Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea

This article could – to an extent – be described as an act of ventriloquism insofar as the narrative voice used is often the projection of the voices of participants in a recent workshop on the topic “Co-Regulation of the Media in Europe”. Additional information has also been introduced into the article, mainly for supplementing and symmetrising purposes. The article picks up the trail begun by the earlier IRIS plus article, “Co-Regulation of the Media in Europe: European Provisions for the Establishment of Co-Regulation Frameworks”. Drawing extensively on the discussions held at the workshop, the focus of the article is on the translation of concepts of co-regulation into practice.

The workshop on which this article is based was held at the European University Institute, Florence, on 6-7 September 2002. It was jointly organised by the European Audiovisual Observatory and its partner organisations, the Institute for Information Law (IViR) of the University of Amsterdam and the Institute of European Media Law (EMR) in Saarbrücken. The papers presented at the workshop will be published as part of an IRIS Special Report on the theme of co-regulation early in 2003. For more information on this forthcoming publication please contact Markus.Booms@obs.coe.int or visit the OBS website (http://www.obs.coe.int).

Susanne Nikoltchev
IRIS coordinator
Legal Expert of the European Audiovisual Observatory
Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea

Tarlach McGonagle
Institute for Information Law (IViR)
University of Amsterdam

An Intangible Idea

In recent times, traditional regulatory systems have been coming under careful scrutiny in the context of the nascent quest at the European level for better, more effective regulation, as a means of achieving improved governance. Unsurprisingly, the media have been one focus of relevant discussions.

Having “developed by accretion, as piecemeal responses to new technology”, contemporary media regulation can be considered “complex and unwieldy”.1 Different regimes often apply to different media and each regime is characterised by its own specificities. In consequence, it can prove difficult to identify or achieve consistency in these different regimes. The reality of ongoing and projected technological changes has already precipitated fresh thinking about the best (regulatory) means of attaining desired objectives; of honouring specific values. This is particularly true in light of trends of convergence and individualisation.

It is at this juncture that the notions of self- and co-regulation have been introduced into the debate. As patently demonstrated elsewhere,2 these are fluid notions, watertight definitions of which remain elusive. The definitional dilemma has been compounded by a lack of consistency in interpretations of the relevant (and other proximate) terms, not to mention linguistic difficulties arising from translations. The least that can be stated with certainty is that the terms indicate “lighter” forms of regulation than the traditional State-dominated regulatory prototype.

A further difficulty to the concretisation of the debate on regulatory matters is the difficulty of developing practical guidelines for co-regulation in abstracto. The term ‘co-regulation’ is one of many different shades, with each shade being distinguished by the degree of involvement of the various parties. A crucial question is whether State involvement would be direct, at one remove, or even more indirect. A wide range of different principles and techniques could determine the level of involvement of a public authority in co-regulation. In any event, co-regulation is always likely to exist under the umbrella of general law dealing with immutable social goals and values.

This article3 investigates the potential of co-regulation for implementation in the audiovisual sector (although examples of self-regulation are occasionally drawn upon by way of illustration or comparison).

Council of Europe

In light of the growing awareness of the need for greater diversity in regulatory types, the Council of Europe (COE) has already demonstrated that its thinking does transcend traditional regulatory parameters. This has been borne out by successive European Ministerial Conferences on Mass Media Policy.4

In Resolution No. 2 on Journalistic Freedoms and Human Rights, the conviction was expressed “that all those engaged in the practice of journalism are in a particularly good position to determine, in particular by means of codes of conduct which have been voluntarily established and are applied, the duties and responsibilities which freedom of journalistic expression entails”.5 Principle 8 of the Resolution builds on this preambular statement by averring that public authorities “should recognise that all those engaged in the practice of journalism have the right to elaborate self-regulatory standards - for example, in the form of codes of conduct - which describe how their rights and freedoms are to be reconciled with other rights, freedoms and interests with which they may come into conflict, as well as their responsibilities.”

In the subsequent European Ministerial Conference on Mass Media Policy there was a palpable reluctance to pursue traditional regulatory routes for the Information Society.6 Although the theme of this Conference does not fall squarely in the domain of traditional audiovisual media, it is of more than a mere passing interest. In the context of convergence and digital broadcasting, in particular, there is a growing potential for the analogous application of norms and practices from adjacent domains, such as information society services.7

A central topic for consideration in the Declaration ‘A media policy for tomorrow’ is “the adaptation of the regulatory framework for the media in the light of the ongoing changes”.8 There have been other recent examples whereby the COE has demonstrated its consciousness of the need for greater regulatory flexibility in the online world, such as its two-pronged approach to cyber matters. This approach is characterised by the Convention on Cybercrime9 (which represents the Council’s traditional standard-setting approach) and the Recommendation on self-regulation concerning cyber content.10 Meanwhile, in the more traditionally-defined audiovisual sector, the Standing Committee on Transfrontier Television of the CoE recently issued a Statement on human dignity and the fundamental rights of others.11 The Statement urges regulatory authorities and broadcasters, inter alia, to seek “consensual co-regulatory or self-regulatory solutions” to deal with programmes which might contravene human integrity or dignity.

European Union

While the policy debate within the EU institutions on the feasibility of co-regulation as a model for governance in certain sectors has been documented elsewhere,12 a cursory investigation of the actual real potential - under existing EC law - for the adoption of co-regulatory mechanisms in the audiovisual sector is perhaps timely. Some of this potential has already been tapped. Article 16 of the Directive on electronic commerce13 and Article 27 of the Data Protection Directive,14 for instance, express the clear preference of Member States and the Commission to encourage increased reliance upon codes of conduct as a means of contributing to the proper implementation of EC law. This new tendency to think outside of traditional regulatory squares is also taking effect at the national level. It is becoming increasingly common for the audiovisual legislation of States to make reference to codes or a mixture of legislative rules and co-regulatory rules recognised by the State.
A more far-reaching question, however, is whether EC law can be validly and entirely transposed by self- or co-regulatory instruments. To answer this question, a suitable point of departure is Article 2(1) of the “Television without Frontiers” Directive which enjoins each Member State to ensure compliance “with the rules of the system of law” applicable to broadcasting intended for the public in that Member State.15 What are the rules referred to here? May industry-devised codes be considered part of the system of law of a Member State, for the purposes of determining whether the Directive has been properly implemented? Article 3 of the Directive prompts similar questions about the nature of the measures chosen at the national level for its implementation. The consideration of whether co-regulatory measures would be a suitable mechanism for transposing the Directive hinges on the phrases, “appropriate procedures”, “competent judicial or other authorities” and “effective compliance” in Article 3(3).

As the ultimate arbiter on matters of EC law, it is the Court of Justice of the European Communities (ECJ) that will determine the answers to these questions. The existing – and growing – jurisprudence of the Court on the issue of the proper transposition of EC Directives has already provided some clarification in this regard. Specificity, precision and clarity should characterise national implementing measures. The Court held in Commission v. Netherlands16 that “[I]n order to secure the full implementation of directives in law and not only in fact, Member States must establish a specific legal framework in the area in question”.17 In Commission v. Germany,18 the Court in effect rejected that particular example of the implementation of an EC Directive by administrative measures as inadequate. It held that: “the fact that a practice is in conformity with the requirements of a directive in the matter of protection may not constitute a reason for not transposing that directive into national law by provisions capable of creating a situation which is sufficiently precise, clear and transparent to enable individuals to ascertain their rights and obligations.”19 More importantly for present purposes, the Court also referred to its earlier case-law, reiterating that: “the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context 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.”20

Any consideration of the degree of freedom for Member States to delegate rule-making powers to self-regulatory bodies ought to be viewed in light of these - and other - pronouncements of the Court. However, it must not be overlooked that both of the mentioned cases examined specific modes of transposition or that the quoted statements from the Court do not necessarily preclude the possibility of legitimately adopting co-regulatory measures in order to transpose a Directive. As ever, all would depend on the specific modalities of the co-regulatory structures, scope and status.

A number of other pertinent questions could be posed at this juncture, concerning the level at which co-regulatory mechanisms should be established and the extent to which the perceived need for consistency, uniformity of standards and application is insisted upon in existing legal orders. These questions can perhaps be answered collectively, while bearing in mind that in the context of co-regulation, different issues can be dealt with optimally at different levels. In terms of fundamental rights, a set of non-negotiable standards must be upheld and therefore the international instruments in which they are enumerated must be given uniform application (see infra). Other considerations requiring uniformity of application include those identified as being crucial for the functioning of the Internal Market e.g. certain aspects of advertising, media concentration, competition law, etc. While different value schemes are in operation here, both can lay strong claim to positions of centrality in the existing European legal order. Other issues lend themselves more easily to consideration and application at the national level. As regards morals and decency, for instance, the European Court of Human Rights has always tended to show utmost deference to local and regional specificities and to accommodate these to the greatest extent possible.23 This begs a further question about the extent to which morals and decency - and by extension, ethics - should be included in a co-regulatory system (see infra).

Possible ambit of co-regulation

There exists a general consensus that co-regulation is unsuited to the safeguarding of fundamental rights.24 This consensus rests on a particular understanding of international law which holds that the duty to safeguard human rights lies exclusively with States. At the national level, constitutional guarantees of freedom of expression and information are generally designed (like Article 10 of the (European) Convention on the Protection of Human Rights and Fundamental Freedoms – ECHR) to minimise the potential for stifling freedom, save for in certain defined circumstances. One example of this is the German Grundgesetz (GG, the German Federal Basic Law).25 Article 5(1) expressly provides for freedom of the press and for freedom of reporting by means of broadcasts and films. Pursuant to Article 5(2) GG, any limitation on these freedoms must be statutory: either of a general nature or, in particular, for the protection of youth and the right to personal honour (see further, infra). Also of relevance is Article 19(4), which stipulates that freedom, save for in certain defined circumstances, may industry-devised codes be considered part of the system of law of a Member State, for the purposes of determining whether the Directive has been properly implemented? Article 3 of the Directive prompts similar questions about the nature of the measures chosen at the national level for its implementation. The consideration of whether co-regulatory measures would be a suitable mechanism for transposing the Directive hinges on the phrases, “appropriate procedures”, “competent judicial or other authorities” and “effective compliance” in Article 3(3).

As the ultimate arbiter on matters of EC law, it is the Court of Justice of the European Communities (ECJ) that will determine the answers to these questions. The existing – and growing – jurisprudence of the Court on the issue of the proper transposition of EC Directives has already provided some clarification in this regard. Specificity, precision and clarity should characterise national implementing measures. The Court held in Commission v. Netherlands16 that “[I]n order to secure the full implementation of directives in law and not only in fact, Member States must establish a specific legal framework in the area in question”.17 In Commission v. Germany,18 the Court in effect rejected that particular example of the implementation of an EC Directive by administrative measures as inadequate. It held that: “the fact that a practice is in conformity with the requirements of a directive in the matter of protection may not constitute a reason for not transposing that directive into national law by provisions capable of creating a situation which is sufficiently precise, clear and transparent to enable individuals to ascertain their rights and obligations.”19 More importantly for present purposes, the Court also referred to its earlier case-law, reiterating that: “the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context 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.”20

Any consideration of the degree of freedom for Member States to delegate rule-making powers to self-regulatory bodies ought to be viewed in light of these - and other - pronouncements of the Court. However, it must not be overlooked that both of the mentioned cases examined specific modes of transposition or that the quoted statements from the Court do not necessarily preclude the possibility of legitimately adopting co-regulatory measures in order to transpose a Directive. As ever, all would depend on the specific modalities of the co-regulatory structures, scope and status.

A number of other pertinent questions could be posed at this juncture, concerning the level at which co-regulatory mechanisms should be established and the extent to which the perceived need for consistency, uniformity of standards and application is insisted upon in existing legal orders. These questions can perhaps be answered collectively, while bearing in mind that in the context of co-regulation, different issues can be dealt with optimally at different levels. In terms of fundamental rights, a set of non-negotiable standards must be upheld and therefore the international instruments in which they are enumerated must be given uniform application (see infra). Other considerations requiring uniformity of application include those identified as being crucial for the functioning of the Internal Market e.g. certain aspects of advertising, media concentration, competition law, etc. While different value schemes are in operation here, both can lay strong claim to positions of centrality in the existing European legal order. Other issues lend themselves more easily to consideration and application at the national level. As regards morals and decency, for instance, the European Court of Human Rights has always tended to show utmost deference to local and regional specificities and to accommodate these to the greatest extent possible.23 This begs a further question about the extent to which morals and decency - and by extension, ethics - should be included in a co-regulatory system (see infra).

Possible ambit of co-regulation

There exists a general consensus that co-regulation is unsuited to the safeguarding of fundamental rights.24 This consensus rests on a particular understanding of international law which holds that the duty to safeguard human rights lies exclusively with States. At the national level, constitutional guarantees of freedom of expression and information are generally designed (like Article 10 of the (European) Convention on the Protection of Human Rights and Fundamental Freedoms – ECHR) to minimise the potential for stifling freedom, save for in certain defined circumstances. One example of this is the German Grundgesetz (GG, the German Federal Basic Law).25 Article 5(1) expressly provides for freedom of the press and for freedom of reporting by means of broadcasts and films. Pursuant to Article 5(2) GG, any limitation on these freedoms must be statutory: either of a general nature or, in particular, for the protection of youth and the right to personal honour (see further, infra). Also of relevance is Article 19(4), which stipulates that freedom, save for in certain defined circumstances, may the apparent legal impossibility of delegating this duty to private (regulatory) bodies. The word “apparent” is crucial here, for much would depend on the exact modalities of the delegation. To entrust a voluntary self-regulatory mechanism with responsibility for defending human rights does not relieve the State of its duty to do so, even if the self-regulatory mechanisms prove to be effective. A co-regulatory body, however, contains more scope for effectively honouring State obligations, notwithstanding the caveat that ultimate responsibility remains with the State. This potential is strengthened by proper mechanisms for reviewing decisions of the co-regulatory body, appeals procedures, etc. Legislation and recourse to courts established by law could provide the necessary structures to ensure that States satisfy their international obligations in this regard.

The adoption of co-regulatory systems would entail significant role-changes for the various parties involved. Law-making and enforcement would no longer be the exclusive province of public authorities, as has traditionally been the case. Simultaneously, professionals would be brought within a new regulatory fold – the
parameters of which they would help to set. Resulting regulatory norms would be a fusion of the two old dispensations and their application would be invigorated on both sides on account of relevant expertise being channelled into the attainment of common objectives.

**Key features**

Before discussing a selection of (desired) key characteristics of co-regulatory systems, there is a need for preliminary reflection on the process values involved. In other words, would any scrutiny of the procedures in question reveal them to be principled and firmly grounded in the rules of natural justice? In essence, this represents concern for modi operandi and not simply objectives and results. Participation, accountability, rule- and decision-making procedures, information and review mechanisms, etc., are therefore all of cardinal importance.

The goal of attaining full or at least equitable participation for all members of society prompts concerns about representation (i.e., either under-, or indeed, over-representation of certain interest groups). Balance is required in terms of the gender, ethnic and age profiles of the individuals involved. It is also important to ensure an appropriate blend of sectoral and social interest groups in the co-regulatory process. Representation should lead to meaningful participation in the whole range of co-regulatory activities. Broad-based representation should be sincere and not merely symbolic.

As can be inferred from the term itself, co-regulation ought to involve collegiate responsibility in all of its aspects. Although benefiting from the synergic input of various relevant actors, the system should enjoy insulation from undue interference by political and economic forces, as well as by pressure groups and industry players. This insulation can be secured by adequate financing (either from independent sources or in an unconditional manner from partisan sources such as the State or industry actors). It is also contingent on firm political and industry commitment to its purpose and practice. Above all, there should not be involvement of the State by stealth or any puppetry by nominally independent public authorities.

A co-regulatory system would have to enjoy the confidence of all parties involved: professionals, State representatives (direct or at one remove) and members of the public. To win the support of professionals, their input into the formulation of codes and practices must be guaranteed and these must be reflective of practical professional experience. Similarly, the State would usually be reluctant for its former regulatory role to be completely usurped by the other parties in a co-regulatory arrangement. Its continued involvement would have to be vouchsafed, albeit in a redefined way from partisan sources such as the State or industry actors). It is also contingent on firm political and industry commitment to its purpose and practice. Above all, there should not be involvement of the State by stealth or any puppetry by nominally independent public authorities.

Independence of Journalists

The maxim that there is no freedom without responsibility is the cornerstone of the institutional status that befits their role.26 A corollary of the power of the media is that the judiciary in many national and international jurisdictions shows itself to be deferential to the notion of media autonomy and self-regulation. The extensive jurisprudence of the European Court of Human Rights is the prime example of this deference.27

While the ethical substratum of journalism is particularly true of the print media, which enjoy a long tradition of operational autonomy.

The effectiveness of existing self-regulatory models rests in no small measure on the effectiveness of their sanctions. Sanctions must be carefully devised and systematically enforced. They must be quantitatively and qualitatively meaningful. This can involve myriad combinations and permutations: warnings; public condemnations; administrative penalties; fines which command deterrent and/or punitive effect, etc. The administration of such a detailed and effective sanctioning regime necessarily presupposes the existence of a well-functioning, coherent, well-organised self-regulatory model.

The above, non-exhaustive list of desired traits could perhaps feed into a blue-print for co-regulation. However, the difficulty of first determining and then implementing so-called “best standards” at the national level should not be overlooked. Co-regulation is a term which has considerable political resonance. In some countries, it can be interpreted as signifying the light touch approach to regulation which is a feature of the economic liberalism being embraced by many governments in Europe at the moment, or more radically, as an initial step towards deregulation. In other countries, it may be perceived as a charade by the State, which would ostensibly convey the impression of an inclusive approach to law-making, but in reality ensure a covert continuance of the State-dominated status quo. The emotive quotient of the term is decidedly influenced by the political and cultural situation prevailing in a given state. Great care should therefore be taken to allow the organic growth of co-regulatory standards, in harmony with the specificities of individual States; a mere “cut-and-paste” exercise regarding standards and guidelines will be doomed to failure if it does not take full account of the environment in which it is intended to operate.
interest and other ethical matters can constitute an integral part of employment contracts. However, such in-house safeguards and codes of ethics and conduct are always open to suspicion and questioning: their very nature deprives them of the moral authority of codes negotiated and endorsed by broad industry representation.

Hate Speech

The potential for a co-regulatory approach to ‘hate speech’ is particularly interesting in that it is an issue with fundamental rights ramifications, but one which invariably figures prominently in media codes of ethics, whatever the circumstances of their elaboration. ‘Hate speech’ is a term which refers to a whole spectrum of negative discourse stretching from hate and incitement to hatred; to abuse, vilification, insults and offensive words and epithets; and arguably also to extreme examples of prejudice and bias. In short, virtually all racist and related declensions of noxious, identity-assailing expression could be brought within the wide embrace of the term. ‘Hate speech’, as such, is not defined in any international conventions, although a number of provisions do act as barometers for the extremes of tolerable expression.

These provisions include the express checks and balances considered to be an integral part of the right to freedom of opinion, information and expression. At the European level, these are essentially Articles 10(2) and 17 ECHR. The latter article, entitled “Prohibition of abuse of rights”, is an in-built safety mechanism of the Convention, which was designed in order to prevent provisions of the Convention from being invoked in favour of activities contrary to its text or spirit. This is the rock on which most cases involving racist speech or hate speech tend to founder: they are consistently adjudged to be manifestly unfounded. An examination of existing jurisprudence reveals that despite a traditional deference to the principle of journalistic autonomy, international adjudicative bodies are clearly reluctant to compromise on their consistent refusal to grant legal protection to hate speech.

At the national level, largely in reflection of the past, recent past or contemporary experiences of States, the dissemination of hate speech generally tends to be classed as a criminal offence. This would, prima facie, leave little scope for co-regulatory initiatives in the media sector (which is invariably subject to the overarching provisions of criminal law) to influence legal/regulatory approaches to (sanctioning) hate speech. Offences under criminal law constitute a de minimis threshold. As such, the putative role to be played by co-regulation as regards hate speech could perhaps be to raise the threshold above that of ordinary criminal law in order to insist on higher standards in the audiovisual or journalistic sectors.

However, such a role could prove to be controversial in the finer details of its implementation. The first consideration here could be the wariness in certain human rights circles about endorsing any further restrictions on the right to freedom of expression. The obvious subtext here is that an honest adherence to existing standards would preclude the need for the adoption of additional regulation of any description. The creation of a more sanitised environment for public discourse could, in theory at least, run the risk of whittling away the rougher, outer, most meaningful edges of the right to freedom of expression. It could tramme]
classification. A recent example of such inconsistency between the approach of the FSF and the Gemeinsame Stelle Jugendschutz und Programm der Landesmedienanstalten (Joint Body for Youth Protection and Programmes of the Regional Media Authorities) concerned the time at which the Steven Spielberg movie, 'Saving Private Ryan', could be broadcast.\textsuperscript{38}

A new interstate agreement on the protection of minors in the media was adopted in September and is expected to enter into force in April 2003.\textsuperscript{39} It proposes that the regulation of all electronic communications media will fall within the ambit of a new body, the Kommission für den Jugendmedienschutz (Commission for the Protection of Minors in the Media – KJM). Self-regulatory bodies will implement the regulations dealing with the protection of minors, under the auspices of the KJM. This should eliminate the current practice of double control involving the FSF (ex ante) and the regional media authorities (ex post facto). In addition, the KJM will only be able to overturn decisions of a self-regulatory authority if it fails to measure up to professional standards.

In the Netherlands, the situation is more straightforward. The Nederlands Instituut voor de Classificatie van Audiovisuele Media (Dutch Institute for the Classification of Audiovisual Media, NICAM) was established in 1999.\textsuperscript{40} It could be classed as a co-regulatory initiative for the entire audiovisual sector. NICAM is responsible for the implementation of Kijkwijzer, a uniform classification system for television, video, film and games. The great advantage of the uniformity of the system is that the clear explanation of the classifications applies across the board in the audiovisual media. Consistency in the information provided increases the public’s familiarity with the six content descriptors (violence; fear (raising feelings of fear); sex; drug/alcohol abuse; language and discrimination) and with the age categories (all ages; MG6 (essentially PG); 12 years and 16 years). Accordingly, this increases the use that can be made of the system. Crucial to this strategy is the prominence that these indicators manage to achieve in the public eye.

The Kijkwijzer classification system was devised by independent experts and coders who are given special training by NICAM. A product is usually classified by one coder, who may have recourse to a (three-member) coder committee for advice, if necessary. Although each audiovisual “product” is in theory classified for television, video, film and games, the system strives to be as practical and flexible as possible, with the result that if and when new circumstances arise, a renewal of classification can be requested. The complaints system is accessible and lodging complaints is uncomplicated; again a uniform system applies to all sections of the audiovisual industry. Effective sanctions are imposed by an independent Complaints Committee\textsuperscript{41} and these range from warnings to fines.

Despite the fact that Kijkwijzer is the progeny of enabling legislation in force since February 2001,\textsuperscript{42} operational independence is retained by NICAM, subject to the fulfilment of a number of criteria set out in Section 53 of the Mediawet (Dutch Media Act\textsuperscript{43}). State involvement is limited: it partly funds NICAM’s activities along with the member audiovisual organisations (in an approximate ratio of 3:1 (respectively)). As regards monitoring, the Commissariaat voor de Media (Dutch Media Authority)\textsuperscript{44} gives an opinion on the overall functioning of NICAM in its annual report and the Government has commissioned an independent research agency to carry out an evaluation of the effectiveness of the system by the end of 2002.

The description of the above systems for the protection of minors in the audiovisual sector reveals a number of the desired characteristics enumerated supra. Whatever the appellation used to describe the two models, the documented experiences to date have demonstrated that these key criteria would truly be the axes on which co-regulatory mechanisms would turn.

**Advertising**

In many countries, the advertising sector can boast a relatively long history of successful self-regulation. The self-regulation of advertising appears to fulfill many of the desired criteria for co-regulation enumerated supra. Its interest, for present purposes, is the possible analogous application of some of its features to a co-regulatory scheme in the audiovisual domain.

One of the driving forces in the self-regulation of advertising has been a consensus within the industry on basic values and how to uphold them. There is a clear realisation that consumer confidence in the entire advertising industry would suffer if advertising that is dishonest, misleading or offensive were allowed to go unchecked. It is thus in all players’ interests that the high tide of standards would raise all boats.

Self-regulation in the advertising sector plays a very distinct, if somewhat complementary, role to that of pertinent legislation, which tends to only concern itself with broader principles. Recourse to the law is only relied upon as an avenue of last resort, when the internal dynamics of the self-regulatory structures fail to resolve a matter. These structures prioritise the provision to consumers of quick, accessible, uncomplicated and cost-free means of lodging and pursuing complaints. Compliance with the elaborated standards by advertisers is not usually a problem, given the broad support for the system, both by advertisers and constituent parts of the industry. This points to an additional strength of self-regulation in the advertising sector, i.e., it spans all the different levels of the advertising process. This is particularly relevant for the purposes of effective enforcement of sanctions, which can therefore include the withdrawal of advertising space or the refusal to provide such space in the first place.

Predictably, self-regulatory systems in different States tend to have their own specific characteristics. Nevertheless, some principles remain immutable and common to all such systems: consumer-oriented; ease of accessibility for members of the public; independent in their composition and the discharge of their functions (and seen to be independent, to boot transparent in their operations; adequate financing by the industry, etc. The European Advertising Standards Alliance (EASA) builds on these points of commonality\textsuperscript{45} and on the shared goals of national self-regulatory bodies and promotes their development at the European level. In this context, it adopted a document entitled “Self-regulation – A Statement of Common Principles and Operating Standards of Best Practice”\textsuperscript{46} on 13 June 2002, which contains much substance that could be tailored for incorporation into a similar set of standards for co-regulation.

The transfrontier dimension to advertising is of cardinal importance and would have to be addressed within a co-regulatory framework, just as it had to be addressed in self-regulatory circles. EASA’s system for handling complaints with a cross-border dimension sets out to offer complainants the same redress that is available to potential complainants in the country in which the media containing the advertisement originally appeared. Consistent with this ‘country of origin’ principle, advertisements are required to comply with the applicable rules in the country in which the advertisement is originally disseminated. The Cross-Border Complaints System relies on the network of self-regulatory bodies which are members of EASA. Complaints are dealt with through cooperation between these self-regulatory bodies and through
their adherence to the principle of “mutual recognition”, which allows for certain differences of approach by the self-regulatory bodies. The EASA Secretariat monitors developments in these cross-border cases closely. Again, many of these procedures could prove of interest for co-regulatory regimes in the audiovisual sector as they would inevitably be confronted by similar issues.

Technical Standards

The choice and legal endorsement of technical standards for television broadcasting has always been highly politicised and, to a greater or lesser extent, market-driven. Markets tend to develop de facto standards without regulatory intervention: standards are thrust into the marketplace; are carried along by commercial currents and evolve accordingly. However, the legal sponsorship of standards with a view to their enforced implementation is subject to intense political lobbying. It is not unduly sceptical to argue that in the absence of a shared sense of purpose or a common objective (as arguably exists in journalism and in advertising), the altruistic premises of co-regulation might not prevail over the narrow, commercial interests of the various parties involved. This is why calls for the establishment and legal endorsement of technological standards could echo convincingly.

Technical standards are important for a number of reasons. Reliance on diverging standards can jeopardise the interoperability of services/systems and thus become a potential impediment to the enjoyment of the right to freedom of information (including the right to access information), as guaranteed by Article 10 ECHR. In commercial terms, different standards can become barriers to trade (the free flow of services) as non-interoperability prevents consumers from switching to competing services. It can also allow service providers to act as gatekeepers and thereby consolidate their own market position by controlling the value chain of broadcasting. Without interoperability solutions, there is therefore a danger of market foreclosure. These ethical, legal and commercial considerations lead to labyrinthine others and it can safely be said that the control of technical bottlenecks is at the very core of contemporary competition and information policy.

There has been a traditional reluctance on the part of regulators to intervene in matters of standardisation for fear of discouraging investment in various novel forms of broadcasting and as a result of pressure from market players. Instances of such intervention at the EC level have not always been successful. In the mid-1980s, the quest for a uniform European standard for satellite television led to the wide endorsement of the MAC standard, as evidenced by Directive 86/529/EEC (making MAC the mandatory standard for broadcasting satellites in Europe). This Directive, however, never made any real impact. A similar fate lay in store for HD-MAC, the high-definition television standard favoured by the EC in, inter alia, Council Directive 92/38/EEC on the adoption of standards for satellite broadcasting of television signals. In this case, the wind was taken from the sails of HD-MAC by the advent of digital television. The objective of Directive 95/47/EC on the use of standards for the transmission of television signals is to promote and support the accelerated development of television services in the wide-screen 16:9 format and using 625 or 1250 lines. Its Preamble provides evidence that it emerged from the same conceptual crucible as the two aforementioned standardising Directives.

Current approaches to standardisation by the EC are perhaps best exemplified by the Framework Directive, which promotes the idea of technical standardisation with a view to achieving harmonisation/interoperability between standards. In the same vein, the underlying thinking to current EC approaches is perhaps best synthesised by Recitals 30 and 31 of the Preamble to the Framework Directive, with the former stating: “[S]tandardisation should remain primarily a market-driven process. However there may still be situations where it is appropriate to require compliance with specified standards at Community level to ensure interoperability in the single market. […]”.

In Article 17 of the Framework Directive, the European Commission undertakes to draw up “a list of standards and/or specifications to serve as a basis for encouraging the harmonised provision of electronic communications networks, electronic communications services and associated facilities and services”. However, it reserves the right to request that the relevant European standards organisations draw up these standards. It further reserves the right to render compulsory the implementation of the aforementioned standards and/or specifications where the same have not been adequately implemented from the point of view of interoperability between Member States. Article 18 requires Member States to encourage the use of - and compliance with - open application program interfaces (APIs), again in the interests of interoperability. In this Article, the Commission also reserves the right to render the relevant standards compulsory (in accordance with Article 17), if interoperability and freedom of choice for users have not been adequately achieved in one or more Member States within one year after 25 July 2003.

Having examined the status quo at the EC level, it is now possible to consider how a co-regulatory framework might divide responsibility for the elaboration and promotion of technical standards favouring interoperability. Would or should such a task be the prerogative of market players (with some State involvement), subject to the clear and previously stated proviso, that should they fail to agree on the relevant standards, regulators would proactively intervene and assume this responsibility themselves? Would such a carrot-and-stick approach be appropriate? Another pertinent question concerns the point at which such regulatory intervention could or should take place: ex ante measures could prove necessary as competition law, for example, is only applicable once there is clear evidence of abuse of dominant position and would thus be unsuited to the goal of securing interoperability. In any event, it seems undisputed that interoperability would be one of the best ways of safeguarding citizens’ right to freedom of information and consumers’ right to protection and freedom of choice. These objectives should remain the lodestars of the process.

Conclusion

While the concept of co-regulation remains in the nursery, its future growth does seem assured. This projected growth will take place within the perimeter fences of existing international, European and national constitutional and legal orders. It will be stimulated by the interaction of all interested parties with a view to deciding upon the key structural and procedural characteristics that will ensure the effectiveness of co-regulation in a variety of circumstances. Foremost amongst these characteristics are equitable participation; operational autonomy; effective monitoring and compliance mechanisms; flexibility and responsiveness of complaints and appeals systems, etc. As illustrated above, co-regulation is very capable of playing different roles, depending on the context to which it is applied (e.g. journalism, the protection of minors and human dignity, advertising and technical standards). Whatever the versatility of the notion of co-regulation in theory, its suitability in practice will ultimately be determined by a multitude of political and other climatic considerations.


3) The grateful to Nataša Kregar for insights and information shared during the preparation of this article. However, any omissions or inaccuracies remain the sole responsibility of the author.

4) Texts adopted at COE Media Ministerial Conferences are available at: http://www.humanrights.coe.int/MI/Media/documents/4h-mm/MinisterialConferences(F).doc.


9) ETS no. 185. See further, IRIS 2001-10: 3.


12) See further, IRIS 2003-9: 5.


17) ibid, para. 25.


19) ibid., para. 24.

20) ibid., para. 15.

21) It is beyond the scope of this article to analyse the relevant jurisprudence in detail.

22) In worst-case scenario, self- or co-regulation, as essentially private forms of organisation, could lead to the development of cartels which might ignore principles developed elsewhere for the protection of open markets.


24) See, C. Palzer, op. cit., p.15.

25) Another point of commonality worth mentioning is that national codes of advertising practice are often based on the codes of the International Chamber of Commerce.


29) See generally, N. Helberger, op. cit., p. 46.

30) See further, S. Kaitatzi-Whitlock, “The Privatizing of Conditional Access Operators of conditional access services to offer their services (to all operators of conditional access services) to all (Article 6 juncto Article 54) and operators of direct satellite television broadcasting (86/529/EEC), available at: http://www.nican.cc or http://www.kijkwijzer.nl.

31) An Appeals Committee also exists.

32) See, however, the explanation of ‘Hate Speech’ contained in the Appendix to the New Media Act, 2nd Edition (London, Sweet & Maxwell, 1998), pp. 2-4.

33) For example, Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR), Article 20, ICCPR (which ought to be read in conjunction with Article 19) and Articles 4 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.


37) This choice of countries corresponds to the Agenda of the Florence Workshop.


40) For further information, see: http://www.nican.cc or http://www.kijkwijzer.nl.

41) Article 6 juncto Article 54.


44) See further: http://www.cdmv.nl.

45) Another point of commonality worth mentioning is that national codes of advertising practice are often based on the codes of the International Chamber of Commerce.


49) See generally, N. Helberger, op. cit., p. 46.

50) See further, S. Kaitatzi-Whitlock, “The Privatizing of Conditional Access Operators of conditional access services to offer their services (to all operators of conditional access services) to all operators of conditional access services to offer their services (to all operators of direct satellite television broadcasting (86/529/EC), available at: http://europa.eu.int/ISPO/infoseg/docs/86529eech.html.

51) Available at: http://europa.eu.int/ISPO/infoseg/docs/9238eec.html.


54) See also in this connection, Recital 9 of the Preamble to the Access Directive, See further, N. Helberger, op. cit., p. 46.

55) This is the date of application stipulated in Article 28(1).