 5.4.2.4. Co-regulatory measures under art. 82 EC

Co-regulation might be used by undertakings with significant market power to distort competition. Therefore, art. 82 EC has to be analysed in addition to art. 81 EC. However, basically,

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325 Jörg Ukrow (ed.), Selbstkontrolle im Medienbereich und europäisches Gemeinschaftsrecht, München: 2000, p. 79, 82, 85.

326 ECJ, 120/78.

327 Jörg Ukrow (ed.), Selbstkontrolle im Medienbereich und europäisches Gemeinschaftsrecht, München: 2000, p. 79+.

328 Eberhard Grabitz and Meinhard Hilf (eds.), Das Recht der Europäischen Union, Vol. II, Josef Aicher and Florian Schumacher, Art. 81, para. 594.

329 Dieter Frey, Fernsehen und audiovisueller Pluralismus im Binnenmarkt der EG, Baden-Baden: 1999, p. 124.

330 Joined Cases Z-528/93, T-543/93, T-546/93, Métropole Télévision SA vs. Comm´n, 1996 E.C.R. II-649-694; Eberhard Grabitz and Meinhard Hilf (eds.), Das Recht der Europäischen Union, Vol. II, Josef Aicher and Florian Schumacher, Art. 81, para. 257.

331 Jörg Ukrow (ed.), Selbstkontrolle im Medienbereich und europäisches Gemeinschaftsrecht, München: 2000, p. 74.

the same principles apply. A specific analysis can only be undertaken regarding specific models in cases of co-regulation.

#### 5.4.2.5. Assessment of the state regulation

It has been elaborated that if undertakings or associations of undertakings merely implement state regulation they are not infringing art. 81 s. 1 EC. However, if the state-part leaves this discretionary part to the non-state-part there is room for the application of art. 81 EC. At the same time, there might be an infringement of art. 3 lit. g, 10 s. 2 EC „where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to art. 81 or reinforces their effects, or deprives its own legislation of its official character by delegating to private parties responsibility for taking decision affecting the economic sphere"[332].

If there is under the regulation of the respective Member State, no discretionary power for the commercial undertakings, the respective Member State does not infringe art. 3 g, art. 10 s. 2 EC. Whereas the European Court of Justice in *Leclerc* hinted that art. 10 s. 2 EC and the principle of *effet utile* would cover legal regulation which made agreements in the meaning of art. 81 s. 1 EC superficial,[333] the Court ruled in *Meng* that if the state sets parameter for undertakings it acts past the scope of the European cartel law.[334]

However, given the afore-mentioned definition of co-regulation this constellation is unlikely to be found in the co-regulatory settings which are the subject of this study. It might be worth mentioning that the European Court of Justice has ruled that national regulatory bodies have to apply art. 81 EC and other rule national regulation that requires or favours the adoption of agreements, contrary to art. 81 EC.[335]

To answer the question whether the respective regulation is state-regulation or leaves scope for the undertakings to follow their specific economic interests, the so-called „procedural public interest test"[336] may be applied. If the whole regulatory setting is devised to follow public policy objectives, the whole setting might be regarded as state-regulation with the effect that the undertakings are not infringing art. 81 s. 1 EC and the respective Member State acts within its legislative power.

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332 ECJ, 267/86, para. 16; constant legal practice, see at last C-35/99, para. 34-35 and C-198/01, para. 46.

333 ECJ, 229/83, para. 15.

334 ECJ, C-2/91, para. 7.

335 ECJ, C-198/01, para. 55.

336 Harm Schepel, Delegation Regulatory Powers To Private Parties Under EC Competition Law: Towards A Procedural Public Interest Test, 39 *Common Mkt. L. Rev.* 2002, p. 31.

The same goes with the case in which the respective Member States delegates regulatory power to undertakings or associations of undertakings. If it stands the procedural public interest test there is no infringement of art. 3 g, 10 s. 2 EC.[337]

## 5.5. Co-Regulation under national law

The correspondents submitted no cases in which co-regulatory measures have been abandoned by courts as being intrinsically in contradiction with a national legal framework. However, some points which have been put forward in academic analysis have emerged as relevant.

First and foremost there are human rights' protection issues, both based on the national constitution or ECHR. Problems can arise from the human rights to be protected by the co-regulatory system or, the other way round, rights which might be harmed, such as freedom speech and information, freedom to offer services, freedom of association and freedom of entrepreneurship. The general problems with public-private-partnerships under many national constitutions regarding the question whether they are seen as public bodies bound to the objectives or not. The private association ASA in the UK, to take an example, has in some cases been held to be a public body,[338] however, there is no judgment concerning the Human Rights Act in this respect. Furthermore, the hybrid nature of co-regulation has given rise to reflection on democratic legitimisation of decisions in academic debate.[339] Some academic scholars in Germany have criticized the co-regulatory framework (Protection-of-minors-model in broadcasting and internet services in Germany, see above 3.1.2.3 and 3.1.2.4) as infringing art. 5 s. 1 GG (Grundgesetz basic law, ie the German constitution). However, these are isolated opinions.

Furthermore, the national competition law is regarded as relevant. Although agreements between industry members on a code of conduct might fall within the regulation which prohibits anti-competitive agreements on a national level, the correspondents that commented on this issue found it to be likely that in the end there will be no effect on competition and therefore no prohibition of the respective agreement. The restrictions are akin to those shown above for art. 81 EC. However, they might differ in some points and an in-depth analysis has to be undertaken in each case which cannot be done here.

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337 Wulf-Henning Roth, „Staatliche Wirtschaftsregulierung, Selbstregulierung und EG-Kartellrecht," *Recht der Wirtschaft und der Arbeit in Europa*, Rüdiger Krause, Winfried Veelken and Klaus Vieweg (eds.), Berlin: 2004, pp. 471+.

338 *R* v *ASA* ex parte *Insurance Services plc* [1990] COD 42, (1990) 2 Admin LR 77; *R* v. *ASA* ex parte *Vernon Organisation Ltd* [1992] 1 WLR 1298.

339 Cf. Wolfgang Schulz, „Was leisten Selbst- und Co-Regulierung?" *Medien, Ordnung und Innovation*, Dieter Klumpp et al. (eds.), Berlin et al.: 2005, pp. 180+.

## 5.6. Conclusion

For the implementation of co-regulatory measures in the Member States the analysis done above leads to the following conclusions:

- Specific restrictions for implementing directives by means of co-regulation under ECHR are only to observe if the system's objective is designed for protecting basic rights which are protected d by the Convention. However as any regulation it has, the other way round, the obligation to avoid infringement of basic rights protected under the ECHR.
- According to art. 249 III EC a directive is binding as to the result to be achieved upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods. Therefore, combinations of state and non-state regulation are not excluded. However, consistent with the jurisdiction of the ECJ there are certain requirements which are to be met:
    - There has to be a full application in a clear and precise manner; it has to be transparent for everybody bound by the regulation as to what it requires. Since many of the assessed systems lack transparency special attention should be laid on this point in future.
    - The transposition has to be in an effective and binding manner. This does not mean that a complete transformation in state-law is required; the Court has held that, to take an example, agreements between the state and a private actor can suffice. Therefore, contracting-out types of co-regulation fulfil this requirement without any doubt. However, a binding legal framework in the field in question is required; leaving the matter to complete self-regulation would not meet this requirement.
- Co-regulatory settings might infringe the freedom to provide services under art. 49 EC. Under certain circumstances even collective rules of associations fall within the scope of art. 49 EC as well, that is to say when they are of similar effect as state regulation. However, the media policy objectives of safeguarding diversity, protection of minors or consumer protection might constitute justifications of restrictions. In any case, systems have to be open to companies residing in other Member States without any unjustified restrictions.
- The non-state-regulatory part of co-regulation might under certain circumstances distort or restrict competition. Well-established companies can – to take an example – enter into agreements within a co-regulatory framework which hinders the market entry of competitors, that is to say all at least code-models of co-regulation.
    - Though the Court regards some types of agreements as state law not as private rule making, this is only the case when the scope for private entities is rather limited. This is not the case with co-regulation under our definition. Therefore art. 81 will, as a rule, be applicable.

  - However, the ECJ holds anti-competitive agreements do not infringe art. 81 s. 1 EC if there are part of a broader framework which aims at improving, securing or enabling competition in the respective branch of the industry. This might be the case with co-regulatory systems assessed in the study. Furthermore, there is the possibility that the provision may be declared inapplicable under s. 3.
  - In any case, systems constituted by an agreement within the industry will be regarded as anti-competitive if they are not open to competitors.
- The analysis does not provide a complete picture of restrictions to co-regulation under national law. However it transpires that there are no fundamental restrictions in Member States regarding this alternative form of regulation. However, in some Member States there is a debate concerning the legal classification of co-regulatory body under constitutional law, about safeguarding democratic legitimacy and about matters of competition law.

The Institutions of the European Union have responded to the fact that alternative forms of regulation, like co-regulation, is becoming more and more important, and, at the same time is connected with complex legal issues on the European level. According to the Interinstitutional Agreement the Commission assesses the compatibility of co-regulatory systems within the scope of the agreement with community law.[340]

[340] 2003/C 321/01.

# 6. CONCLUSIONS

The contractor has been asked to put forward specific suggestions regarding co-regulatory measures in the media in Europe.

## 6.1. General suggestions

### 6.1.1. Allow for co-regulatory systems to implement directives

Based on the findings of the study there is no reason to assume that co-regulatory models as defined within this study are generally insufficient to implement European directives (neither with regard to the effectiveness of regulation nor legal requirements).

The assessment undertaken in this study shows that several co-regulatory systems safeguard the respective policy objectives effectively. However, the effectiveness of co-regulatory systems depends on a set of factors (see above chapter 4.2.1) and cannot be taken for granted for one of the models analysed in this study. This does not militate against co-regulation as an adequate means to implement directives since it is also true for strict state regulation.

One reason for the fact that there is no sole co-regulatory „silver bullet" for all Member States and purposes is that the regulatory path matters for a shift to co-regulation. The degree of contrariness in debates about self-, co- and pure state-regulation stems from misunderstandings about the starting point. Therefore one uniform way of establishing co-regulation is neither desirable nor feasible.

There is no reason to believe that some media services are not appropriate for co-regulation. Therefore, regarding audiovisual media services, traditional broadcasting as well as non-linear services, are in principle open to alternative forms of regulation. However, the findings suggest, that different models or combinations of instruments might be appropriate for different types of media.

### 6.1.2. Distinguish clearly between co-regulation and self-regulation

The analysis shows that co-regulation is characterized by a combination of state and non-state regulation. According to our definition the non-state part as such is a regulatory process. This could lead to the assumption that co-regulation and self-regulation are only marginally different. However, this assumption would not be true. Self-regulation is defined by the absence of state interference into this regulatory process, while co-regulation only exists if there is a link between state and non-state regulation. This analytical difference complements differences within the regulatory culture, which to some extent explains the resistance of representatives of pure self-regulation when it comes to a co-regulatory approach. This does not mean that there is no room for pure self-regulation where a co-regulatory system is in place. Self-regulation can further the development of professional ethics which, in consequence can support the regulatory efforts of the state.

However, implementing a European directive means that the Member States are bound to ensure that the objectives of the directive are fulfilled in a sufficiently effective manner. Under the jurisprudence of the European Court of Justice the complete absence of state regulation – which is a characteristic of self-regulatory models – is not sufficient for a Member state to comply with European directives (see above 5.2.2).

### 6.1.3. Regard protection of minors and advertising content regulation as suitable fields for co-regulatory measures

Most of the co-regulatory systems in place are established to protect minors or to regulate advertising. Theoretical findings which are backed by our empirical assessment show that both objectives are especially suitable for co-regulatory measures. However, that does not mean that other fields would be unsuitable, but we have unearthed no evidence for the appropriateness concerning other policy objectives.

### 6.1.4. Demand for evaluations

As shown above co-regulation depends on several rather weak factors to be effective. Therefore, a well-defined set of conditions that have to be fulfilled to implement European directives sufficiently cannot be given. In consequence, the effectiveness of the given co-regulatory system has to be assessed individually. Therefore, Member States should be called for evaluating the co-regulatory systems that they set in place on a regular basis. It seems adequate for such evaluations to be more frequent in the beginning of such a regulatory change than later on when the smooth running of the system has been proven.

### 6.1.5. No need for legal provision on co-regulation on a European level

Many Member States already use co-regulation in a great variety of models. Co-regulation builds on regulatory cultures and its strength is based on this condition. Therefore, there are no reasons evident to predefine or even require co-regulation on a European level. However, if the Commission follows our recommendation to accept co-regulation as a means of implementation of directives, an explanatory note on what is required to make such systems sufficiently effective might be useful.

## 6.2. Restrictions for Co-regulatory measures

The impact assessment has brought to light some factors that have to be in place to make a co-regulatory system workable regardless of the specific design and the framework. These factors are summarised in the following.

### 6.2.1. Factual conditions

- Sufficient incentives for the industry to participate: A co-regulatory system without sufficient incentives will most likely be ineffective. There is no reason to believe that the industry will participate out of selfless reasons just to further a given policy objective. According to both the theoretical findings and the empirical impact assessment, an incentive that is effective as a rule is a pending regulatory intervention by the state itself into the respective sector.
- Proportional and deterrent means to enforce regulation: On the one hand, non-state organisations must have effective sanctions at their disposal. On the other, co-regulation needs backstop powers to be effective. Even experts from self-regulatory bodies involved in co-regulation state that the state regulator in the background is necessary for a co-regulatory system to work properly.

### 6.2.2. Normative conditions

- Art. 81 EC Treaty requires that industry associations avoid the creation of obstacles to competitors' entry into the market. Therefore, co-regulatory systems must not be designed in a way that favours traditional actors and leaves competitors out. This requirement is especially relevant for models of co-regulation that rely on non-state codes.
- According to art. 49 EC Treaty the Member States are required to refrain from regulatory measures which create obstacles for service providers from other Member States in delivering the service within the respective Member State. Therefore, co-regulatory models have to be designed in a way that does not restrict the participation of foreign service providers.
- Openness not only for competitors but also for other relevant stakeholders like civil society representatives or consumer groups is lacking in several systems in place. However, whether the inclusion is required is a policy decision if the effectiveness is guaranteed otherwise.
- The analysis has shown that the non-state part often does not guarantee process objectives all by itself, most notably transparency. Therefore, the state framework for co-regulation has to provide for sufficient safeguards to ensure that these objectives are fulfilled.
- The ECJ states general requirements for the implementation that must be observed under art. 249 sec. 3 EC. Member states have to implement directives in a clear and precise manner. The requirements to provide for a binding nature, sufficient safeguards and effective legal protection point to the core question of effectiveness, which is addressed by the factual condition.

## 6.3. Promotional factors and best practices

While there are no models which can be regarded per se as sufficiently effective, our findings suggest that systems in which the state regulator certifies codes or organisations (or where the state regulators are empowered to contract out) allow for effective backstop powers and therefore enforcement of rules.

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

### 6.3.1. Protection of minors

As far as effectiveness is concerned, systems like NICAM in the Netherlands show high ratings in the impact assessment. At the same time the process objectives are mainly considered as granted. The empirical base is not broad enough to nominate best practice; however NICAM is certainly a role model worth considering. Even though the systems are rather recently established the German Broadcasting and internet regulation scheme gets a positive rating as well. However, deficits regarding transparency are mentioned. Moreover, the German example shows that a similar system works differently for different types of media. Even though there are differences in the legal framework, both systems are based on non-state regulatory bodies which are supervised by a state regulator. However, the internet system is such new that it cannot be judged finally at this stage. As a well-established system the German film regulation gets high ratings as well.

### 6.3.2. Advertising regulation

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

Another approach with high effectiveness is the advertising regulation in France. However, the systems are not comparable since the French approach establishes a mandatory preclearance and the legal connection between state and non-state regulation is rather slight.

It is remarkable that unlike with protection of minors – not only in the UK – experts regard the pace of decision-making so high that some more non-complying ads slipping through the net are obviously regarded as excusable.

## 6.4. Outlook

The European Commission has recently published a Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC. The proposal contains reference to Co-regulation to be used in the Member States within the scope of the direc-

tive. The European Parliament, the Council, the Member States and all stakeholders will certainly get into a substantial discussion about the proposal. This study provides facts and analysis for these future debates and for deliberation in the Member States whether and how to integrate co-regulatory measures into their framework of media regulation.

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| **Malaysia** | **Zalina Abdul Halim, Rizal Salim** |
| **South Africa** | **Prof Pieter J. Fourie**<br>University of South Africa<br>Pretoria |

**Proof reading:**

- Melissa Pritchard
- Candelaria Van Strien-Reney

# ANNEX 2: OVERVIEW OVER THE INCLUSION OF SYSTEMS IN THE ANALYSIS

| COUNTRY | Combination of state regulation and non-state-regulation | Co-regulation according to our working definition | Earmarked for impact assessment | Enough data for impact assessment (1.1.2006) |
|---|---|---|---|---|
| AUSTRIA | Protection of minors in movies (including DVDs and CD-ROMs) | ☑ | ☑ | ☑ |
| BELGIUM | Protection of minors and advertising regulation in broadcasting and press | | | |
| | Protection of minors in internet services | | | |
| | Ethics in broadcasting | ☑ | | |
| CYPRUS | Protection of minors in movies | | | |
| | broadcasting regulation (advisory committee) | | | |
| | Ethics in broadcasting | | | |
| CZECH REPUBLIC | Ethics in press | | | |
| | Protection of minors in movies | | | |
| | Advertising regulation | | | |
| DENMARK | Ethics in press | | | |
| ESTONIA | No systems | | | |
| FINLAND | Ethics in diff. Media | | | |
| | Advertising Regulation | | | |
| FRANCE | Protection of minors in broadcasting | | | |
| | Advertising regulation | ☑ | ☑ | ☑ |
| GERMANY | Protection of minors in broadcasting | ☑ | ☑ | ☑ |
| | Protection of minors in internet services | ☑ | ☑ | ☑ |
| | Protection of minors in movies | ☑ | ☑ | ☑ |
| | Protection of minors in video games | ☑ | ☑ | |

| COUNTRY | Combination of state regulation and non-state-regulation | Co-regulation according to our working definition | Earmarked for impact assessment | Enough data for impact assessment (1.1.2006) |
|---|---|---|---|---|
| | Advertising regulation in broadcasting | ☑ | ☑ | |
| GREECE | Protection of minors in internet services | | | |
| | Ethics in broadcasting and press | | | |
| | Advertising regulation in broadcasting | ☑ | ☑ | ☑ |
| HUNGARY | Protection of minors in internet services | | | |
| | Advertising regulation | | | |
| IRELAND | protection of minors in internet services | | | |
| | Protection of minors in mobile services | | | |
| | Protection of minors in movies and | | | |
| | Protection of minors in video games | | | |
| | Ethics in press | ☑ | | |
| ITALY | Protection of minors in television | ☑ | ☑ | |
| | Protection of minors in internet services | ☑ | ☑ | |
| | Protection of minors in mobile services | ☑ | ☑ | |
| | Pharmaceutical advertising regulation | ☑ | ☑ | |
| | Consumer protection in television | ☑ | ☑ | - |
| LATVIA | No systems | | | |
| LITHUANIA | Ethics in press | ☑ | | |
| LUXEM-BOURG | Protection of minors in broadcasting | | | |
| | Ethics in broadcasting | | | |
| | Ethics in press and internet services | | | |
| MALTA | No systems | | | |

| COUNTRY | Combination of state regulation and non-state-regulation | Co-regulation according to our working definition | Earmarked for impact assessment | Enough data for impact assessment (1.1.2006) |
|---|---|---|---|---|
| NETHER-LANDS | Protection of minors diff. media | ☑ | ☑ | ☑ |
| | Advertising regulation in broadcasting | ☑ | ☑ | ☑ |
| POLAND | No systems | | | |
| PORTUGAL | Protection of minors in broadcasting | | | |
| | Broadcasting protocol (including advertising rules) | ☑ | ☑ | ☑ |
| SLOVAKIA | No systems | | | |
| SLOVENIA | Protection of minors in broadcasting | ☑ | ☑ | ☑ |
| | Advertising Regulation | ☑ | ☑ | ☑ |
| SPAIN | Ethics in press and broadcasting | | | |
| | Protection of minors in movies | | | |
| | Advertising Regulation | | | |
| SWEDEN | Ethics in Press | | | |
| | Protection of minors in internet services | | | |
| UNITED KINGDOM | Protection of minors in internet services | | | |
| | Protection of minors in mobile services | ☑ | ☑ | ☑ |
| | Advertising regulation in broadcasting | ☑ | ☑ | ☑ |