Study on Co-Regulatory Measures in the Media Sector:

Background Information for Seminar 1

Analytical part of the draft interim report

Study for the European Commission, Directorate Information Society
Unit A1 Audiovisual and Media Policies, Digital Rights,
Task Force on Coordination of Media Affairs

Tender DG EAC 03/04

Hamburg, 19 April 2005

Table of Contents

1. INTRODUCTION

The purpose of this report is twofold. Firstly, it describes the state of knowledge gained so far in the study on co-regulation in the media in Europe. In line with the working plan, this knowledge focuses on

- the definition of systems to be examined further in order to identify co-regulation
- methods for assessing co-regulation concepts and instruments
- the regulatory systems in place in the media sector within the EU member states.

Secondly, the report indicates how work is progressing and what steps will follow next.

2. DEFINED SCOPE OF SYSTEMS TO BE EXAMINED FURTHER

2.1. Theoretical Framework

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. 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.[1]
- Furthermore, the regulating state displays a knowledge gap and this gap is growing.[2] 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.[3] 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

---

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

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

3 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, p. 301+.

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 resource". However, in contrast to the resource "power", information is not at the privileged disposal of the state.
- However, there are not only knowledge gaps but also gaps of understanding that cannot be overcome. According to "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.[4] 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.[5] 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 an item-by-item basis only, and not in a process-orientated manner, which would be desirable for complex regulatory tasks. If the state wants to influence the outcome of a process, it has to act before a trajectory has been laid out ("preventive state").[6]
- Finally, another obstacle facing traditional regulation is globalisation. It enhances the potential for international "forum shopping" to evade whatever national 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 struc-

---

4 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.

5 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.

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

tures, legal regulation still derives mainly from national states. Structures of global non-governmental law are now emerging which national states have to take into account.[7]

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
- from unidirectional to co-operative rulemaking and implementation
- from enforcement to convincing strategies.[8]

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.[9]

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*[10] 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"[11] – which was also influential in the economic approaches discussed below – as well as *Luhmann's* design of social systems.

---

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

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

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

10 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.

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

Some discern a "retreat of law to the meta-level of procedural programming" *(Rückzug des Rechts auf die Meta-Ebene prozeduraler Programmierung*).[12] 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.[13]

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.[14]

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.[15] 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.[16] Although – or even because? – the term still lacks precise contours[17] 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.

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

---

12 Klaus Eder, "Prozedurale Rationalität", *Zeitschrift für Rechtssoziologie* (ZfRSoz) Vol. 7 (1986), p. 1+.

13 Karl-Heinz Ladeur, "Proceduralisation and its Use in a Post-Modern Legal Policy", *Governance in the European Union*, De Schutter et al. (eds.), Luxembourg: Office for Official Publications of the European Communities: 2001, pp. 53-69.

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

15 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, p. 1-29.

16 Jan Kooiman, Governing as Governance, Sage 2003.

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

forms of state regulation.[18] 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 severer. 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.[19] 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.[20]

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.[21]

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 in the organisation itself. The task of the governmental regulator is by and large restricted to the control of this control.[22]

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.

---

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

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

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

21 See Ian Ayre and John Braithwaite, Responsive Regulation, Oxford: 1992, p. 38+.

22 On this concept see: ibid., p. 101+.

2.2. Purpose of the Definition

The aim of this chapter is 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 scope 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
- to some degree sustainable and formalised non-state settings and sustainable and formalised links between non-state regulation and state regulation that could serve as role models for other fields.

As a first step, we explored how studies already conducted have dealt with the problem of defining co-regulation. This includes studies which 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.

2.3. Definitions in Existing Studies

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".[23] It recognises that the shape of these and the combination of "legal and non-legal instruments" will vary from one sector to another.[24]

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".[25]

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 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.[26] It discusses two particular co-regulation strategies[27] that can be summarised as "initial approach" and "bottom to top".[28] 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".[29] Finally, the importance of guarantees is stressed in order to safeguard the public interest by means of supervisory mechanisms.[30]

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 an act of legislation serving as a "frame-

---

23 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.

24 Ibid.

25 Ibid., p. 20.

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

27 Ibid., p. 17.

28 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.

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

30 Ibid.

work".[31] 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.[32]

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).[33]

Regulated self-regulation, to use 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".

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.

"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".[34]

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 even third parties such as consumers might be involved in the rule-making.[35]

---

31 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+.

32 Ibid., p. 10.

33 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.

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

35 Ibid.

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.[36]

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.

After referring to other attempts at definitions[37] 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".[38] 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. The author proposes that these mechanisms be established through legislation and reviewed by the courts.[39] 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.[40]

"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"**[41], the starting point for the definition of co-regulation here is an arrangement about rules between private and public actors.[42]

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[43], which

---

36 Ibid.

37 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).

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

39 Ibid., p. 3.

40 Ibid., pp. 3+.

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

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

must all be carried out by a private actor[44]. As a hallmark, the rules must originate from within the group to whom they are addressed.[45] The rules may contain material obligations as well as procedural regulations.[46] Distinguishing between different levels of compulsoriness, the authors extend their definition of self-regulation to "gentlemen's agreements" that are not legally binding.[47] Especially in the area of broadcasting, self-regulation is seen as a sensible complement to state regulation.[48]

The above-mentioned tasks of setting up and enforcing rules and imposing sanctions for violations may also be conducted in public-private cooperation.[49] Every co-regulatory system, however, has to be based on statutory rules.[50] The main objective of public interference is to prevent self-regulatory actors from focussing entirely on their own self-interest[51], 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[52], but this is not considered to be true co-regulation.[53] 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.[54] The issue of public restraint[55] 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.[56]

"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.

---

43 Ibid., p. 54.

44 Ibid., p. 55.

45 Ibid.

46 Ibid.

47 Ibid., p. 56.

48 Ibid., p. 57.

49 Ibid., p. 61.

50 Ibid.

51 Ibid., p. 62.

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

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

54 Ibid., p. 63.

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

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

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.[57]

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
- 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.[58]

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."[59]

Nevertheless, the authors still draw a distinction between such "less formal" instruments of regulation and truly codified co-regulation.[60] Especially in the media context, they recommend that the state should "play an active role in certifying schema […], above and beyond any self-regulatory design requirements".[61] In their view, this is particularly important wherever the safeguarding of fundamental rights is in question.[62] After all, 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.[63]

---

57 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.

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

59 Ibid., p. 11.

60 Ibid., p. 11+.

61 Ibid., p. 12.

62 Ibid.

63 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.

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"[64] 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 be given autonomy to formulate detailed rules, whilst statutory guidelines form a framework. After all, the "backstop powers" remain with the public regulator.[65]

"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"[66]. It was published in the January 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".[67] The concept is a middle way between over-harsh government intervention and exclusive self-regulation by industry.[68]

The author also emphasises the importance of interaction between general legislation and a self-regulatory body.[69] This interaction corresponds to the joint responsibilities of market actors and the state in a co-regulatory system.[70]

"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

---

64 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.

65 Ibid., p. 9.

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

67 Ibid., p. 4.

68 Ibid.

69 Ibid.

70 Ibid., p. 5.

achieve public goals.[71] Co-regulation itself is regarded as a special, "alternative" category of regulation.[72]

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.[73]

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.[74] Self-regulation in a narrow sense, where no state influence whatsoever occurs,[75] 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.[76] 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.[77]

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".[78] 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.[79] Another important element is the voluntary nature of this process[80] and the independence of the self-regulatory organisation from the government and specific interest groups.[81] Finally, the organisation must have options for enforcement of its decisions in order to ensure credible regulation.[82]

---

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

72 Ibid., Table 2 on p. 41.

73 Ibid., Box 3 on p. 43.

74 Ibid., p. 46.

75 Ibid., p. 47.

76 Ibid., op.cit., p. 46.

77 Ibid.

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

79 Ibid., pp. 7, 10.

80 Ibid.

81 Ibid., p. 10.

82 Ibid., p. 11.

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.[83] It also recognises that the threat of legislative intervention might further the readiness to effectively self-regulate an industry.[84]

"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".[85] 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".[86]

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".[87]

"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.[88]

---

83 Ibid., op.cit., p. 8.

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

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

86 Ibid.., "Self-regulatory initiative in Sweden: SWEDMA".

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

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

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.[89] By formulating e.g. rules of process or organisation or by announcing economic incentives, the state is able to abstain from *directly* influencing (environmental) decisions by law.[90] However, due to the nature of solving ecological problems, the author deems a total restraint in the sense of non-state regulation inadequate.[91]

As a general definition for "regulated self-regulation" the author offers the following: intentionally formulating constraints, processes and target values for non-state actors.[92]

"Die Aufgaben des öffentlichen Rundfunks – Wege zu einem Funktionsauftrag" by *Martin Bullinger* of the University of Freiburg im Breisgau (Germany) is a study compiled for the Bertelsmann Foundation (Gütersloh, Germany) within the framework of the project "Communications Order 2000". Although this study only covers public broadcasters it should nevertheless be mentioned because it refers explicitly to cooperative self-regulation.

In addressing the specific remit of public service broadcasting, he advocates a combined solution with an elaborate, yet flexible statutory framework and self-regulation by the broadcasting institutions.[93] As one possible procedure for concretisation, the author suggests a model of "cooperative self-regulation", where different actors such as a public authority, the general public and possibly others participate in the self-regulating body's rule-making process (in this case the public service broadcasting actors).[94]

Bullinger ultimately adopts a "double strategy" for this special field of regulation: a statutory framework must exist, laying down fundamental descriptions,[95] but possibly also containing "reserve rules" that take effect if self-regulation should display deficiencies[96]. On the other hand, there may be room for complementary autonomous or cooperative self-regulation that – in this case and in the author's opinion – should also have its basis in statutory law.[97]

2.4. 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

---

89 Ibid., p. 42.

90 Ibid., p. 43.

91 Ibid., p. 36.

92 Ibid., p. 48.

93 Martin Bullinger, Die Aufgaben des öffentlichen Rundfunks – Wege zu einem Funktionsauftrag, 1998, available at www.ko2010.de/deutsch/download/rundfunk.pdf, p. 95.

94 Ibid.

95 Ibid., p. 103.

96 Ibid., p. 105.

97 Ibid., pp. 105+.

one basic assumption that all definitions have in common: co-regulation consists of a state and a non-state component to regulation.

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? (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 or does the state incorporate codes set by industry without influencing the regulatory process within the non-state regulatory system)
- Other criteria

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

CRITERIA/STUDIES	White Paper	Mandelkern	Action Plan	Palzer IRIS plus 6/2002	McGonagle IRISplus 10/2002	Ukrow	Puppis et al.	PCMLP: IAP-CODE
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	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	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)				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, 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		not clear, "constant review and appeals" may		public restraint is essential and room for self-reg.	rather not

power to a non-state-regulatory system)			process		imply full control by state		room for self-reg.	
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)	regulatory action	"initial approach": state simply incorporates self-regulation rules into law "penalising w/out regulatory force"		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 behaviour 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 agree	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 re

system or also just informal agreements between state and non-state bodies)								achieve the respective regulatory objectives
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	

2.5. 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 say anything about 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 opted to pursue the following tracks, 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 basis for the non-state regulatory system (however, the use of non-state regulation need not necessarily be mentioned in laws).
- The state leaves discretionary power to a non-state regulatory system.
- The state uses regulatory resources to influence the non-state regulatory system (power, money, public awareness etc.).

Non-state regulatory system		
Criteria	Cases excluded by this criterion	Explanation
The creation of organisations, rules or processes	Informal agreements, case-by-case decisions	This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.
To influence decisions by persons or, in the case of organisations, decisions by or within such entities	Pure consultation	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.
As long as this is performed by or within the organisations or parts of society that are addressees of the regulation	Measures by third parties (e.g. NGOs)	The range of possible subjects of non-state action has to be limited to make the definition workable.

Link between the non-state-regulatory system and state regulation		
Criteria	Cases excluded by this criterion	Explanation
The system is established to achieve public policy goals	Measures to meet individual interests	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.
There is a legal basis for the non-state regulatory system	Informal agreements without any legal criteria to judge the functioning of non-state regulation	If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.
The state/EU leaves discretionary power to a non-state regulatory system	Traditional regulation	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.
The state uses regulatory resources to influence the non-state regulatory system	Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system	Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.

3. CRITERIA FOR ASSESSING EFFICIENCY AND IMPACT OF REGULATORY SYSTEMS

3.1. 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[98] and at European level[99]. 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.[100] 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 SMEs, are "not well developed"[101].

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.[102]

It has to be stressed that impact analysis tends to see regulation as a mechanical, unidirectional process, a supposition which is rather antiquated.[103] 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.

---

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

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

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

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

102 Work is in progress; so far approaches from criminology have not been analysed.

103 See Ian Ayres/John Braithwaite, Responsive Regulation, Oxford: 1992.

3.2. Methodology

3.2.1. Basic Approaches

Different basic approaches are used to measure the effectiveness and efficiency of regulation. These include (to name but a few)[104]:

(1) Cost effectiveness

(2) Cost assessment

(3) Benefit assessment

(4) Benefit-cost analysis

(5) Risk assessment

(1) - (3) 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.[105] 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?
- 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.[106]

---

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

[105] Ibid, p. 180.

[106] 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.

3.2.2. Approaches in Existing Impact Analyses

3.2.2.1. 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.[107] Other examples are the distribution of access to electricity in developing countries[108] or the service prices and number of self-employed craftsmen when it comes to different concepts of trade regulation[109] or production and price of different products in relation to the rate of taxes on fertilisers.[110]

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[111] to measure side effects of telecom regulation, and the delay in market entry of chemical products to assess the impact of regulation on innovation.[112] However, this process of defining indicators is in itself an assessment of benefits and depends on political appreciations.[113]

---

107 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+.

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

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

110 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.

111 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.

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

113 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.[114]

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.[115] However, this procedure obviously does not take into account that intervening variables could account for changes of the indicator's development.[116] It is not in every case methodologically feasible to extract the regulatory element within the bundle of causes.[117]

At least for some fields of regulation there are elaborated economic approaches to analyse costs and benefits.[118] However, mostly quantification is not feasible when it comes to specific regulatory arrangements and so those methods are considered too complex to be applied.[119]

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.[120] Such empirical designs respond to new theoretical understandings of regulation.[121]

Apart from the evaluation of indicators, expert interviews or interviews with actors[122] are considered appropriate means to judge the outcome of regulation.[123]

---

114 Ibid.

115 Ibid.

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

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

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

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

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

121 Cf. See Ian Ayres/John Braithwaite, Responsive Regulation, Oxford: 1992.

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

123 See below 3.3.

3.2.2.2. 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.[124]

3.2.2.3. 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.[125]

A study on German Copy Right 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.[126]

3.3. 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.

---

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

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

[126] 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,[127] *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.[128] *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.[129] 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".[130] 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 do

---

127 Michael Latzer/Natascha Just/Florian Saurwein/Peter Slominski, Selbst- und Ko-Regulierung im Mediamatiksektor, Wiesbaden: 2002.

128 Ibid, p. 102.

129 Ibid, p. 161+.

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

not perform 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.

Jarren, Weber, Donges, Dörr, Künzler and *Puppis* compared broadcasting regulation in different states by analysing documents and interviewing experts.[131] 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.[132]

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).[133] As a result, the *PCMLP* presented 18 recommendations on media self-regulation, which can specifically help the effective development of media Codes of Conduct.

3.4. Preliminary Conclusions

There is no well-established methodology simply waiting to be adopted. Therefore, we will 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 such a system should be implemented, can be assessed by a benefit-cost analysis.

To be able to include all relevant aspects, the terms “costs” and “benefits” must be understood in the broadest sense. Costs generally comprise undesirable side effects. What has to be regarded as a benefit and what as a cost, and how to weigh different benefits or costs, depends on the specific objectives the regulator wants to achieve.

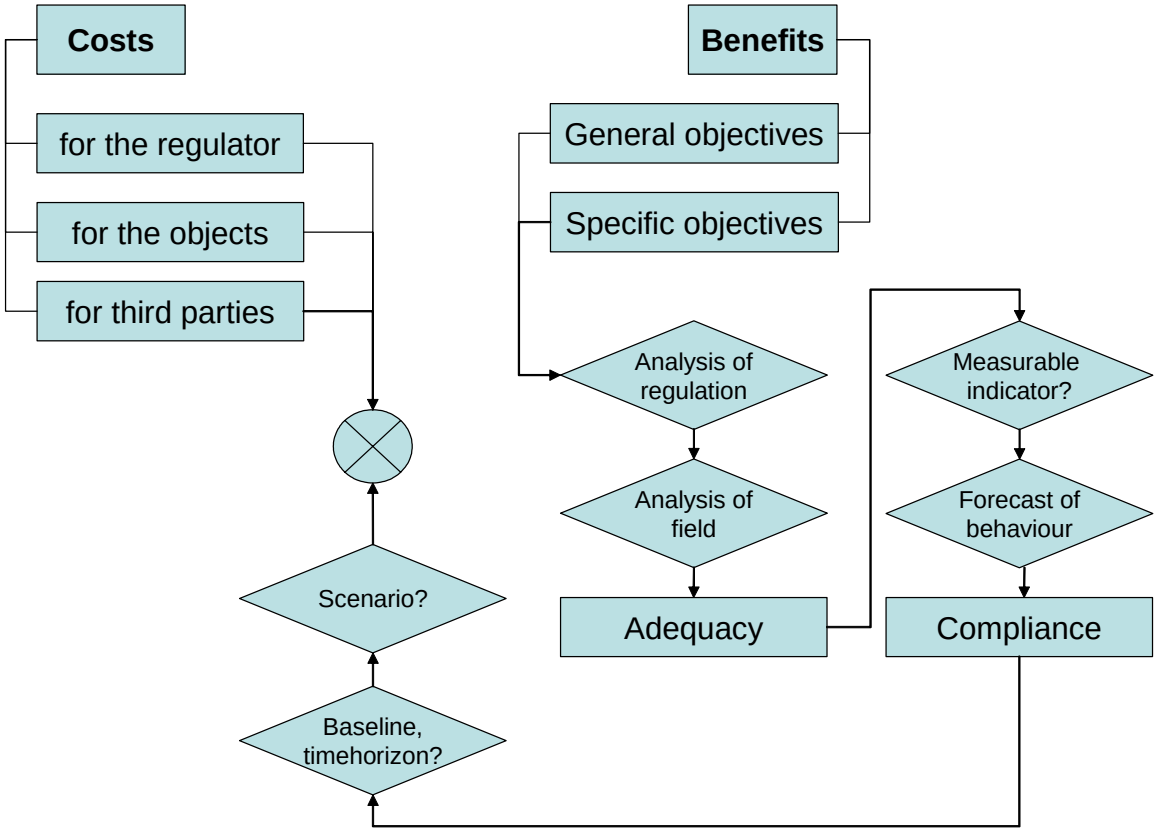
---

131 Otfried Jarren/Rolf H. Weber/Patrick Donges/Bianka Dörr/Matthias Künzler/Manuel Puppis, Rundfunkregulierung – Leitbilder, Modelle und Erfahrungen im internationalen Vergleich, Zurich: 2002, p. 289+.

132 Ibid, p. 349 and 356.

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

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



When it comes to benefits, the objectives of the regulation compose the yardstick for measuring achievements. There are objectives which might be true for all regulation, such as acceptability, coherence and transparency, 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 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 can be conducted by analysing the regulation as such and the social area where regulation intends to cause effects. Here, the theories mentioned above might be useful to understand the processes and interactions (especially macro and “meso” approaches, see above p. 3). 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 there might be numerical indicators at hand, or to be constructed, and, thus, whether quantitative research seems possible. If this is not the case, economic theory and game theory in particular may help to forecast the behaviour of relevant actors. Finally, evaluation parameters such as the baseline (what will the outcome be if the regulation is not enacted?), the relevant time horizon in which costs and benefits are to be measured, and the scenario (best, worst or most likely case) have to be chosen. Again, benchmarks must be defined according to the specific regulatory objective.

The same goes for the final consideration of costs and benefits.