

# Co-Regulation of the Media in Europe

Published by the  
European Audiovisual Observatory

In addition to the question of which media and services should be regulated and to what extent, the regulatory apparatus itself has been a topic of debate for some time now. The discussion has particularly centred on the possibility, either alongside or instead of traditional legislation (parliamentary acts, ordinances, directives, etc), of introducing “alternative” forms of regulation. Self-monitoring, self-regulation and co-regulation are examples of these alternative types of regulation, the boundaries between which are difficult to define. This IRIS Special focuses in particular on co-regulation.

This publication explains co-regulation, offers current examples of its use and discusses possible areas in which it may be applied. It describes the characteristics and legal requirements of co-regulation, as well as the chances and risks associated with it.

Any discussion of co-regulation should take into account the current debate over what criteria should be met by the content of audiovisual regulation. Acceptance, competence, flexibility, harmonisation, simplification, legal certainty and speed are just a few key concepts which come to mind and which are discussed in the report.

As well as practical demands, the publication considers how co-regulation can be brought in from a technical point of view. In particular, the interfaces between traditional and alternative methods of regulation are explained in concrete terms, with reference to existing European regulatory instruments.

Four questions form a central theme throughout the various articles: Is there already a legal framework for co-regulation? Are there good or bad examples of its use? What tools are needed for this and who is in charge of them? Consideration is also given to possible differences between national and supranational co-regulation and to whether there is a need for a European framework for co-regulation.

We cannot expect to find conclusive answers to many of these questions. The publication offers sound knowledge and current examples which make co-regulation easier to understand and contribute constructively to the co-regulation debate.

The information presented in this IRIS Special was gathered at a workshop on the theme of “Co-regulation of the Media in Europe”, held in September 2002 at the European University Institute in Florence. The different parts of the publication reflect various stages of preparations for and follow-up to the workshop, as well as some elements presented at the event itself. They are supplemented with a selection of background material and information about the workshop.

The Observatory is doubly grateful to every one of the workshop participants: firstly, for their excellent contributions to this IRIS Special and secondly for their willingness to share them with the public in this way. Our sincere thanks also go to our two partner institutions, the Institute of European Media Law (EMR) in Saarbrücken and the Institute for Information Law (IViR) in Amsterdam. They not only co-organised the workshop with the Observatory, but each also produced one of the two expert reports found at the beginning of this IRIS Special. Last but not least, we thank the European University Institute in Florence for its superb logistical support.

**Wolfgang Closs**  
*Executive Director*

**Susanne Nikoltchev**  
*Head of the Legal Information Department*

## **IRIS Special: Co-Regulation of the Media in Europe**

European Audiovisual Observatory, Strasbourg 2003

ISBN 92-871-5141-5  
EUR 27

### **Director of the Publication:**

Wolfgang Closs, Executive Director of the European Audiovisual Observatory  
E-mail: [w.closs@obs.coe.int](mailto:w.closs@obs.coe.int)

### **Editor and Coordinator:**

Dr. Susanne Nikoltchev (LL.M. EUI and U of M)  
Head of Department Legal Information  
E-mail: [S.Nikoltchev@obs.coe.int](mailto:S.Nikoltchev@obs.coe.int)

### **IRIS Special: Co-Regulation of the Media in Europe Contributing Partner Organisations:**

#### **Institute for Information Law (IViR)**

Rokin 84  
NL-1012 KX Amsterdam  
Tel.: +31 (0) 20 525 34 06  
Fax: +31 (0) 20 525 30 33  
E-mail: [website@ivir.nl](mailto:website@ivir.nl)  
URL: <http://ivir.nl>

#### **Institute of European Media Law (EMR)**

Nell-Breuning-Allee 6  
D-66115 Saarbrücken  
Tel.: +49 (0) 681 99 275 11  
Fax: +49 (0) 681 99 275 12  
E-mail: [emr@emr-sb.de](mailto:emr@emr-sb.de)  
URL: <http://www.emr-sb.de/>

### **Editorial Assistant:**

Michelle Ganter

### **Marketing:**

Markus Booms  
E-mail: [M.Booms@obs.coe.int](mailto:M.Booms@obs.coe.int)

### **Typesetting/Print:**

Pointillés, Hoenheim (France)

### **Publisher:**

European Audiovisual Observatory  
76 Allée de la Robertsau  
F-67000 Strasbourg  
Tel.: +33 (0)3 88 14 44 00 - Fax: +33 (0)3 88 14 44 19  
E-mail: [obs@obs.coe.int](mailto:obs@obs.coe.int)  
URL: <http://www.obs.coe.int>

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# Part I

## Co-Regulation of the Media in Europe

What role can co-regulation play in the audiovisual media sector? What is co-regulation anyway? How is it different from self-monitoring and self-regulation? Is there a European legal framework for co-regulation?

The first of the following expert reports investigates these questions, concentrating on European Union and Council of Europe legal provisions in this field. As far as audiovisual services are concerned, these provisions cover, *inter alia*, the bodies entrusted with monitoring powers within a co-regulation framework, as well as the staffing, tasks, competencies and, last but certainly not least, supervision of these bodies.

The second report deals with the practical implementation of the idea of co-regulation. This is illustrated using concrete examples from EC law governing the audiovisual sector and domestic legislation on the independence of journalists, incitement to hatred, protection of minors, advertising and technical standards.



# European Provisions for the Establishment of Co-Regulation Frameworks

by Dr. Carmen Palzer

*Institute of European Media Law (EMR), Saarbrücken/Brussels*

The concepts of co-regulation, self-regulation and self-monitoring have become central to the current political and academic debate on alternatives to traditional forms of public authority control. The debate concerns many different spheres of political control at national, regional, European and international levels. But what provisions exist at the European level for such regulatory models, especially for co-regulation? The following article aims to answer this question. It also served as a preparatory document for a workshop to be held in the autumn 2002 by the European Audiovisual Observatory (Strasbourg), the Institute of European Media Law (Saarbrücken) and the Institute for Information Law (Amsterdam).

## I. Self-monitoring/Self-regulation/Co-regulation

Although the terms “self-monitoring”, “self-regulation” and “co-regulation” are used as if their meaning were self-evident, there are no standard official definitions. None of the three basic types of regulatory framework - industry self-regulation, public authority control or a combination of the two - are clearly defined and, even where there is an accepted definition, there is no general consensus on whether any particular model is adequate in itself.<sup>1</sup> Also, different terms are sometimes used to describe the same type of framework.<sup>2</sup> Even at the European level, the terminology is not always consistent. Therefore, before we begin to discuss this subject, we must clarify the key concepts.

### 1. Self-monitoring

A self-monitoring system is limited to monitoring compliance with a given set of regulations.<sup>3</sup> The regulations themselves, whose implementation is monitored by a self-monitoring body, are not laid down by that body, but rather by another authority, such as the State.

### 2. Self-regulation

Self-regulation, on the other hand, is a regulatory framework under which bodies draw up their own regulations in order to achieve certain objectives and take full responsibility for monitoring compliance with those regulations. Such regulations may take the form of technical or quality standards or even codes of conduct defining good and bad practice. A key element of self-regulation is that the participation of those who are subject to regulation is voluntary. Codes of conduct should be drawn up at the instigation of market players (companies, associations, etc). The rules themselves may be laid down by a self-regulatory organisation which is created by the parties concerned (ideally involving

1) For example, the term “self-regulation” is also used to describe regulation of the market by means of supply and demand: Hoffmann-Riem/Schulz/Held, *Konvergenz und Regulierung*, Baden-Baden 2000, p.50; Schulz/Held, *Regulierte Selbst-Regulierung als Form modernen Regierens, Gutachten, Zwischenbericht*, October 2001, p.A-2, etc.

2) For example, in German administrative law circles, the model referred to in this article as “co-regulation” is known as regulated self-regulation, although the European institutions use the term co-regulation.

3) Ukrow, *Die Selbstkontrolle im Medienbereich in Europa*, Munich, Berlin 2000, p.22.

other interested parties, such as consumers) and which also monitors compliance with the rules and imposes any sanctions provided for by them. Since the State is not responsible for this form of regulation, public authority sanctions cannot be imposed, but only those provided by civil law, particularly the articles of associations. Codes of conduct may also contain rules on out-of-court mediation, e.g. regarding disputes over the legality of sanctions, and on the structure of relevant complaints bodies.

### 3. Co-regulation

This term is particularly ambiguous. The concept is not clearly defined and does not refer to any one particular regulatory model. "Co-regulation" is normally used as a generic term for co-operative forms of regulation that are designed to achieve public authority objectives. It contains elements of self-regulation as well as of traditional public authority regulation.<sup>4</sup>

The co-regulation model is based on a self-regulation framework (in its broadest sense), which is anchored in public authority regulations in one of two ways: the public authority either lays down a legal basis for the self-regulation framework so that it can begin to function, or integrates an existing self-regulation system into a public authority framework. This broad definition covers many different types of co-regulation, depending on the combination of public authority and private sector elements.<sup>5</sup> The elements chosen as the foundations of a co-regulation framework depend in particular on the task to be performed. If the framework is meant to fulfil what was originally a public authority responsibility, such as the protection of minors in the media, that task will have to be relinquished by the public authority concerned. The corresponding legal framework must take account of the responsibility still incumbent on the State to ensure that the task is fulfilled effectively and efficiently. The public authority should therefore monitor the activities of the self-regulatory body; should the latter offer inadequate protection of minors, the State must be entitled to intervene. In other areas, in which the public authority intervenes after an industry has been fully self-regulating (e.g., the action taken by the EU to implement the Multimedia Home Platform (MHP) Standard that sets out how interactive multimedia applications may be run in the home for the next generation of digital set top boxes), the public authority element is completely different. In such circumstances, the original objective of the agreement reached at industry level is proposed by the market players. When the agreement is converted into or added to legal provisions by the public authority, not only is the binding nature of the agreement reinforced, but it can also be applied to parties that were not involved in drawing it up. Since the agreement is reached by market players for economic reasons, it is in their own economic interests to adhere to it. The level of State monitoring may be reduced accordingly.

## II. European Provisions for the Establishment of Co-regulation Frameworks

### 1. General: Co-regulation within the European Union

Co-regulation is not mentioned in the European treaties, which tend to be based on a traditional form of public authority regulation. It therefore needs to be clarified whether co-regulation is admissible as a regulatory model from a European point of view and, if it is, how it can be incorporated into the regulatory instruments already in place for the implementation of European policy.

#### 1.1 European Governance White Paper

In early 2000, the European Commission explained that reforming European governance was one of its main strategic aims. In summer 2001, it published the White Paper on European Governance.<sup>6</sup> Based on the recognition that the current form of European governance is reaching its limits not just because of the impending accession of new Member States, but also in view of the system's unpopularity among European citizens, the Commission began by analysing the weaknesses of the instruments currently used to transpose its policies, before formulating some proposed reforms.

According to the Commission, if EU rules were complicated even further, it would take a very long time for the Member States to implement them.<sup>7</sup> Moreover, it believes that, in view of the length of

4) White Paper on European Governance, Footnote 6, p.27; a very broad definition appears in the Mandelkern report, Footnote 9, p.15: "... combining legislative or regulatory rules and alternatives to regulation".

5) The definition of co-regulation is deliberately broad so that it includes the various forms of co-regulation which, in view of individual States' various legal provisions and traditions, are or could be used to pursue political objectives.

6) White Paper on European Governance, 25 July 2001, COM (2001) 428 final ("White Paper"), available at [http://europa.eu.int/comm/off/white/index\\_de.htm](http://europa.eu.int/comm/off/white/index_de.htm)

7) Only five of 83 EC Directives which should have been transposed in 2000 had been implemented in all Member States by summer 2001, White Paper, p.25.



the legislative process, the EU cannot react quickly enough to changing market conditions. One possible way of improving this situation is by preparing, under certain conditions, implementing measures within the framework of co-regulation.<sup>8</sup> Co-regulation combines binding legislative and regulatory action with measures taken by the actors most closely concerned, drawing on their practical expertise. By involving those most affected in the preparation and enforcement of the measures, there is wider ownership of the policies in question and greater compliance with detailed, non-binding rules. According to the White Paper, the exact shape of co-regulation, the way in which legal and non-legal instruments are combined and who launches the initiative – stakeholders or the Commission – will vary from sector to sector.

### 1.2 Mandelkern Report

Similar conclusions are reached in the final report of the so-called “Mandelkern Group”, which deals with the problems of enhancing and simplifying the legislative process at European and national levels from the perspective of the governments of the Member States.<sup>9</sup> The Mandelkern Group was a High Level Consultative Group comprising representatives of the 15 Member States and the Commission. It was established on 7 November 2000 by the EU Ministers of Public Administration in order to implement one of the conclusions of the European Council meeting in Lisbon.<sup>10</sup>

On the basis that public authority regulation is not necessarily the best or the only way of resolving the current problems facing public administration, the report suggests a number of alternatives. One example is co-regulation,<sup>11</sup> which combines public authority objectives with the responsibility of those subject to regulation. Co-regulation can exist in various forms, combining legislative or regulatory rules and alternatives to regulation. The report mentions in particular two approaches to co-regulation: an “initial approach” and a “bottom to top approach”. The first involves establishing, by public authority regulation, global objectives and the main implementation mechanisms and methods for monitoring the application of public policies. Private actors are required to draw up the detailed transposition arrangements. On the other hand, with the “bottom to top approach”, non-compulsory rules agreed by private partners are changed into mandatory rules by the public authority. Similarly, the public administration may penalise bodies for failing to honour their commitments without giving any regulatory force to those commitments.

### 1.3 General Conditions for the Recognition of Co-regulation as a Means of Transposing Community Law

The White Paper and the Mandelkern Report both describe a series of conditions that co-regulation frameworks must meet in order to be recognised as effective instruments for achieving EU objectives.<sup>12</sup>

- Scope

Co-regulation cannot be used where fundamental rights or major political decisions are involved, or where safety or citizens’ equality are at stake. In the Commission’s view, co-regulation cannot be used to implement Community policy in situations where rules need to apply in a uniform way in all the Member States. It should only be used where it clearly adds value and serves the general interest.

- Legal Framework

A framework of overall objectives, basic rights, enforcement and appeal mechanisms and conditions for monitoring compliance should be set out in the legislation. The Mandelkern report states that co-regulation does not mean that the responsibility for the rules being implemented is shared. The primacy of the public authority remains intact.

- Co-regulation Bodies

Participating organisations must be representative, accountable, reliable and capable of following open procedures in applying agreed rules.<sup>13</sup>

8) White Paper, p.27.

9) Final Report of the Mandelkern Group on Better Regulation, 13 November 2001 (“Mandelkern Report”), available at <http://www.csl.gov.pt/docs/groupfinal.pdf>

10) The Commission, Council and Member States were urged to do everything they could to set out by 2001 a strategy for further coordinated action to simplify the regulatory environment, including the performance of public administration, at both national and Community level. This was to include identifying areas where further action is required by Member States to rationalise the transposition of Community legislation into national law; see Conclusions of the Presidency of the European Council at Lisbon, 23 and 24 March 2000, no.17, available at [http://www.europarl.eu.int/summits/lis1\\_de.htm](http://www.europarl.eu.int/summits/lis1_de.htm); for more information about the mandate of the Mandelkern Group, see final report, pp.7 ff.

11) Mandelkern report, pp.15 f.

12) Mandelkern report, pp.15, 16; White Paper, p.28.

13) In individual cases, this is a decisive factor in determining the added value of a co-regulatory approach, see White Paper, p.28.

- Public Authority Control

According to the Mandelkern report, co-regulation does not mean that the regulatory or legislative authority is no longer concerned with the effective application of the rules. On the contrary, supervisory mechanisms must be set up. The Commission explains that, where co-regulation fails to deliver the desired results or where certain private actors do not adhere to the agreed rules, it will always remain possible for public authorities to intervene by establishing the specific rules needed.

- Competition Law

The Commission also states that co-operation resulting from a co-regulation system must be compatible with competition rules.

- Transparency

According to the Commission, the rules agreed must be sufficiently visible that people are aware of the rules that apply and the rights they enjoy.

Co-regulation is therefore, in principle, recognised both by the Commission and by the governments of the Member States as a way of achieving political objectives at the European level; the European Council at Laeken expressly acknowledged the Commission White Paper and the work of the Mandelkern Group.<sup>14</sup> However, it remains unclear whether this also applies to areas regulated by EC Directives, in other words whether co-regulation systems may be used as implementing tools at national level, or whether Directives must be transposed solely by means of binding rules laid down by the public authority.

#### 1.4 Can Co-regulation be Used as an Implementing Tool in Areas Regulated by EC Directives?

The recognition of co-regulation models as implementing tools should pose little problem where directives specifically refer to them as instruments for the transposition of their provisions,<sup>15</sup> as long as those models also fulfil the criteria mentioned above (1.3).

In other cases, where directives do not mention co-regulation systems, it is necessary to refer back to the general rules governing the transposition of directives. In principle, the transposition of a directive into national law does not necessarily require its provisions to be formally incorporated verbatim in express, specific legislation by the Member States. A general legal context may, depending on the content of the directive in question, 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.<sup>16</sup> A specific legal framework is therefore necessary. Modifying an administrative practice<sup>17</sup> or issuing a circular<sup>18</sup> is not sufficient, since these can be amended at any time. Administrative provisions designed to implement a directive are only adequate if they have an effect vis-à-vis third parties.<sup>19</sup> The other criteria which transposing provisions must meet also depend on the content of the directive: for example, if the directive requires sanctions to be imposed for breaches of its provisions, those sanctions must be effective, reasonable and dissuasive.<sup>20</sup>

Co-regulation frameworks can be used as an additional mode of transposition as long as they fulfil the necessary conditions. In principle, this is possible because co-regulation is always associated with a legal framework which, together with other rules, can ensure the proper implementation of the directive concerned. The detailed provisions of the directive will have a significant influence on how the system is organised, determining for example whether the rights of individuals should be

14) Conclusions of the Presidency of the European Council at Laeken, 15 December 2001, available at [http://europa.eu.int/futurum/documents/press/oth151201\\_de.htm](http://europa.eu.int/futurum/documents/press/oth151201_de.htm)

15) See, for example, Art. 16.1(a) of the E-Commerce Directive, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178/1 of 17 July 2000, according to which codes of conduct drawn up at Community level can contribute to the proper implementation of Articles 5 to 15 of the Directive; see also Art. 27 of the Data Protection Directive, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/31 of 23 November 1995, which states that codes of conduct can contribute to the proper implementation of national provisions adopted pursuant to the Directive.

16) See ECJ case-law, e.g. ECJ, case C-96/95, Commission/Germany, Rec. 1997, p. I-1653; ECJ, case 361/88, Commission/Germany, Rec. 1991, p. I-2567.

17) ECJ, case 29/84, Commission/Germany, Rec. 1985, p.1661.

18) ECJ, case 239/85, Commission/Belgium, Rec. 1986, p.3645.

19) ECJ, case 361/88, Commission/Germany, Rec. 1991, p. I-2567.

20) ECJ, case C 180/95, Draehmpaehl/Urania Immobilienservice OHG, 1997, p. I-2195.

established in the legal framework or whether the need for transparency and enforceability can be met some other way. If it is necessary to impose responsibilities on individuals for the effective implementation of the directive, consideration should likewise be given to including these responsibilities in the legal framework in order to ensure by means of public authority sanctions that they are fulfilled. Moreover, the conditions set out by the Commission for the recognition of co-regulation systems as suitable means for the proper implementation of directives (see 1.3, above) must also be met. Additional rules concerning the exact form of the co-regulation system may be laid down in the directive that is to be transposed.

## 2. European Provisions for the Establishment of Co-regulation Models in the Audiovisual Media

Generally speaking, the actual structure of a co-regulation model depends essentially on the field in which the political objectives are to be implemented. These structures are therefore extremely varied. This can be illustrated with reference to two specific fields: firstly, co-regulation of the protection of minors in the television sector as an example of the national transposition of binding regulations, and secondly, protection of minors in the audiovisual services sector as an example of co-regulation in a field in which the EU and the Council of Europe have introduced non-binding rules, known as “soft law”.

### 2.1 Protection of Minors in the Television Sector

General regulations on the protection of minors in the television sector exist mainly at European Union level.<sup>21</sup> Council of Europe Conventions apply to a broader geographical area.<sup>22</sup>

#### 2.1.1 European Union

The protection of minors in the television sector is mainly regulated by the “Television without Frontiers” Directive,<sup>23</sup> which aims to guarantee transfrontier circulation of television programmes freely within the internal market. A receiving State may not restrict the reception and retransmission of broadcasts from other Member States if they comply with the rules applicable in the transmitting State and the provisions of the Directive (Art. 2a para.1). The transmitting State must ensure that these rules and provisions are complied with (Art. 2 para.1 and Art. 3 para.2). Provisions on the protection of minors are set out in Art. 22 ff. and Art. 16. According to Art. 22 para.1, Member States must take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes that might seriously impair the development of minors, in particular programmes that involve pornography or gratuitous violence. Under the terms of Art. 22 para. 2, other programmes which are likely to harm the development of minors may be broadcast where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors will not normally hear or see such broadcasts. According to Art. 22a, the Member States must ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality. Finally, Art. 16 contains provisions on the protection of minors in connection with advertising and teleshopping.

There are currently no references to co-regulation systems as instruments for the transposition of this Directive. The inclusion of such provisions was called for in connection with the promised review of the “Television without Frontiers” Directive,<sup>24</sup> although it is doubtful whether any revision will take place in the near future and the scope of such a review is unclear.<sup>25</sup> If the general conditions for the transposition of directives are adhered to (see 1.4) and if the criteria set out by the Commission for the recognition of the proper implementation of Community law (see 1.3) are met, there is no reason why co-regulation should not be used to achieve Community objectives in this area. The exact nature

21) An overview and links to the regulations may be found at: [http://europa.eu.int/comm/avpolicy/regul/new\\_srv/pmhd\\_de.htm](http://europa.eu.int/comm/avpolicy/regul/new_srv/pmhd_de.htm); for details of Commission policy in the audiovisual sector until 2004, see Communication from the Commission to Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 14 December 1999, COM (1999) 657 final: Principles and guidelines for the Community's audiovisual policy in the digital age.

22) An overview and various references to the Council of Europe's activities in the media sector can be found at <http://www.humanrights.coe.int/media/>

23) Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 202/60 of 30 July 1997.

24) According to Art. 26 of the “Television without Frontiers” Directive, the Commission has until the end of 2002 to produce a report on the application of the Directive and, if necessary, make further proposals to adapt it to developments in the field of television broadcasting, in particular in the light of recent technological developments. The report should pay particular attention to the application of provisions on the protection of minors and public order (Art. 22b para. 1). Information on the current state of preparations for the revision of the Directive can be found at: [http://europa.eu.int/comm/avpolicy/regul/regul\\_de.htm](http://europa.eu.int/comm/avpolicy/regul/regul_de.htm)

25) The Commission is considering three alternatives: an “immediate radical amendment of the Directive”, *i.e.*, major reform, a “fine-tuning”, *i.e.*, minor reform, or establishment of a work programme to prepare a proposal at a later date. The Commissioner responsible, Viviane Reding, declared in a speech in Brussels on 21 March that the third option, which would involve setting up a working group, is the most likely. See [http://europa.eu.int/comm/avpolicy/legis/speech\\_de.htm](http://europa.eu.int/comm/avpolicy/legis/speech_de.htm)

of such a co-regulation system cannot be fully discussed here. We can, however, mention a few key aspects: when the framework is devised, it will be important to ensure in particular that the aims of the Directive - e.g., to ban the broadcasting of pornography - can be effectively achieved through national legislation. The related responsibilities of broadcasters must be binding and State sanctions should apply to those who fail to fulfil them. The same applies to the other requirements and prohibitions laid down in the Directive: they, along with sanctions in case of non-compliance, should be established within the legal framework. Since basic rights are involved here, it is also important to ensure that those rights are protected by the public authority. The use of co-regulation should not lead to the unlawful restriction of individuals' basic rights. However, the detailed rules may be drawn up by the co-regulatory bodies set up by the industry. The private sector may also be entrusted with the task of monitoring compliance with the rules, as long as the State, which bears ultimate responsibility for adherence to the provisions, reserves the right to intervene if monitoring by the co-regulatory bodies is inadequate.

Another aspect that should be borne in mind when establishing a co-regulation framework is described in Art. 3 para. 3 of the "Television without Frontiers" Directive. This obliges Member States to set up appropriate procedures for third parties directly affected, including nationals of other Member States, to apply to the competent judicial or other authorities to seek effective compliance with the provisions of the Directive according to national provisions. Now, if these provisions include codes of conduct and other rules inherent in a co-regulation system, it is possible that a complaints board set up as part of the co-regulation framework to deal with alleged breaches of a code of conduct, for example, could constitute an "other authority" in the sense of Art. 3 para. 3. According to Art. 3 para. 3, all EC citizens should be entitled to lodge such a complaint. However, the wording of Art. 3 para. 3 tends to suggest that "other authorities" could mean other public authorities. On the other hand, a "co-regulation-friendly" interpretation is also conceivable.<sup>26</sup> If this is ruled out, Art. 3 para. 3 should be revised in order that the Directive may be transposed by means of co-regulation.

#### 2.1.2 Council of Europe

Beyond EU borders, the protection of minors in the television broadcasting sector is dealt with by the European Convention on Transfrontier Television ("Transfrontier Television Convention").<sup>27</sup> According to Art. 1, the purpose of the Convention is to facilitate the transfrontier transmission and retransmission of television programme services. Therefore, the parties undertake, in Art. 4, to guarantee freedom of reception and not to restrict the retransmission on their territories of programme services which comply with the terms of the Convention. They are obliged to ensure that all programme services transmitted by broadcasters within their jurisdiction comply with the terms of the Convention (Art. 5). Art. 7 contains regulations concerning content that is illegal or harmful to minors. According to Art. 7, para. 2, programmes which are likely to impair the development of children and adolescents must not be scheduled when, because of the time of transmission and reception, they are likely to watch them. Art. 7 para. 1 prohibits the broadcasting of content which is indecent, *i.e.*, which contains pornography, or which gives undue prominence to violence or is likely to incite to racial hatred. Other rules concerning the protection of minors are contained in Art. 11 para. 3 and Art. 15 para. 2(a), for example, which are concerned with advertising. Since Community law, including the "Television without Frontiers" Directive, takes priority in relations between EU Member States (Art. 27 of the Transfrontier Television Convention), the Transfrontier Television Convention mainly applies if there are no Community rules governing a specific subject, or if either the transmitting or receiving State is not a member of the EU.

If, in these circumstances, the protection of minors in the television sector is transposed using co-regulation, the provisions of the Transfrontier Television Convention, which are binding under international law, must be respected. The parties involved must fulfil their obligations under the Convention. Each State is free to decide how to implement the Convention at national level; however, they are responsible to the other parties for ensuring that the provisions on the protection of minors contained in the Convention are effectively applied.<sup>28</sup> It is therefore advisable to incorporate the duties incumbent on broadcasters under the Convention into the legal framework and to ensure they are fulfilled by means of public authority sanctions. However, the detailed implementation could be entrusted to self-regulatory organisations established within a co-regulation framework.

<sup>26</sup>) Regarding the admissibility of a "self-regulation-friendly" interpretation, see Ukrow, *op.cit.*, pp.39 ff.

<sup>27</sup>) European Convention on Transfrontier Television, adopted and opened for signature in Strasbourg on 5 May 1989, entered into force on 1 May 1993 and was amended by the Protocol of 1 October 1998, which entered into force on 1 March 2002; the consolidated text of the Convention and the chart of signatures and ratifications can be found at: <http://conventions.coe.int/treaty/EN/cadreprincipal.htm> and in IRIS 2002-5: 8-11.

<sup>28</sup>) See the rules on dealing with alleged violations of the Convention, Arts 24 *et seq.*

## 2.2 Audiovisual Services

### 2.2.1 European Union

Although it has not issued any binding legal instruments in this field, the EU is also making great efforts to protect minors in the audiovisual services and Internet sectors. The most important measure it has taken is the Council Recommendation of 24 September 1998, which deals with the protection of minors and human dignity in the audiovisual and information services industry and which, in its Annex, provides some guidelines for the establishment of a “self-regulation framework”.<sup>29</sup> The Recommendation is concerned with all audiovisual and information services made available to the public, whatever the means of conveyance. This includes broadcasting, proprietary on-line services and Internet services.<sup>30</sup> The Council recommends, *inter alia*, that Member States, with the involvement of all relevant parties, should promote the establishment of national frameworks for the protection of minors and human dignity.<sup>31</sup> It also refers specifically to the need for co-operation at Community level in developing comparable assessment methodologies and the need for international Community-wide co-operation between the parties involved in such a framework.<sup>32</sup> The parties include not only (State) bodies concerned with the establishment and implementation of self-regulation frameworks, but also self-regulatory organisations, complaints bodies, companies and their associations.

The Annex to the Recommendation contains practical guidelines for the organisation of the required “self-regulation frameworks”,<sup>33</sup> particularly with regard to the content of codes of conduct:

- Legal Framework

Since the main purpose of a self-regulation framework is to supplement existing legislation,<sup>34</sup> it is not meant to replace the current regulatory framework.

- Consultation and Representativeness of the Parties Concerned

All parties concerned, e.g., public authorities, users, consumers and businesses, should participate fully in the definition, application and evaluation of the national self-regulation framework.<sup>35</sup>

- Separation of Public and Private Sectors

The respective responsibilities of the parties concerned, both public and private, should be clearly set out.<sup>36</sup>

- Drawing up Codes of Conduct

The parties concerned should draw up rules governing their conduct on a voluntary basis. In doing so, they must take into account the diversity of services and functions performed by the various categories of operators and service providers and the diversity of environments and applications in on-line services; more than one code of conduct may therefore be necessary. They should also uphold the principles of freedom of expression, protection of privacy, free movement of services, technical and economic feasibility (given that the overall objective is to develop the Information Society in Europe) and proportionality. Codes of conduct should at least contain the following:

- Comprehensive information for users concerning the dangers posed by content, and ways in which they can protect themselves or minors,<sup>37</sup>
- Rules on the establishment of complaints bodies and on the complaints procedure,<sup>38</sup>

29) Council Recommendation 98/560/EC of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity, OJ L 270 of 7 October 1998, pp.48 – 55 (“Recommendation on the protection of minors and human dignity”, with Annex: “Indicative guidelines for the implementation, at national level, of a self-regulation framework for the protection of minors and human dignity in on-line audiovisual and information services”).

30) Recommendation on the protection of minors and human dignity, Recital 5 (broadcasting, proprietary on-line services, or services on the Internet).

31) Recommendation on the protection of minors and human dignity, Section I No. 1.

32) Recommendation on the protection of minors and human dignity, Section I No. 3, Section 3.

33) These “self-regulation frameworks” should be established within a legal framework; public authorities should also be involved in order that these frameworks conform with the definition of co-regulation used in this report.

34) Recommendation on the protection of minors and human dignity, Annex, Objective.

35) *Ibid.*

36) Recommendation on the protection of minors and human dignity, Annex, section 1.

37) Further details, e.g., regarding the timing of information given to users about potential risks or the available warning signals and filter systems, particularly support for parents, are mentioned in the Recommendation on the protection of minors and human dignity, Annex, sections 2.2.1 (a), (b) and (c); these provisions apply to illegal content and content that may be harmful to minors (section 2.2.2 (a)).

38) Recommendation on the protection of minors and human dignity, Annex, section 2.2.1 (d); this is also covered in greater detail and also applies to illegal content, (section 2.2.2 (b)).

- Dissuasive sanctions for violations of the codes of conduct, proportionate to the nature of the violation,<sup>39</sup>
  - Rules on appeal and mediation procedures for disputes over imposed sanctions,<sup>40</sup>
  - For illegal content: rules on co-operation between operators/service providers and the appropriate judicial and police authorities, in accordance with their respective responsibilities and functions.
- Networking of Appropriate Structures  
In order to facilitate co-operation at Community level, the appropriate structures within the Member States should be networked. To this end, all the parties involved in the drawing up of a national self-regulation network and those involved in an effective complaint-management system should set up a national contact point.<sup>41</sup>
  - Monitoring of the Framework by Member States  
Measures should be introduced for the evaluation of the self-regulation framework at national level.<sup>42</sup> They should serve to assess its effectiveness in protecting the general interests in question. This should take into account appropriate European-level co-operation, *inter alia* on the development of comparable assessment methodologies.

At the beginning of the year, the Commission published its evaluation report on the application of the Recommendation.<sup>43</sup> In the report, the Commission concludes, *inter alia*, that the results of the application of the Recommendation are generally encouraging, but that interested parties, particularly consumers, should have been more involved. It states “that the challenges are to be met with respect to the protection of minors and human dignity across all the media, be it Internet, broadcasting, videogames or supports like videocassettes and DVDs”. It believes renewed efforts need to be made to ensure a coherent approach, particularly in view of the fact that “convergence will continue to increase, with Internet TV, interactive broadcasting or downloading of videogames from the Internet”.

The EU is also taking measures to combat illegal and harmful Internet content. Of particular note is the action plan on promoting safer use of the Internet,<sup>44</sup> which offers funding for projects designed to promote self-regulation and content-monitoring schemes, for the development of filtering tools and rating systems and for campaigns to raise users’ awareness of the possibilities and the dangers of the Internet.

### 2.2.2 Council of Europe

The Council of Europe is also concerned with the protection of minors in the audiovisual services sector. On 5 September 2001, it adopted a Recommendation on self-regulation and user protection against illegal or harmful content on new communications and information services.<sup>45</sup> In the Appendix to this Recommendation,<sup>46</sup> it sets out principles and mechanisms that might be used to achieve this objective. The Member States are encouraged to implement these principles, which are described below, in their domestic law.<sup>47</sup>

39) Recommendation on the protection of minors and human dignity, Annex, section 2.2.3; this should strengthen the credibility of the codes.

40) *Ibid.*

41) Recommendation on the protection of minors and human dignity, Annex, section 3.

42) Recommendation on the protection of minors and human dignity, Annex, section 4.

43) Evaluation report from the Commission to the Council and the European Parliament on the application of the Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity, 27 February 2001, COM (2001) 106 final, (“evaluation report”); see also the Council Conclusions of 23 July 2001 on the Commission’s evaluation report, 2001/C 213/03) OJ C 213/10 of 31 July 2001, and the European Parliament resolution on the evaluation report, adopted on 11 April 2002, available at: <http://www3.europarl.eu.int/omk/omnsapir.so/calendar?APP=PV2&LANGUE=DE>

44) Annex to Decision No. 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks, OJ L 33 of 6 February 1999. The Commission has now extended the action plan until 21 December 2004, since it believes, *inter alia*, that further measures are needed to promote self-regulation; see also the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – Follow-up to the multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks, COM (2002) 152 of 22 March 2002, which contains a Proposal for a Decision of the European Parliament and of the Council amending Decision No. 276/1999/EC.

45) Recommendation No. R (2001) 8 on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services, <http://cm.coe.int/ta/rec/2001/2001r8.htm> which lists previous Council of Europe Recommendations, such as Recommendation No. R (92) 19 on video games with a racist content and Recommendation No. R (97) 19 on the portrayal of violence in the electronic media.

46) Appendix to Recommendation No. R (2002) 8 – Principles and mechanisms concerning self-regulation and user protection against illegal or harmful content in new communications and information services.

47) Recommendation, para. 1.

- Self-regulatory Organisations
  - Member States should encourage the establishment of organisations which are representative of Internet actors, for example Internet service providers, content providers and users. They should encourage such organisations to establish regulatory mechanisms within their remit, especially codes of conduct, and to monitor compliance with these codes.
  - Organisations in the media field, which already have self-regulatory standards, should be encouraged to apply them to new communications and information services.
  - Member States should encourage self-regulatory organisations to participate in relevant legislative processes and in the implementation of relevant norms, as well as Europe-wide and international co-operation between such organisations.
- Development and Use of Content Descriptors
  - Member States should encourage the definition of a set of content descriptors, on the widest possible geographical scale and in co-operation with self-regulatory organisations, in order to provide for neutral labelling of content. Such content descriptors should indicate, for example, violent and pornographic content as well as content promoting the use of tobacco or alcohol, gambling services, and content which allows unsupervised and anonymous contacts between minors and adults.
  - Content providers should be encouraged to apply these content descriptors, in order to enable users to recognise and filter such content regardless of its origin.
- Filtering Systems
  - Member States should encourage the development of filtering systems, which provide users with the ability to select content on the basis of content descriptors.
  - Member States should encourage the use of conditional access tools by content and service providers in relation to content harmful to minors. These might include age-verification systems, personal identification codes, passwords, encryption and decoding systems or access through cards with an electronic code.
- Complaints Systems
  - Member States should encourage the establishment of complaints systems, such as hotlines, which are provided by Internet service providers, content providers, user associations or other organisations. Such systems should, where necessary for ensuring an adequate response against presumed illegal content, be complemented by hotlines provided by public authorities. The development of common minimum requirements and practices should be particularly encouraged. Such requirements should include, for instance, the provision of a permanent web address, 24-hour availability, the provision of information to the public about the legally responsible persons and entities within the hotline providers and about the rules and practices relating to the complaints procedure, including co-operation with law enforcement authorities with regard to presumed illegal content, the provision of information to users concerning the processing of their complaints and the provision of links to other content complaints systems.
  - Member States should also set up, at the domestic level, an adequate framework for co-operation between complaints bodies and public authorities with regard to presumed illegal content. For this purpose, they should define the legal responsibilities and privileges of bodies offering complaints systems when accessing, copying, collecting and forwarding presumed illegal content to law enforcement authorities. Member States should also foster Europe-wide and international co-operation between complaints bodies. They should undertake all necessary legal and administrative measures for transfrontier co-operation between their relevant law enforcement authorities with regard to complaints and investigations concerning presumed illegal content.
- Out-of-Court Mediation

Member States should encourage the creation, at the domestic level, of voluntary, fair, independent, accessible and effective bodies or procedures for out-of-court mediation as well as mechanisms for the arbitration of disputes concerning content-related matters. They should also encourage Europe-wide and international co-operation between such mediation and arbitration bodies, open access for everyone to such mediation and arbitration procedures, irrespective of frontiers, and the mutual recognition and enforcement of out-of-court settlements reached hereby, with due regard to the national *ordre public* and fundamental procedural safeguards.
- User Information

Finally, Member States should encourage the provision of comprehensive information about the aforementioned principles to users and the public. The development of quality labels for Internet content, for example for governmental content, educational content and content suitable for children, should also be encouraged.

### 2.2.3 Application of Recommendations

These European Council and Council of Europe recommendations have no direct legal effect insofar as the Member States are not obliged to incorporate their provisions into domestic law.<sup>48</sup> Nevertheless, EU Member States are obliged, under the principle of loyalty to the Community (Art. 10 EC Treaty), to base their actions on Council recommendations.<sup>49</sup> The purpose of Council of Europe recommendations is also to encourage Member States to take particular action. Whether the recommendations are binding or not, common international standards are necessary to ensure that minors are properly protected in individual countries where an international medium such as the Internet is concerned. It is therefore sensible, when creating or reviewing national frameworks for the protection of minors on the Internet, to include these provisions, which should as far as possible be compatible with the respective legal systems and practices.

## III. Matters to Be Resolved

It therefore appears that detailed provision has already been made within the European Community and the wider geographical area covered by the Council of Europe for the establishment of co-regulation frameworks relating to the protection of minors in the audiovisual media.

Nevertheless, uncertainty still shrouds certain aspects of the establishment of co-regulation frameworks, such as the amount of detail that domestic legislation should - and may - contain. Co-regulation systems can tend towards public authority regulation or industry self-regulation, which begs the question: which aspects of the traditional mandatory regulation model should be included in co-regulation frameworks in order for them to work efficiently? On the other hand, to what extent can the public authority be involved before the system is no longer one of co-regulation, *i.e.*, at what point does State regulation begin?

Furthermore, it is unclear how the self-regulatory bodies within the co-regulation framework should be staffed and who is responsible for appointing the people concerned. One idea is to staff them only with representatives of the parties involved, *e.g.*, companies and consumers; on the other hand, State representatives or independent experts could be recruited. It might also be possible to appoint "independent" State representatives, who would be guaranteed independence and would not be subject to instructions from higher authorities. Closely related to this issue is that of whether any public authority representatives involved would or should have full voting rights, a casting vote (*e.g.*, a right of veto) or whether they should merely act in an advisory capacity. The answer may lie in the need to separate the public and private sectors: the two types of regulation should not be combined. The need for separation<sup>50</sup> implies that it should be clearly apparent who is responsible for which areas of decision-making: the State or the self-regulatory organisation. It can therefore do no harm for a public authority representative to act as an advisor or observer within the self-regulatory body. However, if the public sector can have a deciding influence on the actions of the self-regulatory organisation, the whole identity of the framework needs to be rethought: is it still a co-regulation framework? Or is it a State framework that merely makes use of private sector expertise?

Further questions are raised by the conclusions of the Commission's evaluation report on the application of the Council Recommendation concerning the protection of minors and human dignity.<sup>51</sup> What should the coherent approach necessitated by increasing convergence look like? Should all media be included in a co-regulation framework? Or should different frameworks be established and networking be used to ensure that consistent decisions are taken? Clues to the answers to these questions might be found in the reasons why a coherent approach is required: as a result of convergence, different technical methods might be used to transmit the same content, which should be rated in the same way. For example, if it is illegal to broadcast pornographic content on television, it should also be illegal to transmit it to a computer screen via the Internet. It might therefore be wise to create a central, cross-media authority with responsibility for rating all content.<sup>52</sup> The methods used to prevent or restrict the dissemination of such content can then be determined, in accordance with

48) See Art. 249 para. 5 of the EC Treaty: "Recommendations and opinions shall have no binding force."; regarding the Council of Europe recommendations, see Seidl-Hohenfeldern/Loibl, *Das Recht der Internationalen Organisationen*, para. 1548.

49) See, for example, Hetmeier in Lenz, *EGV-Kommentar*, Art. 249 para. 19, etc.

50) The need for separation results from the principle of democracy and the transparency required by the rule of law, see Ukrow, *op.cit.*, pp.29 f; Recommendation on the protection of minors and human dignity, Annex, section 1.

51) See end of section 2.2.1.

52) See the NICAM (*Nederlands Instituut voor de Classificatie van Audiovisuele Media*) system in the Netherlands: <http://www.kijkwijzer.nl/>



the means of transmission used, by the various co-regulatory bodies. It should also be remembered that some States already have self-regulation frameworks in place for various media.<sup>53</sup> These systems, whose experiences should be built upon, should be incorporated into the new framework as smoothly as possible. Finally, the choice of a particular framework will also depend on local conditions in the State concerned.

A final, but not unimportant, question relating to the creation of a functioning co-regulation framework is that of finance. Such a system may be funded by the companies concerned, the State or a combination of the two. Here also, there are many possible scenarios. For example, if the purpose of co-regulation is to take over a State function, *i.e.*, to relieve the State of a certain task, the State can be expected to provide start-up funding at the very least. However, a co-regulation framework should not be predominantly financed by the public sector.

Even in relation to a limited sphere of reference, therefore, numerous questions remain unresolved. They cannot be answered clearly, but only in relation to various alternatives, depending on national legal systems and traditions. This is particularly true in a number of fields in which the use of co-regulation is being considered as a way of achieving a whole range of quite different political objectives. Insofar as common Europe-wide standards are necessary for the fulfilment of these objectives or for the system to function properly, there are bound to be similarities between the different co-regulation frameworks established in individual States. However, as far as the detail is concerned, co-regulation frameworks in Europe will be as varied as the States themselves. ■

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53) See the Commission's conclusions in its evaluation report and the comparative survey of self-regulation systems in Europe contained in Ukrow, *op.cit.*, pp.205 ff.



# 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”.<sup>1</sup> 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,<sup>2</sup> 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 article<sup>3</sup> 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).

1) T. Gibbons, *Regulating the Media* (2nd Edition) (London, Sweet & Maxwell, 1998), p. 300.

2) C. Palzer, “Co-Regulation of the Media in Europe: European Provisions for the Establishment of Co-regulation Frameworks”, *IRIS plus* 2002-6; W. Schulz & T. Held, “Regulated Self-Regulation as a Form of Modern Government”, Study commissioned by the German Federal Commissioner for Cultural and Media Affairs, Interim Report (October 2001).

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

## 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.<sup>4</sup>

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”.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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”.<sup>8</sup>

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 Cybercrime<sup>9</sup> (which represents the Council’s traditional standard-setting approach) and the Recommendation on self-regulation concerning cyber content.<sup>10</sup> 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.<sup>11</sup> 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,<sup>12</sup> 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

4) Texts adopted at COE Media Ministerial Conferences are available at:

[http://www.humanrights.coe.int/Media/documents/dh-mm/MinisterialConferences\(E\).doc](http://www.humanrights.coe.int/Media/documents/dh-mm/MinisterialConferences(E).doc).

5) 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994)

*The media in a democratic society*, Resolution No. 2: Journalistic Freedoms and Human Rights.

6) 5th European Ministerial Conference on Mass Media Policy (Thessaloniki, 11 - 12 December 1997) *The Information Society: a challenge for Europe*. See, in particular, Resolution No. 2: Rethinking the regulatory framework for the media, (especially Preambular paras. 4, 7(v)).

7) See further, T. McGonagle, “Does the Existing Regulatory Framework for Television Apply to the New Media?”, *IRIS plus* 2001-6, and “Changing Aspects of Broadcasting: New Territory and New Challenges”, *IRIS plus* 2001-10.

8) *A media policy for tomorrow*, 6th European Ministerial Conference on Mass Media Policy (Cracow, 15-16 June 2000).

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

10) Recommendation Rec(2001)8 of the Committee of Ministers to member states on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services), 5 September 2001.

11) Statement (2002)1 on Human Dignity and the Fundamental Rights of Others, Standing Committee on Transfrontier Television of the CoE, 12-13 September 2002, available at:

<http://www.humanrights.coe.int/media/>. See further, *IRIS* 2002-9: 5

12) See C. Palzer, *op. cit.*, pp. 2-4.

on electronic commerce<sup>13</sup> and Article 27 of the Data Protection Directive,<sup>14</sup> for instance, express the clear preference for 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.<sup>15</sup> 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. Netherlands*<sup>16</sup> 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".<sup>17</sup> In *Commission v. Germany*,<sup>18</sup> 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."<sup>19</sup> 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."<sup>20</sup>

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<sup>21</sup> – 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.

13) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17 July 2000, p. 1.

14) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23 November 1995, p. 31.

15) EC Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, adopted on 3 October 1989, OJ L 298, 17 October 1989, p.23 and amended by Directive 97/36/EC of the European Parliament and of the Council, adopted on 30 June 1997, OJ L 202, 30 July 1997, p. 60.

16) Case C-339/87, *Commission of the European Communities v. Kingdom of the Netherlands*, Judgment of the ECJ of 15 March 1990.

17) *Ibid.*, para. 25.

18) Case C-361/88, *Commission of the European Communities v. Federal Republic of Germany*, Judgment of the ECJ of 30 May 1991.

19) *Ibid.*, para. 24.

20) *Ibid.*, para. 15.

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

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,<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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 restricting this freedom, save for in certain defined circumstances. One example of this is the German *Grundgesetz* (GG, the German Federal Basic Law).<sup>25</sup> 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 recourse to the courts system must be possible for all individuals alleging violations of their human rights by a public authority. This illustrates how a co-regulatory system could have to be deferential to an overarching courts system and also that (national) constitutional provisions would merit special consideration in the context of any proposals to implement the Directive by co-regulatory means (see *supra*).

Whatever about domestic constitutional norms helping to trace the possible contours for co-regulation of the media, the impact of the aforementioned obligations of States resulting from international (human rights) treaties should not be understated. The fact that States are ultimately responsible for guaranteeing human rights suggests 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

22) In a 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.

23) *Müller v. Switzerland*, Judgment of the European Court of Human Rights of 24 May 1988, Series A, No. 133; *Otto-Preminger-Institut v. Austria*, Judgment of the European Court of Human Rights of 20 September 1994, Series A, No. 295-A, etc.

24) See, C. Palzer, *op. cit.*; Mandelkern Group on Better Regulation Final Report, 13 November 2001; European Governance: A White Paper, Commission of the European Communities, 25 July 2001, COM(2001) 428 final.

25) Available at: [http://www.oefre.unibe.ch/law/the\\_basic\\_law.pdf](http://www.oefre.unibe.ch/law/the_basic_law.pdf)

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. In order to command the confidence of the public, the co-regulatory body must be sensitive to citizens' interests, always aiming to improve standards while upholding existing ones. All procedures concerning the public, especially information-distribution, querying, complaints and appeals mechanisms, should be flexible, expeditious and readily accessible to ordinary members of the public. All of these operational criteria should hold equally true in a transfrontier context, the importance of which will be amply illustrated in the section on advertising, *infra*. The ability of co-regulatory bodies to deal with issues of an international character should be considered an integral part of their functions.

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 continuation 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.

## Independence of Journalists

There can be no doubt whatever as to the incredible power wielded by the mass media. It is from this background that notions of media and broadcasting freedoms have emerged; thus making a convincing claim for the institutional status that befits their role.<sup>26</sup> 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.<sup>27</sup>

The maxim that there is no freedom without responsibility is the centrepiece of both the jurisprudence of the European Court of Human Rights and of journalistic ethics. Co-regulation would therefore appear to be a viable option in journalism, provided that it is approached in a thoughtful way. Ethics do not necessarily rhyme with legalities: the former are generally the preserve of the profession and the latter of the legislator and the courts.<sup>28</sup> While the distinctiveness of each cannot be summarised as “never the twain shall meet”, it cannot be presumed that they will always coincide. There is a pronounced reluctance within some sections of the media to allow State involvement in the formulation of their working ethical principles. This is particularly true of the print media, which enjoy a long tradition of operational autonomy.

While the ethical substratum of journalism is particularly suited to self-regulation,<sup>29</sup> its scope must nevertheless not be exaggerated. The major drawback of the purest conception of self-regulation, *i.e.*, regulation that is limited to in-house vetting standards and mechanisms, is its lack of external accountability. No matter how ideologically-primed the in-house code of ethics of any given broadcasting entity and no matter how sophisticated the manner of its implementation, both remain essentially in-house concerns, defined by their subjectivity. Such internal (if not internalised) codes are liable to be “shaped under the strong influence of the owners, sometimes even enforced, with journalists having no option but to conform”.<sup>30</sup> Furthermore, provisions on conflicts of 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.<sup>31</sup> 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,<sup>32</sup> 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.<sup>33</sup> At the European level, these are essentially

26) For a general discussion of ‘broadcasting freedom’ as an institutional right, see E. Barendt, *Broadcasting Law: A Comparative Study* (Oxford, Clarendon Press, 1993), pp. 40-42.

27) See, for example, *Jersild v Denmark*, *op. cit.*; *Thorgeirson v Iceland*, Judgment of the European Court of Human Rights of 25 June 1992, Series A, No.239; *Oberschlick v Austria*, Judgment of the European Court of Human Rights of 23 May 1991, Series A, No. 204; *Bladet Tromso & Stensaas v. Norway*, Judgment of the European Court of Human Rights of 20 May 1999, Reports of Judgments and Decisions, 1999 and *Unabhängige Initiative Informationsvielfalt v. Austria*, Judgment of the European Court of Human Rights of 26 February 2002.

28) See, for instance, D. Flint, “Media Self-Regulation”, in T. Campbell and W. Sadurski, Eds., *Freedom of Communication* (England, Dartmouth Publishing Company, 1994), pp. 281-296, at p. 285.

29) See, for example, Resolution 1003 (1993) on the ethics of journalism, adopted by the Parliamentary Assembly of the CoE on 1 July 1993, available at: <http://assembly.coe.int/Documents/AdoptedText/TA93/ERES1003.HTM>

30) G. Bervar, *Freedom of Non-Accountability: Self-regulation of the media in Slovenia* (Slovenia, Peace Institute, 2002), p. 37.

31) J. Jacobs & K. Potter, *Hate Crimes: Criminal Law and Identity Politics* (New York, Oxford University Press, 1998), p. 11.

32) See, however, the explanation of ‘Hate Speech’ contained in the Appendix to CoE Recommendation No. R (97) 20 of the Committee of Ministers to Member States on “Hate Speech”, adopted on 30 October 1997.

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.



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.<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup> 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 trammel the protection consistently accorded to provocative journalism by the European Court of Human Rights, at least as regards racist speech.

Nevertheless, the above line of argumentation overlooks the usefulness of operational guidelines pertaining to hate speech. Codes of ethics and conduct rarely, if ever, overlook this issue. As these codes tend to be devised by media professionals themselves, they are sector-specific and are coloured by practical experience of the profession. Such considerations are rarely factored into traditional State-dominated regulation (which by its nature is more general in scope than codes of ethics), thus depriving it of sensitivity to the cut and thrust of the working of the media industry. In consequence, it could be argued that the gap separating both sets of standards offers an opening for concerted, consultative policy-elaboration, leading ultimately to some form of co-regulation of the media addressing hate speech. Therefore such co-regulation should not necessarily be ruled out. Potential does, therefore, exist for synergies, but it must be carefully worked out.

## Protection of Minors

The perspective of co-regulatory approaches to the protection of minors has already been investigated in *IRIS plus 2002-6*. The present article therefore focuses on some practical considerations arising out of two country case-studies, Germany and the Netherlands.<sup>37</sup>

Due to structural idiosyncrasies of the German constitutional system, responsibility for the establishment of a legal framework for the audiovisual sector rests with the individual *Länder*. Prior censorship is forbidden under Article 5 GG. This means that in practice, only the option of *ex post facto* review is available to the various ramifications of government; an unsatisfactory state of affairs for the film industry, which requires that the greatest possible degree of legal certainty will attach to film classification. To lack the possibility of pre-emptively examining films has obvious market consequences. However, institutions of self-control are not bound by the same constitutional constraints as the organs of government.

34) See, for example: *Glimmerveen & Hagenbeek v. The Netherlands*, Appn. Nos. 8348/78 & 8406/78, 18 DR 187; *T. v. Belgium*, DR 34 (1983), p.158; *H., W., P. and K. v. Austria*, Appn. No. 12774/87, 62 DR (1989) 216, and *Kühnen v. FRG*, Appn. No. 12194/86, 56 DR 205 (1988). See further, T. McGonagle, “Wresting (Racial) Equality from Tolerance of Hate Speech”, (2002) 23 *Dublin University Law Journal* (ns) 21, pp. 21-54.

35) See further, *ibid.*, and in particular, *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A, No. 298.

36) This reluctance is captured in the recent Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 27 February 2001, available at: <http://www.article19.org/docimages/950.htm>

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

Thus, the film industry committed itself to submit films to the *Freiwillige Selbstkontrolle der Filmwirtschaft* (Voluntary Self-Regulatory Authority for the Film Industry – FSK) in advance of their general release. The FSK classifies films according to age groups. However, the *Oberste Länderjugendbehörden* (the highest regional authorities responsible for youth) are under a statutory obligation to require age classification for any film before it can be approved. The classification issued by the FSK is generally accepted by them. Nevertheless, the regional authorities retain the right to veto FSK decisions. In practice, however, the need to interfere with FSK classifications is virtually non-existent as the regional authorities enjoy majority representation on the FSK governing and censoring bodies. The system appears to operate to the satisfaction of interested parties: it offers the film industry a mechanism that returns the swift decisions required by the instantaneity of the media markets involved and it facilitates the fulfilment of the relevant duties of the regional authorities (while being largely financed by the film industry).

In the television broadcasting sector, the *Freiwillige Selbstkontrolle Fernsehen* (Voluntary Self-Regulatory Authority for Television – FSF) was established to pursue largely the same role and objectives as the FSK in the film sector. Although founded by broadcasters themselves, only one-third of the organisation's governing body is nominated by broadcasters, while two-thirds are generally recognised experts drawn from a diversity of backgrounds. In contrast to the FSK whose classification work is sanctioned by the responsible regional authorities, the FSF lacks a comparable coordination of its work with the *Landesmedienanstalten*, the regional media authorities which ensure compliance with the relevant legislation. Accordingly, the duplication of roles and responsibilities is clearly an issue and has somewhat hampered the development of consistency in approaches to, and results of, 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.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup> 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 life (in the interest of consistency), 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<sup>41</sup> and these range from warnings to fines.

38) See *IRIS* 2002-8: 6.

39) *Staatsvertrag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien – Jugendmedienschutz-Staatsvertrag – JMStV*, Draft of 9 August 2002.

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

41) An Appeals Committee also exists.

Despite the fact that *Kijkwijzer* is the progeny of enabling legislation in force since February 2001,<sup>42</sup> 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<sup>43</sup>). 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)<sup>44</sup> 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 fulfil 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<sup>45</sup> 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"<sup>46</sup> 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

42) *Wet van 14 december 2000 tot wijziging van de Mediawet en van het Wetboek van Strafrecht, alsmede intrekking van de Wet op de filmvertoningen*, *Stb.* 2000, 586.

43) As last amended by the Act of 14 December 2000, *ibid.*, available at <http://www.cvdm.nl/pages/regelgeving.asp?m=w&> (NL) and at [http://www.ivir.nl/legislation/nl/media\\_act.pdf](http://www.ivir.nl/legislation/nl/media_act.pdf) (EN).

44) See further: <http://www.cvdm.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.

46) Available at: [http://www.easa-alliance.org/about\\_easa/en/common\\_principles.html](http://www.easa-alliance.org/about_easa/en/common_principles.html)

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.<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup>

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.<sup>50</sup> Instances of such intervention at the EG 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<sup>51</sup> (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 EG in, *inter alia*, Council Directive 92/38/EEC on the adoption of standards for satellite broadcasting of television signals.<sup>52</sup> 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<sup>53</sup> 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.

47) N. Helberger, "Access to Technical Bottleneck Facilities: The New European Approach", *Communications & Strategies*, no. 46, 2nd quarter 2002, pp. 33-74, at p. 57.

48) This is largely reflected in Articles 17 and 18 of (Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108 of 24 April 2002, p. 33.

49) See generally, N. Helberger, *op. cit.*

50) See further, S. Kaitatzi-Whitlock, "The Privatizing of Conditional Access Control in the European Union", *Communications & Strategies*, no. 25, 1st quarter 1997, pp. 91-122.

51) Council Directive of 3 November 1986 on the adoption of common technical specifications of the MAC/packet family of standards for direct satellite television broadcasting (86/529/EEC), available at: <http://europa.eu.int/ISPO/infosoc/legreg/docs/86529eec.html>

52) Available at: <http://europa.eu.int/ISPO/infosoc/legreg/docs/9238eec.html>

53) Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals, available at: <http://europa.eu.int/ISPO/infosoc/legreg/docs/dir95-47en.html>

Current approaches to standardisation by the EG are perhaps best exemplified by the Framework Directive,<sup>54</sup> 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 EG 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. [...]”<sup>55</sup>

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.<sup>56</sup>

Having examined the *status quo* at the EG 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. ■

54) In Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 108 of 24 April 2002, p. 7, the emphasis lies on the obligation on all operators of conditional access services to offer their services (to all broadcasters) “on a fair, reasonable and non-discriminatory basis” (see Article 6 *juncto* Annex I, Part I).

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

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



# Part II

## 15 Topical Contributions to the Co-Regulation Debate

The following articles reproduce a substantial part of the information and views shared at the workshop. They are presented in the order of the workshop agenda and concern:

- possible definitions of the key concepts of self- and co-regulation;
- concrete examples of co-regulation - these were selected from a variety of fields and concern various countries and, in some cases, European standards;
- practical legal issues;
- information on the social, cultural, economic and political aspects of co-regulation.

All of the articles were written in preparation for the workshop and some of them were slightly revised by the authors afterwards.





# Self-Monitoring v. Self-Regulation v. Co-Regulation

*Dr. Carmen Palzer*

*Institute of European Media Law (EMR), Saarbrücken/Brussels*

Due to the lack of generally-accepted definitions, the terms “self-monitoring” or “self-control”, “self-regulation” and “co-regulation”, describing different regulatory systems, are – even by experts – not used appropriately. These differences in the use of relevant terminology arise equally on the national and on the European levels. Despite this, when discussing co-regulation as a regulatory system consisting of elements of state regulation and self-regulation, one should try to find common definitions for the basic regulatory systems: public authority regulation, self-regulation and co-regulation. The definition of the different regulatory approaches might be considered as being superfluous in a situation where the system under discussion is working well. Nevertheless, in several situations the defining of and differentiation between the regulatory approaches, based upon the key-elements of the concepts, becomes relevant. When stakeholders are planning and discussing the implementation of a new regulatory scheme, it would be more than helpful to work on the basis of a consensus about the key-elements of the model under discussion, e.g. the involvement of state authorities or the voluntariness of participation of those who are concerned. Another situation, in which generally-accepted definitions might be useful, is the implementation of a new regulatory system by a state under the wrong description, e.g. the implementation of state regulation denoted as self-regulation. The existence of an acknowledged definition for a self-regulatory scheme would make it possible for parties concerned to indicate to the state the misleading denotation of its action.

Thus, I shall attempt to clarify some notions. These definitions should not be considered as final definitions. Yet, it would be desirable if these suggestions could serve as reference point for further discussion with the aim of finding some common denominators.

## **Public Authority Regulation**

This term describes the traditional regulatory system: the public authority being the all-embracing regulator, setting the relevant legislative or regulatory rules, monitoring compliance with them and also enforcing them by imposing sanctions. Private persons or organisations may be involved in this system by supporting the public authority with expert knowledge for example. Nevertheless, the responsibility for implementing rules for the purpose of achieving public policy aims always remains with the state.

## **Self-regulation**

Situated at the other end of the “regulatory scale” is the system of self-regulation. Under this system, non-state groups (producers, providers, etc.) draw up their own regulations in order to achieve their objectives and take full responsibility for monitoring compliance with those regulations. Such regulations may take the form of technical or qualitative standards or even codes of conduct defining good and bad practice. Codes of conduct may also contain rules on out-of-court mediation and on the structures of the relevant complaints bodies. These rules may be laid down by a self-regulatory

organisation created by the parties concerned (ideally involving other interested parties, such as consumers). This body may also monitor compliance with the rules and impose any sanctions, if provided for by the body. Equally, it is possible, that the body setting the rules is different from the one applying them. So, rule-making might be the task of the association, having adopted the self-regulatory system and created the self-regulatory body, whereas the self-regulatory body is applying them. This model might even be considered as the preferable one, because the rule-making – “legislative” - power is separated from the rule-applying - “executive” - power.

Since the state is not involved in this form of regulation, public authority sanctions cannot be imposed, but only those provided by civil law, particularly the articles of association(s). According to this, the most severe sanctions are financial penalties or exclusion or expulsion from the relevant association that has adopted the self-regulatory system. Thus, the self-regulatory approach is not primarily based on enforcement by punitive or exemplary sanctions. Based on agreement, the knowledge that the parties concerned have common objectives should ensure the effectiveness of this system.

The major key element of a regulatory system so-defined is the voluntary nature of the participation of those who are subject to regulation.

## Self-monitoring

The self-regulatory model should be distinguished from a self-monitoring or self-control system. The latter is limited to monitoring compliance with a given set of regulations, laid down by another party, e.g. a public authority. Self-monitoring approaches may be a way of involving private organisations or non-state groups in the implementation of state regulation or legislation. They also can be considered as part of a self-regulatory system. In contrast to self-monitoring approaches, self-regulatory systems are not limited to the self-determined control by externally-imposed rules, they also have the power to make the rules in order to achieve their own objectives themselves. This differentiation is not easy to implement in practice, because in ordinary language, the term “self-control” is often used to describe self-regulatory systems. Even organisations such as the German *Freiwillige Selbstkontrolle Multimedia-Diensteanbieter* (Voluntary Self-control Multi-media Service Provider – FSM) or the *Freiwillige Selbstkontrolle Fernsehen* (Voluntary Self-control Television Broadcasting – FSF) are using the notion of “self-control” to describe themselves, although as self-regulatory organisations working independently of state interference (the FSF being a self-regulatory organisation until the entry into force of the reform of the media youth protection system in Germany, at which point it will be involved in a co-regulatory framework). Nevertheless, in academic discourse, this distinction is important, because the two systems are conceptually different regulatory schemes, with self-regulation being a private/non-state regulatory model and self-monitoring – in its proper meaning – being part of a state-dominated model.

## Co-regulation

The term co-regulation in its widest sense denotes co-operative forms of regulation that are designed to achieve public authority objectives; the co-operation being undertaken by public authority and civil society.<sup>1</sup> A co-regulatory scheme combines elements of self-regulation (and self-monitoring) as well as of traditional public authority regulation in a new and self-contained regulatory system. According to this view, there are conceivably many different forms of co-regulatory models, depending on the combination of public authority and private sector elements. One of these possibilities for the creation of a co-regulatory system is that the state would integrate an existing self-regulatory system into a public authority framework, e.g. the involvement of the FSF in the new legal framework for youth protection in Germany. Another approach would be the initiation of a co-regulatory system by the state. In this case, (the) public authority would lay down a legal basis for the co-regulation system, so that it could begin to function. Many other forms of regulatory models could be brought within the above, broad definition of co-regulation. The elements chosen as the foundations of a co-regulation framework also depend in particular on the task to be performed. One common feature will exist in each case: the aim pursued will be a public one.

A key element of a co-regulatory regime is the self-contained development of binding rules by the co-regulatory organisation, and the responsibility of this organisation for these rules.

1) This definition of co-regulation is deliberately broad so that it includes the various forms of co-regulation which, in view of individual states' various legal provisions and traditions, are or could be used to pursue political objectives.

## Main Differences

The responsibility for establishing rules is one of the main differences between co-regulatory systems and self-monitoring systems as well as public authority regulation. However, one has to take into account that a clear-cut distinction between such models is difficult. There is a smooth transition from one system to another; one might denote it as a form of "continuum".

One could consider as a main criterion for the distinction between co-regulation and state regulation, the degree of autonomy of the co-regulatory organisation from state influence, e.g. the extent to which it can take its own decisions, or whether representatives of the public authority can exert influence over the rule making or the decision-making of the co-regulatory body.

An important criterion for the distinction between self- and co-regulatory schemes is the voluntariness of participation. In a co-regulatory-system, non-compliance with the relevant rules is directly or at least indirectly (e.g. in the form of possible revocation of a licence) sanctioned by the state (public authority). Thus, the market players concerned are not really free in their decision to participate in the system. In fact, in a functioning self-regulatory system, there is also some pressure to participate; although this pressure is not applied by the state, but by the public, the consumer; in short, by non-state institutions. The greater the public authority's involvement in a co-regulatory model, the less participation in the inclusive co-regulatory organisation<sup>2</sup> can be considered to be voluntary. The lack of voluntariness is one of the concessions that self-regulatory organisations, being included in a co-regulatory framework, have to make. In return, they receive assistance from the public authority in enforcing their rules. ■

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2) Due to the lack of voluntariness, the inclusive regulatory system is not really a self-regulatory system. Hence, it should not be designated as a such; one could perhaps use the term co-regulatory organisation instead.



# Introduction to the Self-Regulatory System of the EASA

*Oliver Gray, PhD*  
*Director-General of the EASA, Brussels*

I represent the European Advertising Standard Alliance (EASA), which brings together self-regulatory bodies from across the wider Europe as well as European advertising industry bodies supporting self-regulation. Since this workshop is on Self and Co-regulation then it is sensible to start with a definition of what is self-regulation.

## Advertising and Principles

Advertising must inspire public confidence; it must be legal, decent, honest and truthful. If bad advertising – whether dishonest, misleading or offensive – is allowed to go on unchecked, even though it may account for only a small percentage of the whole, it will gradually undermine consumers' confidence and all advertising will suffer. So it is in the interests of the advertising industry itself to ensure that advertising is properly regulated. Traditionally, there have been two ways of doing this; one is detailed legislation, the other is called self-regulation.

Legislation is well-suited to laying down broad principles, for example that advertising must not mislead, and it provides a last resort in the rare cases when all else has failed. It is less effective, however, when dealing with detail: the law is often slow to act, difficult for ordinary consumers to understand and too expensive for them to afford, so the protection it provides in theory may not be so readily available in practice. Also, the content of individual advertisements, although it matters very much to consumers, is often too detailed for the law to concern itself with.

Self-regulation, on the other hand, is specifically designed to deal with these 'important trivia'. It offers consumers a quick, uncomplicated and (because it is funded by the advertising industry) cost-free means of having their complaints handled. Because it has the support of the advertising industry, advertisers and agencies are often more ready to co-operate voluntarily with a self-regulatory system than with one based on legislation. Through advertising self-regulation, the industry demonstrates its ability to regulate itself responsibly, by actively promoting the highest ethical standards in commercial communications and safeguarding consumers' interests. Self-regulation provides an essential complement to national legislation governing advertising.

## The Status of Self-regulation

One of the first questions people will ask about a sector is: first of all do you have a **responsible approach**? As I hope to demonstrate, I believe that in the advertising sector the answer is definitely yes. The advertising sector took a firm decision over 65 years ago to be responsible. After all, if they are not then consumers will not buy the goods. Are their **rules in place** and on what are these based? The rules in place are drawn up by the advertising industry taking into account social and technological changes as well as consumer attitudes to advertising. They all share a common basis or point of

inspiration in the globally accepted codes of the International Chamber of Commerce (ICC) whose basic principles are that advertising should be legal, decent, honest and truthful, have a due sense of social responsibility and respect the rules of fair competition. Self-regulatory systems exist across all EU countries and much of the wider Europe and EU applicant countries. Their scope and application varies according to the legal, economic and political environment in each country. Thus, for example, in countries such as the UK and Ireland where there is little detailed legislation and a tradition of self-regulation, self-regulation is widely developed, whereas in Scandinavia where there is both extensive legislation and the existence of a Consumer Ombudsman system, self-regulation has a restricted scope in which to flourish. We have been encouraged by how the new democracies in the wider Europe have embraced self-regulation and new advertising legislation has included a reference to it.

**Are the rules applied and by whom?** The rules are applied by independent, impartial self-regulatory bodies and processes set up for that purpose by the advertising industry. These bodies see to it that the handling of complaints – predominantly from consumers, the monitoring of compliance and the promotion of the rules are ensured. Complaints are handled at no cost to the consumer and if upheld will result in the advertiser being requested either to modify the ad or withdraw the ad. Through the network of self-regulatory bodies across Europe over 50 000 complaints per year are handled, the majority from consumers. These account for less than 0.1% of the total of ads in circulation. About 20% of complaints are upheld. The advertising self-regulation has the advantage of including all the different parts of the advertising process and with regard to enforcement can use the media particularly to ensure a decision is applied.

The following brief examples demonstrate typically how self-regulation works in relation to misleadingness and taste and decency. Misleadingness: The first example I show features an ad campaign by the supermarket chain Sainsbury's showing two red apples side by side differentiated by the headings Pesticide and Countryside under them. The apple with countryside had a ladybird on it. The body copy said "all Sainsbury's British fruit and vegetables are grown with a commitment to using natural farming methods, like this ladybird to control pests". The complaint of misleadingness was upheld as it implied that the advertiser did not use pesticides, which was not the case. A second example relates to general safety issues and appeared in the UK showing a car speeding with the slogan "exhilarating power, total control". The impression given was that the car would have control under any circumstances which was not true and used the argument of speed. The ad was discontinued following complaints and investigation as it broke the rules on car advertising.

The other two examples featured a press ad for a new magazine in the Netherlands which bore the slogan "the ideal method for coffee and cakes" and featured a picture of a policeman carrying a child's coffin. The ad was withdrawn following complaints. In the second decency example an ad in a German computer magazine for a computer war game, *Battlecruiser*, featured between the legs of a naked woman with the slogan "she really wants it" was ruled against by the German SRO, the *Deutscher Werberat*, as sexist following a complaint from an Austrian consumer. The ad was asked to be withdrawn and was discontinued.

Advertising self-regulation has so far applied a number of **guiding principles**, the first being that the country of origin principle is applied to the handling of complaints in terms of defining the appropriate rules to use. Secondly, that the principle of mutual recognition is applied to each other's rules. Thirdly, in accordance with the subsidiarity principle, self-regulation in the advertising sector while derived from the globally accepted rules of the ICC is applied at a national level. Convergence and consistency in the drafting and application of rules is being encouraged by the EASA in terms of guiding principles.

## EASA

The European Advertising Standards Alliance (EASA) is the single voice of the advertising industry in Europe on advertising self-regulation. It acts as the European coordination point for advertising self-regulatory bodies and systems across Europe ... EASA was set up in 1992 to support and promote self-regulation, coordinate the handling of cross-border complaints and to provide information and research on self-regulation. The purposes of the EASA include ... to encourage best practice and common high standards in advertising self-regulation ... to stimulate improvements where necessary to national self-regulation systems ... to work to establish common principles of best practice and towards greater convergence of the key principles...

The EASA has now grown to become a network of excellence for self-regulation, which provides both promotion and support. It brings together regularly 28 self-regulatory bodies and representatives from

12 advertising industry bodies representing advertisers, agencies and the media, to study and coordinate policy on self-regulation. It also has the prime responsibility to oversee the management and coordination of the cross-border complaints system, which I will cover in a separate presentation in this workshop, which has to date, dealt with over 700 complaints since 1992. The codes are drawn up by the advertising business including advertisers, agencies and media. The codes are applied and the systems managed nationally by independent self-regulatory bodies.

## Developing Self-regulation

### Common principles

The EASA faced with the current debate on self and co-regulation within the EU has reinforced its role in stimulating the establishment of effective self-regulation and the convergence of self-regulatory best practice. This has led concretely to the approval last May of EASA's first set of common principles of best practice and recommended best operating practice for use by national SRO's which are designed to guide all participants in the self-regulatory process in their work. They apply to the self-regulation of both on and offline advertising.

The **common principles** are the core values that should underpin every self-regulatory system in membership of the EASA. The **operating best practices** are the recommended standards towards which all national systems should seek to achieve. The following briefly summarises the key points in the common principles.

### **Consumer benefits**

The purpose of a self-regulatory system is to maintain consumer confidence in advertising by offering a rapid and effective response to consumer concerns. They should above all ensure that the individual consumer is the focus of attention.

### **Independence**

Self-regulation must be and be seen to be impartial. Its operation and the outcome/decisions of the self-regulatory systems should be made independently of government, specific interests and interest groups.

Access to the complaints process should be easy and at no cost to the consumer. The workings and outcome/decisions of a self-regulatory system should be transparent to all parties.

### **Effectiveness**

Notwithstanding the national legislative framework, self-regulation must be and seen to be effective, in both its operation and outcome. Self-regulation must be rapid, flexible and current, and applied in a non-bureaucratic manner. Its rules and procedures should be applied in both the spirit and the letter, and regularly reviewed.

### **Efficient Complaint Handling and Enforcement**

A self-regulatory system should have a means to handle consumer complaints, which should be handled free of charge. It must have adequate and credible sanctions as well as the power to support and enforce effectively its decisions.

### **Self-regulation and the Law**

Self-regulation must always be in compliance with the law, and no part of the self-regulatory process should deprive a consumer of the protection provided by the law.

### **Cooperation**

Self-regulatory systems and bodies in membership of the EASA have a duty to co-operate with each other.

### **Resources**

Self-regulatory systems must be sufficiently resourced and supported to be able to meet their objectives.

It is our belief that the continued acceptance of self-regulation by European consumers and government at both national and EU levels will be made more certain by the visible presence of these common principles and the standards of best practice in all national self-regulation systems. The EASA is ensuring that these are maintained throughout its membership.

## C. Looking to the Future

### Involving stakeholders

We believe that this is a defining moment for the next generation of self-regulation. The advertising industry wishes the self to remain, namely that industry still retains the right to establish rules itself and have these applied. However the priority given to the consumer is paramount and it is essential that the systems should operate effectively and retain consumer and government confidence in the advertising industry's ability to regulate itself. In accordance with the principles of transparency and impartiality we are examining ways in which there will be consistent consultation in the drafting of codes with civil society interests and that research on consumer attitudes to advertising and the appropriateness of self-regulatory decisions are regularly conducted and taken account of. Indeed our newly adopted operating principles state that, "SROs [self-regulatory organisations] should ensure that all advertising practitioners are aware of the national self-regulation system, its rules and its procedures and regularly promote the system. In the development of codes SROs should ensure the relevant views of all stakeholders are taken into account."

Complaint committees or juries will be encouraged to include as a matter of course representatives of civil society which will be appointed by the advertising industry. We do not accept that government nominates representatives or that they will determine the nature of the rules. We will also be asking the European Commission to consider the ICC code of advertising practice as the basic principles of advertising self-regulation applied across Europe. Finally to demonstrate our willingness to coordinate and converge the diverse rules in place as well as taking a view on their application and interpretation we are suggesting that the European Commission consider a specially selected group of self-regulatory bodies and industry associations as an expert group to advise on self-regulatory matters.

At the end of the day we are determined to ensure the continuing ability of the advertising business to regulate itself within the framework of legislation. Self-regulation exists as a complement and we recognise that it must be an efficient one. However self-regulation must not be codified like or forced to be a carbon copy of the law. By doing so sends us down the road to destruction; a destruction of the very characteristics, its flexibility, speed and simplicity, that help self-regulation deal so appropriately and effectively with problems arising from advertising and the immediate developments in the market place.

There are a number of areas where self-regulation and the law can cooperate well to deal with rogue traders and we are encouraging all efforts, such as the International Marketing supervision network, to improve communication and cooperation between regulators. The law is the most relevant last resort in such cases where the advertisers are not responsible, do not have any intention to be and are running from one country to another.

We believe that advertising self-regulation provides a working example with over 65 years of experience in the day-to-day handling and resolution of consumer complaints. In our pursuit of continued best practice we have set an ambitious action programme in place to further develop and promote self-regulation across Europe. In this way we hope that best practice will diminish the incidence and importance of worst practice to the benefit of consumer confidence and trust. ■

*EASA, Monday, 2 September 2002*



# Assumptions about Self-Regulation in the Media

*Joachim von Gottberg*

*General Manager of the Freiwillige Selbstkontrolle Fernsehen e.V. (FSF), Berlin*

## **The Concept of Self-regulation**

The concept of *self-regulation* presumes that those who earn money from a particular product want to operate their own financial controls at the same time, in accordance with principles that they have formulated for themselves. At a time when youth protection rulings are leading to financial losses, it is hard for such self-regulation to be successful, as the need for financial profit is dominating insurance interests.

Such self-regulation can only be justified in the media when infringement of the law covered by the insurance is extremely improbable, for example, with certain providers (such as providers of scientific information).

As an example, the German Press Council was founded in Germany to regulate the print media by checking all sorts of complaints about the press media against a press code developed by the industry itself. Both journalists and publishers participated in this process. It is not just that the provider is self-regulated; the whole press industry draws up certain principles and identifies distinguished persons from its own ranks to check that these principles are adhered to. The State does not just accept the role of the Press Council; it even bears part of the costs for the Press Council to organise itself. In contrast with television, the risk of misuse or the effect on society, particularly on children and young people, is seen to be less for the print media. The Press Council's means of sanction are comparatively small, and are usually limited to the appropriate publications having to publish the Press Council's reprimands. Just by looking at Article 5 para. 1 of the *Grundgesetz* (the German equivalent to a Constitution – GG) one can see that the State is reluctant to introduce statutory regulation of the press, so this form of self regulation, organised by the industry, using inspectors chosen and employed by the industry itself, has been generally accepted until now at any rate.

For the implementation of the protection of young people in regard to the cinema and video, there is the *Freiwillige Selbstkontrolle der Filmwirtschaft* (FSK), a voluntary self regulatory body of the film industry, which goes way beyond the providers' own commitments.

## **Co-regulation: A Mixture of Self-regulation and State Institutions**

The FSK was founded during the period of occupation after 1945. Military censorship varied tremendously between zones and the FSK's initial task was to replace this with a standardised checking procedure, carried out by people accepted by all sides who had nothing to do with national socialist ideology. When the Constitution came into force and the Federal Republic of Germany achieved full sovereignty, there was no longer any military censorship, and the FSK was reorganised into a self-regulatory institution with the aim of implementing youth protection. The duty of the groups that joined together in the leading of the film industry organisation (SPIO) was to submit all films to the

FSK (this concerns film distributors), and only to show films that had FSK approval (this concerns cinemas). In addition, the cinema operators had a duty to check FSK age rating at the box office.

At first, self-regulation was the only form of control (it was completely independent of state influence or corresponding youth protection laws), and this ended in 1954 with the passing of the first youth protection law. It seemed that the State did not believe that self-regulation organised by the industry was capable of neutral and comprehensive implementation of the thinking on youth protection. Instead, it made age rating of films the responsibility of the senior youth authorities in the various *Länder*. However, in the short term, there was no way that these would be able to re-label the amount of films already on the market, or to check regularly the many new types of film coming into cinemas at that time. As a result, the youth authorities decided to take over the FSK age categories. At the same time, however, it was also thought that film regulation organised solely by state offices could easily conflict with the ban on censorship (Article 5 GG). If youth protection in the cinema were to be successful, it could only succeed if films were checked before public release. The film companies could not be forced to do this, though, because of the ban on censorship, although it is not forbidden for providers themselves to undertake a commitment to age rating.

At first, the *Länder* regarded the taking over of the FSK ratings as a temporary measure. In the medium term, the plan was to set up a *Länder* assessment office. However, the film industry was prepared to grant *Länder* representatives extensive rights of co-determination in formulating the principles of assessment and in determining the composition of the assessment committees. Their intention was to prevent the creation of a *Länder* assessment office, and this was how they achieved that.

Accordingly, a so-called self-regulatory institution arose, which, later, in reality, became more and more a means of checking by independent experts organised by the industry but with state participation. The majority of FSK examination committees are today owned by the public sector, the office of chairman is permanently occupied by a representative from the senior youth authorities, one youth protection expert is nominated according to a set rotation procedure directly from one of the senior youth authorities, two further assessors are invited from a list made up of Church representatives, *Länder* Culture Ministers, representatives from the National Ministry of the Interior, etc. Three more assessors are nominated by the film industry, although these do not need to be employed by a film company, and are responsible for youth protection. In any case, the four representatives from the public sector always have a majority in the committees of four to three.

Even the FSK's constitutional commission, which determines both the content and the choice of assessors in the approval process according to the examining laws, reflects the ratio of public and industry representatives. The senior youth authorities have a right of veto, which corresponds to their right of approval as laid down by law. The film industry profits from the youth authorities' strong position in the FSK insofar as the results of the assessments come under local authority administration according to prescribed procedure. The film industry is satisfied with this course of action at the FSK, although it can be described as neither voluntary nor a form of self-regulation. The advantage for the film industry is primarily that the speed of the procedure is in their hands and that they are able to participate directly in the making of decisions. The fear is that, with a *Länder* assessment office, there could be significant disadvantages for the industry because of lengthy application procedures, e.g. resulting in planned film premieres possibly having to take place without youth approval. The film industry, as shown by experience, is not interested in using the FSK to maintain industry-friendly approval practice, it is far more interested in obtaining rapid and reliable decisions, so that it knows in good time how it can rate a film.

Even the senior youth authorities are notably satisfied with the method, not least because almost all the costs are borne by the film industry itself, while the authorities still have a strong influence.

## **Self-Regulation in parallel with State Supervision**

Private television was introduced in Germany in the 1980s and local authority media institutions were set up in the *Länder* for the licensing and supervision of broadcasting stations. Among their tasks are the implementation and checking of youth protection. Each local media institution has a youth protection adviser, and these form working parties to decide whether special approval should be granted or if there could be complaints about certain programmes as a result of infringements of youth protection regulations. The law limits the broadcasting of films that have already appeared in the cinema or on video to certain transmission times. Films that have received 16+ approval may not be

shown until after 22:00, 18+ approval ratings cannot be broadcast until after 23:00. If a broadcasting station wants to transmit at a time different from that imposed by the time limit, it needs a special permit from its relevant local media institution. The broadcasting station itself bears the primary responsibility for observing the youth protection regulations with all other programmes that have not had a public showing in the cinema or on video; the local media institutions can only object to programmes after they have been broadcast, and this means that the broadcasting station may no longer transmit these programmes in the version they chose or at the transmission time they chose. Fines can also be imposed. Prior checking of programmes by the local media institutions is not allowed because of the clear ban on censorship in article 5 para. 1 of the Constitution.

Relatively quickly, this structure for regulating youth protection in regard to television proved not to be particularly sensible. Special applications often needed a period of more than three months because of the complicated procedure involved. The procedure is therefore unsatisfactory for the broadcasting station, because they need a relatively long period to be able to include the film in their programme planning, and their licence, which is subject to a time-limit, is thereby shortened. Regarding complaints, the procedure with the local media institutions again proved relatively complicated, as some complaints were not voiced until one or one-and-a-half years later, by which time the series or the relevant advertiser responsible were no longer with the broadcasting company at all.

During this period the creation of an institution for the television industry was considered, comparable to the FSK in the film industry. Voluntary self-regulation could, in contrast with the local media institutions, assess programmes with youth protection in mind before transmission, without problems with the ban on censorship. This institution was to be organised and financed by private broadcasting companies, although the assessments were to take place under the supervision of an independent board of trustees. It was initially planned that this board should be composed of one third representatives from the local media institutions, one third representatives from the broadcasting companies and one third neutral experts (scientists, political commentators, youth protection practitioners), who could come to a consensus between the representatives from the local media authorities and representatives from the Länder. Similar to the FSK, the providers and the supervisors should work together on this committee, which would be made neutral and augmented by the specialist knowledge of the third group. The three groups on the board should also be reflected in the assessments, where, in each case, one representative from the local media institutions, one representative from the broadcasting stations and one neutral point of view should decide whether the broadcast should be approved. A combination between the interests of the industry, the interests of the authorities and the specialist knowledge must then lead, according to the broadcasting stations, to evidence that the assessment decisions made in this way showed a high degree of being legally sound. To some extent, the local media institutions would have to relinquish part of their authority in favour of self-regulation.

In the local media institutions, they were not prepared to accept this way of mixing providers and supervisors. They saw one particular problem: if an assessor from one local media institution participated, all other local media institutions would be prevented from complaining afterwards about a film which was broadcast after being passed by the self-regulatory body.

For the *Freiwillige Selbstkontrolle Fernsehen* (voluntary self-regulatory body for television – FSF) which was founded in the meantime by the broadcasting stations, there was nothing else left but to allow the board to be filled by the committee which put together a list of generally recognised neutral experts. Besides ten neutral representatives, five people nominated by the broadcasting companies were involved. The neutral part of the FSF board therefore had a majority of two thirds.

The FSF board adopted assessment regulations in April 1994, which were all transparently in accord with the assessment procedure and involved the approval criteria. In addition, seventy assessors were named, of whom a large number were active in the FSK or other youth protection institutions.

While the FSF has gained high acceptance in the scientific field in the meantime, its relationship with the relevant television supervisory authorities has deteriorated over the years. Because of the legal situation, the local media institutions remain responsible for granting special applications; the FSF can only make a judgment on an assessment at the request of the broadcasting company. However, the local media institutions relatively quickly started to reject about thirty per cent of the applications rated positively by the FSF. This rejection quota clearly showed, according to the arguments of the local media institutions, that self-regulation was not functioning well and its results favoured the broadcasting companies too much.

For the broadcasting companies, the process meant that they had to abide by any negative decisions by the FSF though a positive vote did not offer any guarantee that the local media institutions would agree. There was therefore no advantage in the broadcasting companies submitting programmes to the FSF; all it meant was that there was a chance that films rejected by the FSF might be approved in an additional assessment by the local media institutions. The process had become more complicated for the industry and involved greater risks, without actually achieving the objective for which providers were committed to self-regulation: namely, rapid and reliable results.

The FSF's position had therefore been difficult from the beginning, not only regarding the local media institutions, but also regarding the providers, who could not see any real advantage in assessment by the FSF, as the results were so unreliable. Self-regulation had practically no power regarding the providers, although they had supported it in the first place, as the industry could not use the decisions in its planning.

It seemed to the FSF and the providers ever more pointless to undergo double assessment by the FSF and the local media institutions without legally regulated cooperation. Self-regulation and state supervision were working against each other, rather than together. This was not a form of co-regulation but parallel systems, which did not agree with each other.

## What Is Planned: Controlled Self-regulation

After the FSF and the providers made it clear in public political discussion that self-regulation made no sense in these circumstances, the politicians gradually started to re-think the situation. In a new state agreement on youth protection in the media, it is intended that all electronically transmitted media should be supervised together and a *Kommission für Jugendmedienschutz* (commission for the protection of youth in the media – KJM) will be set up by the state.

Responsibility for the implementation of the youth protection regulations will be largely self-regulatory, although certain minimum standards laid down in law and accepted by the KJM must be fulfilled. The KJM's task is to ensure that the work of self-regulation is carried out in full and can be objectively justified.

The difference from the present process is that transmission decisions at least will be self-regulated and a double assessment by the FSF first and then by the local media institutions is no longer necessary. Otherwise, the KJM can only cancel self-regulation decisions if they cannot be objectively justified. Alternative decisions must also be substantiated independently of the KJM.

The main focus of the work, whereby programmes are checked and legal guidelines are implemented, therefore remains under self-regulation. The State has relinquished its regulatory function, but may intervene if self-regulation is not fulfilling its task as required.

## Assumptions about Self-regulation in the Area of Youth Protection

According to the *Grundgesetz*, youth protection is a duty of the state in Germany, so it cannot completely relinquish its resulting responsibility to self-regulation organisations. Pure self-regulation is therefore not under discussion.

From experience with self-regulation institutions, the following is a summary of the assumptions necessary for their successful working:

1. Self-regulation must ensure that the results of its assessments are produced according to qualified opinion and without bias towards the interests of the providers. As the effective risk in audiovisual media is particularly high compared to print media, as is already shown by the fact that the state has already issued a series of legal regulations in this field, a credible assessment can only be carried out by independent professionals, who should not be employed by a provider or in an associated field. Self-regulation must be transparent; it needs clear procedures and criteria, which are binding on the assessor.
2. If self-regulated expert and neutral assessments are carried out, the state must put as much trust in them as they would if the assessment results were carried out by an organ of the state and allow providers to plan properly. The state retains the right to monitor the process by assessing a small amount itself in order to judge whether self-regulation is fulfilling its duties, is being sufficiently

used by the providers and is acting in accordance with its specified practice and that its scope is professionally acceptable.

3. Self-regulation must also have advantages for providers in that valid self-regulated decisions must be made quickly to allow proper planning to be carried out. The state authorities should therefore not carry out their own identical assessments or produce equally valid results. They should be limited to monitoring for cases of misuse or checking that decisions are justified.

Self-regulation cannot take over state duties without any transition period. The state must show its trust, it must define its rights and duties in law, and it must provide legal regulations to enable sensible cooperation between self-regulation and state supervision. It should also not overload self-regulation with expectations and demands that are practically unworkable. You just need to look at the Internet to see that the state could formulate demands on self-regulation, which it would not be able to implement itself. ■



# Protection of Human Dignity, Distribution of Racist Content (Hate Speech)

*Tarlach McGonagle*

*Institute for Information Law (IViR), University of Amsterdam*

*“And, tired of aimless circling in one place,  
Steer straight off after something into space.”<sup>1</sup>*

## Definitions<sup>2</sup>

“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.<sup>3</sup> In short, virtually all racist and related declensions of noxious, identity-assailing expression could be brought within the wide embrace of the term. Various rationales exist for legal prohibitions on hate speech, including: intrinsic harm; harm to identifiable groups; harm to individuals; harm to the market-place of ideas; harm to educational environment.<sup>4</sup> This list is not exhaustive and other authors prefer to focus on the identity-implicating nature of the offence and the “psychic harm”<sup>5</sup> caused by hate speech.

## Existing and Possible Regulatory Approaches

“Hate speech”, as such, is not defined in any international convention,<sup>6</sup> 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 (e.g., Article 19(3), International Covenant on Civil and Political Rights – ICCPR, and at the European level, Article 10(2), (European) Convention on the Protection of Human Rights and Fundamental Freedoms – ECHR). They also include Article 20, ICCPR (which ought to be read in conjunction with Article 19) and Article 4, International Convention on the Elimination of all Forms

1) R. Frost, “On a Tree Fallen Across the Road” in S. Heaney & T. Hughes, Eds., *The Rattle Bag* (London, Faber & Faber, 1982), at p. 323.

2) See further, T. McGonagle, “Wresting (Racial) Equality from Tolerance of Hate Speech”, (2002) 23 *Dublin University Law Journal* (ns) 21, pp. 21-54.

3) J. Jacobs & K. Potter, *Hate Crimes: Criminal Law and Identity Politics* (New York, Oxford University Press, 1998), p. 11.

4) See R. C. Post, *Constitutional Domains: Democracy, Community, Management* (Massachusetts, Harvard University Press, 1995), p. 293.

5) W. Sadurski, “Racial Vilification, Psychic Harm, and Affirmative Action”, in T. Campbell & W. Sadurski (Eds.), *Freedom of Communication* (England, Dartmouth Publishing Company, 1994), pp. 77-94, at 77.

6) See, however, the explanation of ‘Hate Speech’ contained in the Appendix to Council of Europe Recommendation No. R (97) 20 of the Committee of Ministers to Member States on “Hate Speech”, adopted on 30 October 1997, available at: <http://cm.coe.int/ta/rec/1997/97r20.html>. According to this Recommendation, the term covers “all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”

of Racial Discrimination – ICERD (which enjoins States Parties to the Convention, *inter alia*, to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin...”, while having “due regard” to principles such as the right to freedom of expression). At the European level, Article 17, ECHR (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.

An examination of existing jurisprudence will reveal 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. The consideration of “journalistic” licence can prove very divisive in this connection, as evidenced by the famous *Jersild* case.<sup>7</sup>

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.<sup>8</sup> 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 trammel the protection consistently accorded provocative journalism by the European Court of Human Rights, at least as regards racist speech.

Nevertheless, the above line of argumentation overlooks the usefulness of operational guidelines pertaining to hate speech. Codes of ethics and conduct rarely, if ever, overlook this issue. As these codes tend to be devised by media professionals themselves, they are sector-specific and are coloured by practical experience of the profession. Such considerations are rarely factored into traditional State-dominated regulation (which by its nature is more general in scope than codes of ethics), thus depriving it of sensitivity to the cut and thrust of the workings of the media industry. In consequence, it could be argued that the gap separating both sets of standards offers an opening for concerted, consultative policy-elaboration, leading ultimately to some form of co-regulation of the media addressing hate speech. Therefore such co-regulation should not necessarily be ruled out. Potential *does* exist for synergies, but it must be carefully worked out.

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## International Provisions on Hate Speech

### United Nations

The Universal Declaration of Human Rights, 1948, contains a specific Article devoted to the right to freedom of expression, Article 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” This right is also enshrined – and indeed fleshed out – in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). It reads:

“1. Everyone shall have the right to hold opinions without interference.

7) *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A, No. 298.

8) This reluctance is captured in the recent Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 27 February 2001, available at: <http://www.article19.org/docimages/950.htm>.



2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

It is plain to see that the only restrictions on the right countenanced by this article are those which are "provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals." Nevertheless, Article 19 must be read in conjunction with Article 20, which further trammels the scope of the right. It provides for the prohibition by law of "any propaganda for war," and - of crucial importance for present purposes - "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."

The mandatory provisions<sup>9</sup> of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) are also of instructive value when examining the interaction between freedom of expression and the elimination of racism. These provisions enjoin States Parties to the Convention, *inter alia*, to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin..."<sup>10</sup> Nevertheless, the fulfilment of this obligation by States Parties must be achieved while having "due regard" to the principles embodied in the Universal Declaration of Human Rights and the rights explicitly set out in Article 5, ICERD.<sup>11</sup> "The right to freedom of opinion and expression" is among those rights specifically enumerated at Article 5.<sup>12</sup>

In their recent Joint Statement on Racism and the Media,<sup>13</sup> the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, insisted that:

"Any civil, criminal or administrative law measures that constitute an interference with freedom of expression must be provided by law, serve a legitimate aim as set out in international law and be necessary to achieve that aim. This implies that any such measures are clearly and narrowly defined, are applied by a body which is independent of political, commercial or other unwarranted influences and in a manner which is neither arbitrary nor discriminatory, and are subject to adequate standards against abuse, including the right of access to an independent court or tribunal."

### Council of Europe

Article 10 of the (European) Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) reads as follows:

- "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

In its seminal ruling in *Handyside v. United Kingdom*, the European Court of Human Rights affirmed that freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably

9) See, for example, General Recommendations VII (para. 1) and XV (para. 2) of the Committee on the Elimination of Racial Discrimination.

10) Article 4(a), ICERD.

11) Article 4, *ibid*.

12) Article 5(d)(viii), *ibid*.

13) *Op. cit*.

received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there would be no democratic society.”<sup>14</sup>

Nevertheless, tolerance is not without its limits: it is limited, for instance, by a provision of the Convention that serves as an in-built safety mechanism. Designed in order to prevent provisions of the Convention from being invoked in favour of activities contrary to its text or spirit, the operative provision is Article 17 (Prohibition of abuse of rights). It reads:

“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

This is the rock on which most cases involving racist speech or hate speech have tended to founder: they are consistently adjudged by the European Court of Human Rights (and in the past, the now-defunct European Commission for Human Rights) to be manifestly unfounded in accordance with Article 17. These cases include: *Glimmerveen & Hagenbeek v. The Netherlands* (racist leaflets);<sup>15</sup> *T. v. Belgium* (publication of Holocaust denial material in conjunction with a banned author);<sup>16</sup> *H., W., P. and K. v. Austria*<sup>17</sup> and *Kühnen v. FRG*<sup>18</sup> (both Holocaust denial).<sup>19</sup> ■

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14) *Handyside v. United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.

15) Appn. Nos. 8348/78 & 8406/78, 18 DR 187.

16) DR 34 (1983), p.158.

17) Appn. No. 12774/87, 62 DR (1989) 216.

18) Appn. No. 12194/86, 56 DR 205 (1988).

19) See further, T. McGonagle, *op. cit.*

# Self-Regulation – The Swedish Model

*Pär-Arne Jigenius*

*f. Editor-in-Chief, Press Ombudsman, Professor*

Sweden has an effective self-regulation system for the press and no self-regulation in the broadcasting and television field. In this short paper I will make some remarks upon the press system and the regulation of broadcasting and television. (For comparative information on the voluntary regulation of the press in France, Germany, Italy, Sweden and United Kingdom see Gustaf von Dewall: *Press Ethics: Regulation and Editorial Practise*, The European Institute for the Media, Monograph 21, 1997.)

The office of the Press Ombudsman for the General Public was established in 1969.

Three national organisations are together responsible for the Code of Ethics and the business of the Press Council and the Press Ombudsman:

1. *The Newspapers Publishers Association* which is an employers' organisation. Almost all of the companies publishing daily papers are members of the organisation. The editor-in-chief and the managing director represent the companies.
2. *The Union of Journalists*. An overwhelming majority of the employed as well as the free-lance journalists are members of this union.
3. *The National Press Club* is an entirely non-political voluntary association. Members of the organisation include journalists, editors-in chief, authors and intellectual leaders.

## Counterparts

These three organisations have founded a Joint Committee for Press Co-operation which is responsible for the Charter of the Press Council and the standing instructions for the Press Ombudsman. The Committee also decides on changes to the Code of Ethics. The three organisations all contribute to the financing of the Council and the Ombudsman, the dominant financier being the Newspapers Publishers' Association. The self-regulation system marks its independence by not accepting any financial or other support from the government or the authorities.

Internationally, it is not common that two counterparts, one being an organisation for the employers and one being a union for the workers, work together as equals in such a delicate matter. In Denmark, the different organisations did not succeed in working together and the government had to take legislative measures and took control of the Press Council.

The Danish example is interesting from a special point of view. In Denmark the Parliament in the Press Law referred to the Code of Ethics. You can say that the state-run Press Council follows the Code of Ethics from the earlier self-regulation era. But a Code has to be changed from time to time. Will the Ministry of Justice write a new Code of Ethics? Or will the Press Organisations write a new Code that pleases the Ministry. Conclusion: It is easy for a Parliament to take over a present Code of Ethics and Code of Conduct but which party is in the long run responsible for the revision of the Code?

## Press, Radio and Television

The Swedish Press Ombudsman and Press Council only deals with papers and magazines, *i.e.* the printed word. All members of the Union of Journalists are obliged to respect the Code of Ethics, as also are the journalists in broadcasting and television.

But the Broadcasting and Television Authority is in its work only following the Law and the regulation, not the Code of Ethics. This is a strange situation. If a newspaper journalist violates the Code of Ethics you can file a complaint to the Press Ombudsman, if a broadcasting or television journalist violates the same Code, you can complain to the Broadcasting and Television Authority – but you cannot refer to the Code. You will have to refer to Law and regulations and they are in many ways different from the Code.

Why do we have this asymmetrical system in Sweden? The explanation is based in historical reasons. The first Freedom of the Press Act was enacted in 1766. The Press Council was established in 1917 and the Swedish Self-regulation system is the oldest in the world. In 1917 there was only one news medium: the press. The Broadcasting and Television Companies were from the beginning state-owned monopolies. The press has a long tradition of independence in relation to the State and freedom of establishment; broadcasting and television has a shorter tradition of regulation and monopoly.

Given this background, I think it is good that all professional journalists are trying to respect the same Code of Ethics, though only newspaper companies can be held responsible for violating the Code.

## Media Ombudsman instead of Press Ombudsman?

Recently a Member of Parliament proposed a motion on establishing a Media Ombudsman covering the whole media sector, *i.e.* press, broadcasting and television, replacing the Press Ombudsman and some functions of the Broadcasting and Television Authority.

The press industry said no and the broadcasting and television companies said nothing. The press is interested in a well-functioning self-regulation system and the broadcasting and television companies are not interested in self-regulation at all.

By the way, it is a paradox that an MP can propose a motion on self-regulation. The concept of self-regulation means that the parties both formulate the ethical and professional guidelines and see to it that these guidelines are respected. The government and the parliament have no influence whatsoever on the ethical rules of the press.

On the other hand, it is also a paradox that privately-owned broadcasting and television stations are accepting that the Broadcasting and Television Authority control their ethical standards.

It has been suggested that broadcasting and television companies should establish their own self-regulation bodies, similar to the Press Ombudsman and Press Council. But they seem to think that the activities of the Authority are sufficient.

## Internet

The Internet is a form of global mass communication that does not always follow any national ethical rules for the press or even any national legislation.

Contrary to websites connected to individuals and enterprises in general, you can call for webpapers connected to printed newspapers to maintain a certain level of journalistic professionalism. This demand is not unreasonable since these webpapers are run by newspaper enterprises, whose journalists should respect press ethics. There is an enormous amount of information on the Internet and it is important for the journalistic reputation of these webpapers to keep a certain journalistic standard.

Since 1 April 2000 it is possible for the general public to file complaints concerning webpapers connected to a printed newspaper. It is not acceptable that the newspapers could keep double ethical standards, a high standard in the printed paper and a lower one in the webpaper. ■

# Technical Standards

*Philip Laven*

*Director of the Technical Department, European Broadcasting Union, Geneva*

## Introduction

The choice of technical standards for TV broadcasting has long been a political problem, not just in Europe but also across the world. Protection of “local” manufacturing interests has been an important ingredient in such decisions, but regrettably the interests of consumers have rarely been considered.

This paper examines the history of TV standardisation in Europe, in the hope of learning some lessons for the future.

## National Standards

In the 1950s and 1960s, the development of TV in Europe was hampered by arguments over technical standards. Each country felt that it was their sovereign right to choose technical standards that were different from their neighbours, thus resulting in a confused mixture of incompatible TV standards (e.g. 405, 819 and 625 lines, PAL and SECAM, analogue stereo and digital stereo).

Were the decision-makers aware that “national standards” would act as barriers to trade – or, at least, make it difficult to watch TV services from other countries? Regrettably, the answers are “yes” and “yes”! In fact, some national Governments selected TV systems that were subtly different from their neighbours for one very clear reason: they decided to favour their indigenous electronics manufacturers by erecting barriers to trade. Eventually, manufacturers in various European countries came to the conclusion that the multiplicity of national standards had failed to protect them against the severe competition from manufacturers in the Far East. Furthermore, they realised that the multiplicity of national standards made it difficult for them to export to other countries. In fact, they decided that the previous policy was actually harmful to their interests!

## A Single European Standard?

Despite this experience, industrial objectives have long dominated European thinking about technical standards for TV. In the mid-1980s, there was a strong push for a single European standard for satellite TV. In order to gain broad acceptance, it had to be different from all of the existing standards. The chosen standard, called MAC, gained support from the EC and from many national governments. Although MAC was listed in the 1986 TV Standards Directive (86/529/EEC) as the mandatory standard for broadcasting satellites, it has now disappeared from view.

What went wrong? From an engineer’s perspective, the MAC system was undoubtedly superior to the PAL and SECAM systems. For example, the MAC system offered improved picture quality and also avoided the problem of cross-colour – which appears as flashes of false colour when TV presenters wear

clothes with finely-striped patterns. However, the improvement in quality was barely noticeable to most non-technical observers. As MAC receivers were much more expensive than ordinary receivers, broadcasters were reluctant to adopt the new standard. But the final nail in the coffin for MAC occurred when some satellite TV operators opted to use the existing PAL system. How could they do that when the TV Standards Directive made the MAC standard mandatory?

The curious fact is that MAC was only mandatory for satellite broadcasting services in the 11.7 – 12.5 GHz frequency band, whereas most TV satellite broadcasts were using other frequency bands that were officially designated by the ITU (International Telecommunication Union) for “non-broadcasting” purposes. Thus the satellite operators were able to ignore the TV Standards Directive and transmit their programmes in the cheaper PAL format.

## High Definition TV

In 1986, it seemed that the USA would adopt the high-definition TV (HDTV) standard developed in Japan. This was a source of great concern to many Europeans, who felt that Europe must have its own standard for HDTV – so as to avoid becoming dependent on Japanese technology. Their solution was HD-MAC, which was ingeniously based on the MAC system. In essence, HD-MAC transmissions provided two inter-twined versions of the broadcast programme: a standard definition version for MAC receivers and a high-definition version for HD-MAC receivers. In practice, the presence of the HDTV information degraded the quality of the standard definition signal. This was a fatal flaw because, initially, most consumers would watch the standard definition version of the HD-MAC signal and it was obviously unreasonable to expect them to watch poorer quality pictures simply so that a few viewers could watch HDTV. Even worse, although the HDTV pictures were very attractive, HDTV receivers and displays would be so expensive that there would be little or no consumer demand for HDTV. Nevertheless, HD-MAC was heavily promoted by the EC (e.g. Directive 92/38/EEC) – until it became obvious that much better technology (*i.e.* digital TV) was on the horizon. In reality, HD-MAC never left the laboratory.

## Standards for Digital TV

Digital TV offered a real opportunity for Europe to avoid multiple standards. There was no need to worry about offending those countries using their own national standards – because nobody was using digital TV. As everybody seemed to agree that harmonised standards would provide real benefits for all players in the broadcasting value chain (including consumers), the European Digital Video Broadcasting (DVB) Project was established in 1993. Today, this consortium has more than 300 members, including broadcasters, manufacturers, network operators, software developers and regulatory bodies. DVB standards for satellite, cable and terrestrial TV services have been adopted throughout the world.

There are now more than 1500 digital satellite TV services using DVB standards in Europe – with many more planned via satellite, cable and terrestrial. Regrettably, to receive all 1500 satellite services, you would need many different digital TV set-top boxes. The reality is that there is a serious problem with interoperability. How could this happen when the 1995 Directive on TV Standards insists on common transmission standards for digital TV?

Article 2 of Directive 95/47/EC states:

All television services transmitted to viewers in the Community whether by cable, satellite or terrestrial means shall . . . . **if they are fully digital, use a transmission system which has been standardized by a recognized European standardization body.** In this context, a transmission system comprises the following elements: formation of programme signals (source coding of audio signals, source coding of video signals, multiplexing of signals) and adaptation for transmission media (channel coding, modulation and, if appropriate, energy dispersal).

As the specifications developed by the DVB Project have all been standardised by ETSI (European Telecommunications Standards Institute), it is clear that the intention of the Directive was to encourage the use of DVB specifications. However, the drafting of Article 2 is not sufficient to guarantee that consumers will be able to buy digital TV receivers that will be able to receive all broadcast services – because the Directive confines itself to a narrow interpretation of “transmission systems”.

In much of Europe, digital TV has been pioneered by pay-TV operators. Whilst applauding these pioneers, we must also recognise that some chose to use incompatible proprietary standards so as to

create vertical markets. This lack of interoperability was considered to be beneficial because it prevented consumers from changing to competing services. In the mid-1990s, regulators around Europe were concerned about this situation, but they were reluctant to intervene because they did not want to discourage investment in digital TV by “over-regulation” of a nascent industry. The problem is simply that the 1995 Directive’s definition of transmission system excludes many other important elements, such as Conditional Access, Electronic Programme Guides and Applications Programming Interfaces. Without harmonisation of such elements, interoperability remains an unachievable goal.

We can now see that the 1995 Directive failed to deliver the desired benefits of harmonised standards for digital TV services. What happened to the principle of removal of barriers to trade or, indeed, to the noble concept of “TV without Frontiers”?

## Interactive TV

Analogue TV offers only limited opportunities for interactivity, such as teletext which is available on all modern TV sets. However, interactivity is a crucial feature of most digital TV services. For example, a digital TV service offering 100 or more TV programmes cannot function without an Electronic Programme Guide (EPG), which lists all of the available programmes for the following few days.

With so many channels available, the EPG becomes a crucial gateway to digital TV. As the TV screen can display listings for only a few TV channels, the EPG has many “pages”. The first page attracts the most attention from viewers, whereas the later pages are rarely consulted. Consequently, all broadcasters would like to be on the first page. The positioning of “channels” on the EPG obviously influences their success. Who controls the EPG? Where a vertically-integrated operator controls the EPG, there is the risk that the EPG could be used to promote that operator's services to the disadvantage of competing services. Firm regulation is needed to ensure that EPGs are operated fairly.

Interactive TV requires an Applications Programming Interface (API). Several APIs have been designed for digital TV, all of which are incompatible with each other. If a TV programme is to be shown in different markets, the interactive elements must be rewritten for each API (which is NOT a trivial task).

Although several APIs (such as OpenTV and MediaHighway) are available, the DVB Project decided to develop its own API: DVB-MHP. As DVB-MHP is based on Java, it can operate on many different types of set-top boxes, thus offering the prospect of interoperability with digital TV services using other APIs. There is growing support for DVB-MHP because it will encourage horizontal markets. Existing APIs will not disappear overnight because, in some countries (e.g. the UK), there are millions of set-top boxes using existing APIs. Even so, the Nordig Consortium (representing broadcasters, network operators and service providers in the Nordic countries) has shown that it is possible to migrate from existing APIs.

In March 2001, the EBU recommended that:

- broadcasters should use DVB-MHP on new digital TV platforms;
- broadcasters using other APIs on existing digital TV platforms should give serious consideration to migrating to DVB-MHP.

During 2001, some advocates of DVB-MHP demanded that it should become mandatory in EU countries, but users of other APIs fiercely resisted this idea. After much lobbying, in the European Parliament, the legislative situation is now defined in Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive), as shown below:

### Article 18

#### Interoperability of digital interactive television services

1. In order to promote the free flow of information, media pluralism and cultural diversity, Member States shall encourage, in accordance with the provisions of Article 17(2):
  - providers of digital interactive television services for distribution to the public in the Community on digital interactive television platforms, regardless of the transmission mode, to use an open API;
  - providers of all enhanced digital television equipment deployed for the reception of digital interactive television services on interactive digital television platforms to comply with an open API in accordance with the minimum requirements of the relevant standards or specifications.

2. Without prejudice to Article 5(1)(b) of Directive 2002/19/ EC (Access Directive), Member States shall encourage proprietors of APIs to make available on fair, reasonable and non-discriminatory terms, and against appropriate remuneration, all such information as is necessary to enable providers of digital interactive television services to provide all services supported by the API in a fully functional form.
3. Within one year after the date of application referred to in Article 28(1), second subparagraph, the Commission shall examine the effects of this Article. If interoperability and freedom of choice for users have not been adequately achieved in one or more Member States, the Commission may take action in accordance with the procedure laid down in Article 17(3) and (4).

The European Parliament is obviously sympathetic to the concept of interoperability achieved through the use of open standards, such as DVB-MHP. Although it stopped short of making DVB-MHP mandatory, paragraph 3 indicates that this position will be reviewed in the light of experience.

## Do We Need Standards?

There is no doubt that, following the fiascos of MAC and HD-MAC, the EC is reluctant to involve itself in the standardisation process – other than by encouraging the players to come to voluntary agreements (e.g. through the DVB Project). Making a particular technology mandatory has obviously become a “no-go area” for the EC. Given their track record of “picking losers”, many players in the broadcasting value chain applaud such reticence.

Even so, the EC must bear some responsibility for the diversity of digital TV standards. As with the 1986 Directive, the wording of the 1995 Directive in concentrating on a very narrow definition of “transmission system” gave a loophole to operators allowing them to circumvent the intentions of the 1995 Directive. It is tempting to blame poor drafting, but there is no doubt that the wording of this Directive reflects the demands of certain pay-TV operators that they should be free to adopt proprietary standards.

Do we need standards? In the early 1980s, the FCC in the USA decided that it would not pick technological winners. It was argued that the FCC did not have the commercial or technical expertise to make the best choice of new systems. Consequently, the FCC announced that the market should decide which of the competing AM stereo systems would “win”. It is worth noting that the FCC implicitly defined the “market” very narrowly as being the broadcasters (who may not have the same interests as consumers). Initially, there were 4 or 5 candidate systems – but this was soon reduced to 2 strong competitors. Unfortunately, as there was no clear winner in the market, consumers were unwilling to buy radios for what might turn out to be the “wrong” system. As a result, AM stereo failed to become successful. It is interesting to speculate whether AM stereo would have been successful if the FCC had followed its previous policy of working with broadcasters to devise technical criteria to establish which of the competing systems performed the best.

Also in the early 1980s, consumers became interested in videocassette recorders, but were confused because there were two incompatible tape formats, Betamax from Sony and VHS from JVC. In fact, a third format was sold in Europe: the V2000 format from Philips. By any criterion, V2000 produced the best quality; Betamax was the next best, whilst VHS was definitely inferior. But quality is not the most important criterion. The key factor was that video rental shops and libraries wanted to concentrate on a single format – and eventually opted for the VHS system. Within months, the total demand for VCRs grew very rapidly, but only in the VHS format. Although the VHS format was inferior in terms of quality, this experience demonstrates that “content is king”. In any event, the quality of the VHS format was carefully designed to be “just good enough”, rather than “excellent”, which allowed the manufacturers to produce VHS machines more cheaply than their competitors.

The successes of CD audio, CD-ROM and DVD demonstrate the benefits of universal standards. You are not required to buy one DVD player to view films made by Universal Studios and another player of a slightly different design to view films from Disney. Similarly, a single standard for mobile telephones in Europe has led to a remarkable success story, admittedly aided by the EC’s pressure on national administrations to allocate spectrum to allow pan-European roaming. No mobile telephone operator would offer a mobile phone that could be used to make calls only to other subscribers on the same network. Everybody expects that his or her mobile phone will be able to communicate with any other telephone in the world.



Yet, in the strange world of digital TV, many operators have deliberately chosen standards that are unique to their services. This suggests that self-regulation will not be successful in this area. Market players are rarely in business for the good of humanity. If they can gain a larger market share by any legal tactic, they will do so. Operators of digital TV platforms have also found that they can exert considerable control over competing broadcasters who wish to deliver services to “their” viewers. Of course, those who have made risky investments in digital TV platforms are entitled to a fair return on their investments, but some regulators seem remarkably supine and slow to act even when there is strong evidence of abuse of a dominant position.

Who looks after the interests of consumers? The diversity of incompatible standards for digital TV has a cost penalty in terms of more expensive receivers, as well as locking them into a single service provider.

## **Vertical Markets or Horizontal Markets?**

Content-providers want their content to be viewed by as many consumers as possible. Electronics manufacturers want open standards so that they can achieve the benefits of mass-market production. Consumers want to be able to receive programmes from different content providers.

Proprietary standards can lead to vertical markets – in which the service operator specifies and controls every aspect of the service, such as receivers, conditional access systems, subscriber management and interactivity. On the other hand, open standards lead to horizontal markets – in which consumers are free to buy equipment from any supplier, rather than the equipment specified by a particular service provider (which typically cannot be used to receive services from other providers).

Open standards are crucial for the long-term success of digital broadcasting – just as they have been in the success of CDs and DVDs. Surprisingly, not everybody wants standardised solutions for digital TV. The problem is simply that the value chain for digital broadcasting is typically much more complicated than for analogue broadcasting. For example, digital broadcasting can involve:

- multiplex operations;
- EPGs (Electronic Programme Guides);
- APIs (Application Programming Interfaces);
- conditional access systems;
- subscriber management services
- interactive services;
- set-top boxes

As each of these elements must function properly, those in control of individual elements can act as “gatekeepers” and thus obtain a degree of control over the entire value chain. The fact is that gatekeepers may not want “standards” because open standards would enable competing suppliers to enter these markets.

In theory, competition law should prevent gatekeepers from acting unfairly. However, experience indicates that competition law is a blunt instrument. In general, it applies only when there is evidence that a market player has abused a dominant position: in such circumstances, it may be too late to intervene because the gatekeeper may already have gained an unassailable position in the market place, thus preventing true competition.

The benefits of open standards are widely recognised, but regulators are understandably cautious about mandatory standards because of previous bad experiences.

It must be acknowledged that vertical markets have some advantages: for example, service providers operating in vertical markets can offer heavy subsidies on digital TV equipment, such as providing “free” set-top boxes for those who agree to subscribe for 12 months or longer. Every rational person knows that “there is no such thing as a free lunch”, but such offers have been very successful in triggering rapid initial uptake of digital TV services. From the perspective of the service provider, such subsidies make good business sense, not only by attracting subscribers who are willing to pay for expensive packages of services (e.g. premium movie channels, pay-per-view services, etc.) but also by persuading existing subscribers to transfer from analogue services (which are much more expensive to transmit than their digital equivalents). Nevertheless, it is important to understand that pay-TV operators will not be so keen to offer subsidies to proverbial “grandmothers” who are unlikely to be heavy users of premium TV services.

It has often been argued that subsidies and other incentives offered by pay-TV operators are essential to the all-important transition from analogue to digital broadcasting. In order to be able to close down the analogue transmissions, the public policy goal must be to achieve near-universal coverage of digital broadcasting (i.e. available in more than 98% of homes). Unfortunately, the evidence to date suggests that there is a limited appetite for pay-TV services. Even in countries, such as France and the UK, where pay-TV has been a great success, take-up has flattened off at 30 – 40 %. On the other hand, only about 2 million households in Germany have pay-TV, compared with 32 million households still entirely dependent on free-to-air TV. In such circumstances, it seems foolish to expect that pay-TV will be the mechanism that can achieve universal adoption of digital TV. The reality is that the speed of the transition from analogue to digital broadcasting will be set not by broadcasters (who want a rapid transition so as to avoid the costs of running separate transmission networks for analogue and digital services) but by politicians who will rightly be concerned about disenfranchising those who cannot afford or do not want to invest in digital TV. To put it bluntly: "There are no votes gained by depriving grandmothers of their favourite TV programmes!"

## Lessons for the future

Are there any lessons that we can learn from this complicated story?

- Should regulators stay out of the process of standard setting?
- Should we let the broadcasters do whatever they want?
- Can we simply let market forces rule?

## Conclusions

Digital TV is far too important to be left to the uncertainties of market forces. Regulators in Europe must ensure that the benefits of digital TV are available to all consumers.

The need for common standards for digital TV has long been recognised by all players and by regulators. With the benefit of hindsight, we can see that it was appropriate for regulators to intervene in the issue of transmission standards for digital TV in Europe. They rightly insisted that the transmission systems should operate in accordance with open standards based on the work of the DVB Project. However, the regulators failed to understand the crucial importance of gateways. Many regulators have subsequently been reluctant to demand interoperability. Everybody will suffer the long-term consequences of such timidity!

Experience shows that open horizontal markets benefit consumers – and all other players. Free-to-air broadcasters want to compete on the basis of their services, rather than using technological barriers to limit consumers' freedom of choice.

There are many regulatory challenges ahead, such as:

- the evolution of "must carry" rules to include interactive services;
- ensuring fair and non-discriminatory access to electronic programme guides and conditional access systems.

Although self-regulation is attractive, it is unlikely that it will lead to optimal results **for consumers** in the area of technical standards. ■

# Converged Classification Fantasy or Reality?

*Wim Bekkers*

*Director of the Netherlands Institute for the Classification of Audiovisual Media (NICAM)*

## **NICAM**

- Joint initiative of the entire audiovisual industry
- Self regulation supported by government
- Founded by all public and commercial TV stations plus film, game and video/DVD industry organisations
- Cinemas, video stores, retail, distributors

## **Goal**

To provide **uniform** information to consumers (e.g. parents) that can help them decide whether a product can be harmful for their children.

## **How does NICAM function**

- Classification system developed by independent experts
- Self regulation means self-rating/coding
- Each member company has one or more coders (total > 150)
- Coders are trained by NICAM
- Films and TV programmes are classified through a special internet application
- Coders enter the internet application using a password
- The system is a computerised questionnaire
- All data (answers to questions) are stored in a central database

## **Some principles**

- *One* classification per audiovisual product, valid throughout the rest of its life
- A product is classified by one coder
- In case of serious doubt: advice by coder committee

## **Six content descriptors**

- Violence
- Fear (giving rise to feelings of fear)
- Sex
- Drug/alcohol abuse
- Language
- Discrimination

## Four age categories

- All Ages
- MG6 = comparable with PG ("Parental Guidance")
- 12
- 16

Final age rating determined by highest content descriptor score

## Not free from obligation

- Parliament and government will evaluate the project at the end of 2002
- Evaluation based on extensive independent research
- Effectiveness assessed annually by Broadcasting Regulatory Commission

## Most important: checking by the public

- Anybody can report a complaint via [www.kijkwijzer.nl](http://www.kijkwijzer.nl) or 0900 1612600
- Independent Complaints Committee and Appeals Committee
- Sanctions vary from warnings to fines

## Benefits for the consumer?

- DVD/Video: pictograms on box, on tape and in advertisements
- Film: pictograms in advertisements and cinemas, on posters
- TV: pictograms on screen, in programme guides, in Teletext and EPG

## Organisation

- General board with independent chair + 8 members (representing founders)
- Advisory Committee
- Independent Complaints Committee + Appeals Committee
- Committee of experts
- Coder Committee
- Office

## Some important aspects

- Version 1.1 of rating system in use since November 2001
- English version on [www.nicam.cc](http://www.nicam.cc)
- Version 2.0 due for release in 2003
- Coder Committee important safety net: three coders (film and television) offer advice on classification problems

## What about audience feedback?

- Immediate reactions by e-mail and 0900-1612600 (EUR 0.20/min)
  - Compliments, criticism, requests for information, complaints
  - Approx. 500 complaints since launch in February 2001
- |                 |          |               |            |
|-----------------|----------|---------------|------------|
| Television: 271 | Film: 82 | Video/DVD: 55 | Others: 95 |
|-----------------|----------|---------------|------------|

## Complaints policy

- All complainants receive written response giving reasoning
- Office selects specific complaints for handling by Complaint Committee (CC)
- CC dealt with 22 complaints:
  - 13 warnings
  - 2 fines (largest fine imposed: EUR 22,500)
  - 7 dismissed

- All rulings made public ([www.nicam.cc](http://www.nicam.cc))
- Single complaints mechanism for all AV media complaints

## No problems?

Of course there are problems!

- Classification mistakes do occur, but we believe they are few
- Sometimes the wrong pictograms are shown
- Some arthouse theatres think the pictograms put people off
- Not all video distributors are affiliated, though most are
- Consumers find the MG6 (parental guidance) pictogram difficult
- Even using the system, final classification is still done by people. Interpretation is not always easy, but in most cases the system works
- Sometimes the wrong film classification finds its way onto the video or DVD
- The debate as to what is “damaging” and what is “suitable” continues

## But

- Consumers, government and audiovisual industry are largely happy with the system
- The NICAM Kijkwijzer system enjoys public acceptance
- We are convinced most problems can be solved, given time
- As they have every time so far

## Was the premise right?

- NICAM’s founders elected for a uniform system that would offer consumers consistent and clear information
- Any possible differences in the effects of different forms of media (e.g. Cinema, video, television) are taken to be a fact of life

## Critical factors

- Independent research-based committee responsible for rating system
- Independent Complaints Committee with access to sanctions with real bite
- User-friendly computerised rating system (Internet-based)
- Motivated coders
- Helpdesk plus training package for coders
- Striking the right note – not too solemn!

## Fantasy or reality?

- Overall, and judging by the reception NICAM has had, this was a good choice
- From the response we have had to NICAM from home and abroad we believe we are on the right path
- As far as we are concerned, converged classification is not a fantasy, it’s reality

## Does the government agree?

- Investigation by independent institute
- Five survey questions:
  1. Degree of participation by organisations and companies
  2. Functioning of complaints procedures
  3. Reliability of rating system
  4. Audience feedback
  5. Degree of support from affiliated organizations

Evaluation later this year (2002). ■



# Self-Regulation, Co-Regulation and Reform of Media Regulation in the UK

*Prof. Tony Prosser*  
*The University of Bristol*

## Introduction and Key Concepts

The different concepts of self-regulation, co-regulation and regulation by a public authority have not been clearly defined in the UK. This is perhaps particularly unfortunate in that the first and last have acquired political resonance; successive governments have tended to treat regulation as something to be minimised because of the burdens it may impose on business, whilst self-regulation is often portrayed either as a preferable means of avoiding such burdens, or as an illegitimate abandonment of the state's responsibilities to represent the interests of consumers or a broader public interest. The necessity for definition has been reduced by the flexibility of the UK constitutional arrangements which do not impose clear conceptual limitations on legitimate forms of governmental action, and by the lack of a clear divide between public and private law so that it has proved unnecessary to allocate regulatory arrangements to one or the other legal regime.<sup>1</sup>

Despite the lack of definition, much recent attention has been paid to the possibility of developing regimes between self- and public regulation, sometimes referred to as "regulation with a light touch" which correspond closely to the concept of co-regulation discussed at this workshop. This has been particularly the case in relation to the current reform of communications regulation, both of telecommunications and of broadcasting, and this will be described further below.

One important point must be made at the outset. Self-regulation has often been presented in the debates as the antithesis of law. However, this is far too simple a categorisation. Firstly, self-regulation in this sense is not a useful way of categorising a whole regulatory regime as inevitably it is accompanied by more direct interventions by public authorities including the use of criminal or civil law sanctions. A striking UK example would be regulation of the press, classically described as self-regulatory because of the absence of any statutory framework for the public regulation of content. Yet the UK press is subject to civil laws of defamation amongst the most restrictive in the Western world; criminal liability for obscenity is also relatively severe, and we even retain criminal liability for blasphemy. Similarly, the Internet is seen as a classic area of self-regulation, but legislation has had to be passed *inter alia* to strengthen liability for Internet pornography involving children, to clarify liability for defamation on the Internet and to regulate access to electronic communications by the state.<sup>2</sup> Secondly, where self-regulation has been attempted in some form, it often evolves into more detailed public regulation where crises have to be faced and government cannot decline responsibility for their resolution. This was particularly so in the case of the financial services industry where regulation was delegated to so-called "self-regulatory organisations" during the 1980s but, after a

1) For the peculiar constitutional flexibility of the UK in this context, see C. Graham and T. Prosser, *Privatizing Public Enterprises* (Clarendon Press, 1991).

2) The Criminal Justice and Public Order Act 1994 s. 84; the Defamation Act 1996 and the Regulation of Investigatory Powers Act 2000, Part I.

series of financial scandals, this has been replaced by direct regulation by a body on which statute has conferred extensive powers, the Financial Services Authority.<sup>3</sup>

Alongside the limits to self-regulation, limits to public or statutory regulation have also been recognised. At a practical level, this has found expression in the attempts of successive Governments to lift regulatory burdens through “deregulation” or “better regulation” initiatives and the creation of new institutions to achieve this goal.<sup>4</sup> In academic debate, there has been an extensive body of work stressing the limits of law as a means of intervening in other domains such as the social and the economic systems.<sup>5</sup> Simultaneously, concepts of regulation which is neither simple self-regulation nor direct regulation by public authorities have become more sophisticated, for example in the form of the celebrated “enforced self-regulation” of Ayres and Braithwaite.<sup>6</sup> This refers to the negotiation of particularised regulations between government and firms with enforcement primarily for the enterprises themselves, but with increasingly strong public intervention where breaches of the rules are serious or frequent. The time is thus clearly ripe for the development of more sophisticated forms of co-regulation, and this is precisely what we are seeing in current media regulation reform.

## The White Paper Proposals

In December 2000 the UK Government published a White Paper setting out plans for a major reform of the regulation of both telecommunications and broadcasting, including establishing a single regulatory body to cover both in the form of a new Office of Communications (Ofcom).<sup>7</sup> Unusually for an official document, it set out a typology of different type of regulation, and this is set out below.

**Formal regulation:** Government (or regulator) defines the detailed requirements which are to be met (within a defined framework provided by legislation) and enforces the rules.

**Self-regulation:** Takes many forms, with varying degrees of Government (or regulator) involvement. Self-regulatory schemes may have no Government involvement or be created by Government but develop their own rules and sanctions. Schemes can be adopted and enforced by groups such as trade associations and professional bodies. In the field of communications, the work of the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS) represents a good example of effective self-regulation in action, where the interests of industry and citizens match.

ICSTIS adopts an industry-led approach to the regulation of premium telephone lines, which is supported by formal legislation and a close working relationship with Oftel, who are currently consulting on licence changes to help make ICSTIS even more effective. Self-regulatory initiatives can draw on the experience and self-motivation of those who are to be regulated. But they are only likely to be effective if they also answer adequately the needs of other stakeholders. As a generalisation, self-regulation needs to enjoy the confidence of the public if it is to be effective. In a regulated industry, such as communications, it would be expected that the regulator would be involved in any self-regulatory initiative, at least to the extent of monitoring progress and the effectiveness of the initiative in meeting the perceived needs.

**Co-regulation:** Implies a more active involvement of Government or regulator in seeking a solution to an emerging concern or perceived need for regulation. There is no very fixed distinction between co-regulation and self-regulation, but co-regulation is used in this White Paper to indicate situations in which the regulator would be actively involved in securing that an acceptable and effective solution is achieved. The regulator may for example set objectives which are to be achieved, or provide support for the sanctions available, while still leaving space for self-regulatory initiatives by industry, taking due account of the interests and views of other stakeholders, to meet the objectives in the most

3) Financial Services and Markets Act 2000.

4) See the Deregulation and Contracting Out Act 1994 and the Regulatory Reform Act 2001; also the work of the Regulatory Impact Unit in the Cabinet Office at <http://www.cabinet-office.gov.uk/regulation/Index.htm> and the Better Regulation Task Force at <http://www.cabinet-office.gov.uk/regulation/TaskForce/Index.htm>

5) E.g. G. Teubner, “Juridification: Concepts, Aspects, Limits, Solutions” in G. Teubner, ed., *Juridification of the Social Spheres* (de Gruyter, 1987) and J. Black, “Constitutionalising Self-Regulation” (1996) 59 *Modern Law Review* 24.

6) I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992). Note that these writers use the concept of “co-regulation” differently from that in this workshop, confining it to industry association self-regulation with governmental oversight.

7) *A New Future for Communications*, Cm 5010 (2000) at <http://www.communicationswhitepaper.gov.uk/>



efficient way. The regulator will in any such case have scope to impose more formal regulation if the response of industry is ineffective or not forthcoming in a sufficiently timely manner.<sup>8</sup>

Building on these conceptual distinctions, the White Paper proposed that regulation be kept at a minimum level and that where effective competition developed, regulatory rules would be lifted. In particular it recommended that a new system of regulation for public service broadcasting be introduced based on three tiers of requirement. The first tier, applying to all broadcasters, would include minimum content standards, rules on advertising and sponsorship, the provision of fair, impartial and accurate news and EC quotas; these would be enforced by Ofcom. The second tier would apply only to public service broadcasters, and would consist of quantifiable public service requirements, such as quotas for original and independent productions and for regional programming; these also would be enforced by Ofcom. Finally, the general qualitative public service remits would be primarily a matter for the broadcasters themselves to deliver. They would be required to develop statements of programme policy and self-regulatory mechanisms to do so, setting out annually their plans to meet their statutory public service remits. Each year the broadcasters would each be required to report on delivery of the plans. If they failed to respond positively, Ofcom could require and enforce quantified obligations.<sup>9</sup> In the case of Internet content, a self-regulatory approach was also favoured through the work of the Internet Watch Foundation, an industry body handling complaints about child pornography and other illegal material, through filtering and through rating systems.<sup>10</sup>

## The Communications Bill

Even before the publication of legislation to implement the proposals, the UK broadcasting regulator, the Independent Television Commission, moved in the suggested direction through requiring the publication of statements of programme policy by the commercial broadcasters.<sup>11</sup> In May 2002 the Government published a Communications Bill in draft for comments; this will establish Ofcom and provide a full legal base for the changes.<sup>12</sup> The draft Bill contains general duties for Ofcom which suggest a lighter model of regulation than that adopted in the past; thus the new regulator is required to secure "light touch" regulation and to have regard to the principles that "regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed".<sup>13</sup> It is under duties to secure the "light touch" regulation by ensuring that regulation does not involve "the imposition of burdens which are unnecessary; or the maintenance of burdens which have become unnecessary", and must publish periodic statements of how it is to secure this.<sup>14</sup>

In relation to public service broadcasting, Ofcom is obliged to publish, after twelve months and then every three years, a review of the extent to which public service broadcasters have met their remit; the Bill sets out the general requirements against which this is to be assessed, including providing a wide range of subject matter to meet the needs of as many different audiences as possible and to maintain high general standards in programmes; certain more detailed requirements are also set out, such as comprehensive and authoritative coverage of news and current affairs.<sup>15</sup> The public service broadcasters' licences must include a condition requiring the fulfilment of the public service remit and each must prepare an annual statement of programme policy and monitor its own performance against it, having regard to guidance issued by Ofcom.<sup>16</sup> Should the regulator decide that the remit has not been fulfilled or that the broadcaster has not made an adequate contribution towards the satisfaction of the general requirements for public service broadcasting, and the failure is serious "and is not excused by economic or market conditions", it may give directions to remedy the failure and may replace self-regulation with detailed regulation through imposing specific conditions on the broadcaster.<sup>17</sup>

This system applies in full only to the commercial public service broadcasters: Channels 3, 4 and 5.<sup>18</sup> The BBC as the public provider is, on current plans, to retain in part its self-regulatory status; this is however highly controversial and there is likely to be pressure during the passage of the Bill through

8) Para. 8.11.1.

9) Paras. 5.5-5.8.

10) Para. 6.10.

11) See [http://www.itc.org.uk/latest\\_news/press\\_releases/release.asp?release\\_id=484](http://www.itc.org.uk/latest_news/press_releases/release.asp?release_id=484)

12) The Bill, explanatory notes and a policy statement are all available at <http://www.communicationsbill.gov.uk/>

13) Clause 3(2)(a).

14) Clause 5(1-3).

15) Clause 181.

16) Clause 183.

17) Clause 187.

18) This reflects the position in the UK where privately-owned broadcasters are nevertheless treated as public service broadcasters due to the special obligations imposed on them.

Parliament for stronger regulation of the BBC by Ofcom. On current plans, the new regulator will be responsible for formulating codes on basic programme standards and setting quantitative public service requirements both of which will apply to the BBC. However, the qualitative public service remit will remain a matter for the BBC's own Board of Governors and will neither be set nor enforced by Ofcom. This has been criticised on the grounds that the Board of Governors is too closely linked to the management of the BBC to be able to provide an independent viewpoint. As a result of the criticism, the BBC (which remains resolutely opposed to any extension of Ofcom's role to cover its qualitative remit, largely on the ground that this would threaten the Corporation's independence) has made internal changes to clarify the role of the Governors by allocating to them the responsibility to monitor performance against specific objectives and requiring an annual statement of programme policy to be prepared similar to that of the private public service broadcasters. Ultimate powers of enforcement would be for the Secretary of State rather than for Ofcom.<sup>18</sup>

## Criticisms

The consultative process on the Communications Bill has created a lively debate, especially on the future regulation of the BBC and on its proposals for liberalisation of the media ownership rules.<sup>19</sup> In addition to the public consultation, the Bill has also been examined by Parliamentary Committees. The House of Lords and House of Commons Joint Committee on Human Rights, whilst expressing serious concerns about compatibility with the European Convention on Human Rights of the procedures by which Ofcom will impose penalties on broadcasters, did not consider that the procedures for securing observance of the public service remit would be incompatible with the Convention. However, this was subject to the condition that they would have to be applied in ways that were demonstrably proportionate, non-arbitrary and non-discriminatory.<sup>20</sup>

Fuller scrutiny of the substantive provisions of the Bill was carried out by a Joint Committee of both Houses of Parliament, chaired by Lord Puttnam, the former film producer.<sup>21</sup> The Joint Committee was critical of the requirement that Ofcom adopt a "light touch" regulatory approach, preferring instead the alternative wording of "proportionate, consistent and targeted only at cases where action is needed".<sup>22</sup> In addition, there should be clearer signposts for any move from statutory- to self-regulation, with Ofcom being given an explicit power to review and foster the development of effective and accredited self-regulatory bodies in the communications sector.<sup>23</sup> The Committee was broadly supportive of the new arrangements for elements of self-regulation in the supervision of the public service remit, whilst proposing detailed changes to increase flexibility through removing the requirement for prior consultation with Ofcom before changing programme policy, permitting the variation of licence fees mid-term and deleting the exemption from detailed regulation where failure to deliver the public service remit was due to economic or market conditions.<sup>24</sup>

The most highly publicised recommendation of this Committee was, however, in the area of media ownership. The draft Bill will considerably liberalise the complex rules in this area, notably by lifting the current ban on non-EEA ownership of UK broadcasters, permitting the formation of a single company to run Channel 3 and reducing restrictions on cross-media ownership. The Committee recommended that the nationality restrictions be retained until after Ofcom has been established and has undertaken a review of the programme supply market.<sup>25</sup> This raises the broader issue of the extent to which plans for increased self- or co-regulation are compatible with a simultaneous opening of markets. Not only may such an opening lead to increasingly fierce competition between broadcasters, it will create new market actors who may not sit happily within existing self- or co-regulatory regimes, and whose international nature may create problems of monitoring, supervision and enforcement. The moves towards new regulatory forms in British broadcasting over the next few years will be a fascinating case study of how these tensions will work out in practice. ■

18) For full details of the reforms see the BBC, *BBC Governance in the Ofcom Age* (2002) at <http://www.bbc.co.uk/info/bbc/pdf/bbcgovernancebooklet.pdf>

19) Contributions to the consultative process can be found at [http://www.communicationsbill.gov.uk/responses\\_organisations.html](http://www.communicationsbill.gov.uk/responses_organisations.html)

20) *Draft Communications Bill*, HL 149, HC 1102 (2002), para. 48, at <http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/149/149.pdf>

21) *Draft Communications Bill*, HL 169, HC 176 (2002) at <http://www.publications.parliament.uk/pa/jt200102/jtselect/jtcom/169/169.pdf>

22) Paras. 67-8.

23) Para. 71.

24) Paras. 351-2.

25) Para. 249.

# The European Union Legal and Policy Framework<sup>1</sup>

*Dr. Harald Trettenbrein*  
*European Commission*  
*Directorate-General for Education and Culture*  
*Culture, audiovisual policy and sport*

## 1. General Framework

One of the first explicit references to co-regulation in European Audiovisual policy can be found in the **European Commission Communication on AV Policy 1999**<sup>2</sup>:

“The principle of proportionality requires that the degree of regulatory intervention should not be more than is necessary to achieve the objective in question. The degree to which an individual user can exercise choice and control over the content received must be taken into account. This would mean that the regulatory approach with regard to, say, the protection of minors for a scheduled free-to-air television service would entail a different regulatory approach to that for an encrypted Pay-per-View Service which required a user ID and a method of direct payment. The Community can best manage the changes taking place by building on its existing instruments and principles and where appropriate, through promoting initiatives for self-regulation.”

The Commission **White Paper European Governance**<sup>3</sup> proposes opening up the policy-making process on a general level, to get more persons and organisations involved in shaping and delivering EU policy. It promotes great openness, accountability and responsibility for all those involved. To improve the quality of its policies the EU must find ways of speeding up the legislative process. It must find the right mix between imposing a uniform approach when and where it is needed and allowing more flexibility in the way that rules are implemented. The White Paper therefore calls for a greater use of different policy tools and also addresses co-regulatory mechanisms. One of the working groups preparing the white paper delivered a detailed report on “Better regulation” and worked on the requirements for co-regulation. The main conclusions were retained in the final report:

### “Conditions for the use of co-regulation

Co-regulation implies that a framework of overall objectives, basic rights, enforcement and appeal mechanisms, and conditions for monitoring compliance is set in the legislation. It should only be used where it clearly adds value and serves the general interest. It is only suited to cases where fundamental rights or major political choices are not called into question. It should not be used in situations where rules need to apply in a uniform way in every Member State. Equally, the organizations participating must be representative, accountable and capable of following open procedures in formulating and applying agreed rules. This will be a key factor in deciding the added value of a co-regulatory approach in a given case.

1) This contribution expresses the personal views of the author only.

2) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – Principles and Guidelines for the Community’s Audiovisual Policy in the Digital Age, COM (1999) 657 final. For www-links see below.

3) European Governance – A White Paper, COM (2001) 428 final.

Additionally, the resulting co-operation must be compatible with European competition rules and the rules agreed must be sufficiently visible so that people are aware of the rules that apply and the rights they enjoy. Where co-regulation fails to deliver the desired results or where certain private actors do not commit to the agreed rules, it will always remain possible for public authorities to intervene by establishing the specific rules needed."

## 2. Court of Justice of the European Communities (ECJ)

**Community law** is to a great degree open to co-regulation, as is confirmed by **ECJ Case Law**. Firstly, because directives leave it to the Member States to choose the form and the method by which to transpose their obligations. In this respect co-regulation could be an appropriate means to achieve the aims of a given directive. Secondly, because whenever there is no Community definition, Member States are free to regulate. With regard to the "Television without Frontiers" Directive<sup>4</sup> this would be the case for notions like "children's programmes" (Article 11 (5) of the Directive) or "pornography" (Article 22 of the Directive). Already, Member States have put in place rating systems for audiovisual products, which have never been challenged on the grounds of incompatibility with Community Law in general or the "Television without Frontiers" Directive in particular.

"... in so far as there is no Community definition...the definition...is, in principle, a matter for the Member State. It follows that in the absence of Community legislation ... the Member States are free to regulate."

C-61/89

"... a directive is binding, as to the result to be achieved upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods."

C-29/84

"The transposition of a directive into national law does not necessarily require its provisions to be formally incorporated verbatim in express, specific legislation; a general legal context may, depending on the content of the directive in question, 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."

C-95/96

## 3. Examples in Audiovisual-Policy

The **Council Recommendation on the Protection of Minors and Human Dignity** 1998<sup>5</sup> could be seen as a first step in establishing a self-regulation framework for audiovisual and information services. The Recommendation offers guidelines for the development of national self-regulation regarding the protection of minors and human dignity. Self-regulation is based on three key elements: firstly, the involvement of all the interested parties (Government, industry, service and access providers, user associations) in the production of codes of conduct; secondly, the implementation of codes of conduct by the industry; thirdly, the evaluation of measures taken.

The Recommendation was a direct result of the public consultation that took place on the basis of the Commission's 1996 Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services<sup>6</sup>. During the last few years, the Recommendation has been implemented successfully, as the Commission's recently-adopted evaluation Report<sup>7</sup> shows. Member States foster the establishment of national frameworks for self-regulation by operators of on-line services. This necessitates at least regular contacts between the operators. In most of the Member States **associations of Internet-operators** have already been founded. With one exception, in all Member States where associations of operators exist, codes of conduct have been established or are being finalised.

4) Council Directive 89/552/EEC as amended by Directive 97/36/EC of the European Parliament and of the Council (Television without Frontiers).

5) OJ L 270/48, 7. October 1998, p 48.

6) COM (96) 483 final.

7) COM(2001) 106 final.

## 4. Other Examples

The **Universal Service Directive**<sup>8</sup> in recital 48 refers to co-regulation as an appropriate way of stimulating enhanced quality standards and improving service performance. Further to that, co-regulation is mentioned in a number of Commission proposals under discussion. The **Green Paper on European Union Consumer Protection**<sup>9</sup> considers that self-regulation can achieve some consumer protection goals, especially in industries that recognise they have a strong common interest in retaining consumer confidence and where free riders or rogue traders can harm this confidence. Effective self-regulation that contains clear, voluntarily binding commitments towards consumers and which is properly enforced can reduce the need for regulation or co-regulation. The green paper also discusses the option of EU-wide self-regulation and the vital elements needed to make this option work.<sup>10</sup> The Commission follow-up to **the multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks**<sup>11</sup> refers to a self-regulation study, which will conduct research into self-regulatory efforts in various media in Europe and assist self-regulatory bodies in developing and implementing their codes of conduct. The research will cover the Internet and digital film and video industries, video games, digital television and WAP/GPRS/UMTS technology. It will provide a one-stop clearinghouse on self-regulatory models to assist agencies and others to achieve their policy and legislative objectives. Furthermore, it will develop models for self-regulation and codes of self-regulatory approaches across national lines in consultation with industry, user and consumer representatives and official regulatory bodies.

## 5. Useful links

White Paper Governance

[http://europa.eu.int/comm/governance/white\\_paper/index\\_en.htm](http://europa.eu.int/comm/governance/white_paper/index_en.htm)

Commission Communication on AV Policy 1999

[http://europa.eu.int/comm/avpolicy/legis/key\\_doc/legispdffiles/av\\_en.pdf](http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/av_en.pdf)

Mandelkern Group on Better Regulation, Final Report, 13 November 2001

<http://www.csl.gov.pt/docs/groupfinal.pdf>

Council Recommendation on the Protection of Minors 1998

[http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l\\_270/l\\_27019981007en00480055.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_270/l_27019981007en00480055.pdf)

Evaluation Report – Protection of Minors

[http://europa.eu.int/comm/avpolicy/regul/new\\_srv/ermin\\_en.pdf](http://europa.eu.int/comm/avpolicy/regul/new_srv/ermin_en.pdf)

European Commission AV policy unit homepage

[http://europa.eu.int/comm/avpolicy/index\\_en.htm](http://europa.eu.int/comm/avpolicy/index_en.htm)

Study to identify best practice in the use of soft law and to analyse how this best practice can be made to work for consumers in the European Union

[http://europa.eu.int/comm/consumers/policy/developments/enfo/enfo02\\_en.html](http://europa.eu.int/comm/consumers/policy/developments/enfo/enfo02_en.html)

Follow-up to the multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks

[http://europa.eu.int/information\\_society/programmes/iap/docs/pdf/programmes/followup/follow-up%20decision\\_acte\\_en\\_%20fin.pdf](http://europa.eu.int/information_society/programmes/iap/docs/pdf/programmes/followup/follow-up%20decision_acte_en_%20fin.pdf) ■

8) Directive 2002/22/EC.

9) COM (2001) 531 final.

10) Lex Fori produced an interesting analysis for DG SANCO, which is by no way binding on the Commission: Study to identify best practice in the use of soft law and to analyse how this best practice can be made to work for consumers in the European Union. See [www-links](http://www-links) for details.

11) COM (2002) 152 final.



# The Approach of the Council of Europe

*Ramon Prieto Suarez*

*Council of Europe, Directorate of Human Rights, Media Division*

## 1. Regulatory Nature of the COE under Question?

Traditionally, inter-governmental cooperation in the media field within the COE has led to the adoption of legal instruments. A series of binding European conventions have in this way been adopted: the European Convention on Transfrontier Television (ECTT), the European Convention on the legal protection of services based on, or consisting of, conditional access and the European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite. The Committee of Ministers has also adopted a significant number of Recommendations to Member States. The latter are non-binding legal instruments which generally recommend that governments include in their domestic law a number of basic principles, but there are also examples of Recommendations which mention that certain questions can preferably be addressed via self-regulation. It is currently becoming more difficult to identify subjects that require the adoption of a European legal instrument. There seems to be a challenge to the traditional standard-setting role of the COE, which to a certain extent has already been reflected in the nature of the subordinate bodies under the Steering Committee (CDMM): small groups of experts with the mandate of “monitoring developments in the media field rather than coming up with regulatory proposals” have recently replaced some of the traditionally regulatory-oriented inter-governmental committees. It seems that more emphasis will be placed on monitoring from now onwards and not so much on preparing new instruments, which would just add to the long list of conventions and recommendations already passed by the COE.

## 2. Acknowledgement of Self-regulation at Ministerial Level

The elaboration of codes of conduct, self-control and the application of professional standards based on self-regulation was clearly recognised by COE European Media Ministers at the Prague Conference (1994). Resolution No 2 of the Conference, on Journalistic Freedoms and Human Rights, underlined that public authorities should “exercise self-restraint ... and 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”. At the 5<sup>th</sup> COE Ministerial Conference on Media Policy in Thessaloniki (1997), the development of self-regulatory measures concerning the new information services was encouraged. Resolution No 2 stated: “regulatory measures which are specific to new communication technologies and services should be adopted only to the extent that it is necessary to respond to such issues, over and above the self-regulatory measures which can be taken by those who design, provide, exploit and use these technologies and services”. This approach of self-regulation for the Internet and the new services has subsequently been developed in other instruments.

(See texts adopted at COE media Ministerial Conferences:

[http://www.humanrights.coe.int/Media/documents/dh-mm/MinisterialConferences\(E\).doc](http://www.humanrights.coe.int/Media/documents/dh-mm/MinisterialConferences(E).doc)).

### 3. More Flexible Legal Frameworks

Despite the fact that COE Member States have different regulatory approaches towards the media, an acknowledgement of the need to have less detailed legal frameworks given the changes the sector is undergoing emerges from many of the COE committee discussions and documents. A less restrictive regulatory approach seems in particular to be necessary for the traditionally highly regulated broadcasting sector. In effect, digital broadcasting is a good example where a mix of regulation, co-regulation and self-regulation will all be necessary. Basic content regulation will still be applicable to digital broadcasting services and there will also be a need to have legislation on the licensing of DTT services – since the latter occupy frequency spectrum. Industry self-regulation too will have an important role, in particular as regards technical standards for digital set-top-boxes or receivers (acknowledged in the EC Telecoms package). Co-regulatory frameworks, based on cooperation between governments and the industry, will also be called for. An acknowledgement of co-regulation from the COE as regards digital TV will come out of a Recommendation “on the democratic and social impact of digital broadcasting” currently under preparation. As this draft text currently stands, governments will be requested to “bring to the attention of professional and industrial circles a number of basic principles for the transition to digital broadcasting, and to evaluate on a regular basis the effectiveness of the implementation of these principles”. The Recommendation will thus place emphasis on the need for Member States to liaise with the relevant industry players on how to implement some basic principles. (Text could be adopted in course of 2003).

### 4. Review of the ECTT

The changes in the broadcasting sector will also have to be reflected in the near future in a revised ECTT. The Standing Committee has already started thinking about this, and it is possible that the scope of the Convention could be extended to services currently not covered by it, which would imply lowering the current level of content regulation laid down in the Convention. However, the review option that would be more “revolutionary” would be to entrust some of the aims pursued by the Convention to self- or co-regulatory initiatives at the national level (there has not been much discussion about this so far). If that were the case, the ECTT itself would become a sort of co-regulatory framework at the European level. In any event, there seems to be an increasing consensus on the need to have a less restrictive approach in certain areas covered by the convention, for example, on advertising questions, where self- and co-regulatory approaches might be called to play a bigger role. A concrete example under the current ECTT framework where self-responsibility of broadcasters is recognised is, for example, a draft statement “on the responsibilities of broadcasters as concerns respect for human dignity and the fundamental rights of others”, now being prepared by the Standing Committee. The statement will call on regulatory authorities and broadcasters: “to co-operate and discuss among themselves on a regular basis on the question of television programmes which might contravene human integrity or dignity, with a view to seeking consensual and self-regulatory solutions - as far as possible - as regards such programmes”. (Editor’s note: the text was adopted by the Standing Committee at its meeting on 12-13 September 2002, and is available on the Media Division website).

### 5. Online Services

The Internet is one of the sectors where self-regulation and voluntary schemes have a primary role to play. This has been clearly acknowledged by the COE in Recommendation (2001) 8 on self-regulation concerning cyber content. This Recommendation mentions that Member States should: “encourage the establishment of organisations which are representative of Internet actors ... encourage such organisations to participate in relevant legislative processes, for instance through consultations, hearings and expert opinions, and in the implementation of relevant norms, in particular by monitoring compliance with these norms ... and encourage Europe-wide and international co-operation between such organisations”. All these guidelines to Member States are aimed towards facilitating cooperation and the exchange of information between States and the industry, and point in the direction of the establishment of co-regulatory frameworks at the national level, without specifying concrete forms that these could take. With this Recommendation the COE clearly promotes self-regulation and co-regulation for Internet services, and welcomes the adoption of codes of conduct and their implementation by the industry.

(See the recommendation on <http://cm.coe.int/ta/rec/2001/2001r8.htm> and the website on harmful and illegal cyber content on <http://www.coe.int/cyberforum/>).



## 6. Other COE Recommendations that Make Reference to Self-regulation

The value of self-regulation in ensuring fairness by the media during elections is underlined in Recommendation No. R (99) 15 “on measures concerning media coverage of election campaigns”. This text acknowledges that voluntary measures adopted by media professionals, in particular in the form of campaign codes of conduct or internal guidelines on good practice for responsible and fair coverage of electoral campaigns, are useful and necessary complements to State legislation or rules in this area. The Recommendation specifically mentions that questions on how to ensure fairness in news and current affairs programmes or the way in which the media present the results of opinion polls should be primarily decided by the media themselves by means of appropriate self-regulatory measures. (See the recommendation on: <http://cm.coe.int/ta/rec/1999/99r15.htm#>).

Recommendation No. R (99) 1 “on measures to promote media pluralism” outlines a number of principles or policy measures which could be useful to Member States when designing their national rules to protect pluralism and limit media concentrations. However, when addressing the question of media owners and how they can influence the editorial content of their outlets, this instrument acknowledges that this is an issue that has primarily to be dealt with through self-regulation, and simply provides that Member States may “consider ways of encouraging media organisations to secure the rights of editors to decide on editorial matters”. (See the recommendation on: <http://cm.coe.int/ta/rec/1999/99r1.htm>).

In Recommendation No. R (97) 19 “on the portrayal of violence in the electronic media” it is emphasised that media professionals themselves have the primary responsibility for the content of the messages, words and images they disseminate, and that they should be particularly vigilant when portraying violent content, in view of the potentially harmful effects on the public, especially young people. (See the recommendation on: <http://cm.coe.int/ta/rec/1997/97r19.html>).

## 7. Exchange of Information and Networking

The COE has contributed in past years to the exchange of ideas and information on the concept of self-regulation. An Information Seminar on Self-regulation by the Media was organised in October 1998, with a view to clarifying the notion and modalities of self-regulation. At the time, the practice of “regulated self-regulation”, that is, when a self-regulatory mechanism or initiative is established, based on or linked to a law, encountered a certain amount of resistance. This notion of “regulated self-regulation” has now more or less been subsumed, with some nuances, into that of “co-regulation”, and receives increasingly widespread support. Subsequent to the 1998 seminar, there have been other COE seminars and hearings dealing with convergence, digital TV, Internet developments, etc, which have addressed the question of possible methods of regulation of the media sector (legislation, co- or self-regulation). By the mere fact of gathering government, industry, professional and regulatory representatives at such events, the COE carries out a networking role and involves relevant players in the discussions on the possible approaches to regulation.

(See proceedings of the Information Seminar on Self-Regulation by the Media:  
<http://www.humanrights.coe.int/Media/documents/dh-mm/self-regulation.doc>  
 See reports of the European Forum on Harmful and Illegal Cyber Content :  
<http://www.coe.int/t/e/cyberforum/conference/reports.asp#TopOfPage>  
 See reports of the Expert Seminar on the TV Convention in an Evolving Broadcasting Environment:  
[http://www.humanrights.coe.int/Media/events/2001/main\\_TTT\\_sem.htm](http://www.humanrights.coe.int/Media/events/2001/main_TTT_sem.htm)).

## 8. Concluding ideas

The COE adapts to changing times and to evolutions in the media sector. Despite the fundamentally regulatory or normative nature of the Organisation, it also recognises that self- and co-regulation can be means to reach certain public policy objectives, in particular in the areas of online services, digital television and advertising. The “co-regulatory” approach, still considered by some COE Member States to generate a certain degree of legal uncertainty and confusion, might gain increasing recognition as a result of continuing technological developments, which are generally deemed to require less detailed/prescriptive legal frameworks and a higher degree of co-operation between the State and the industry in setting standards and implementing them. ■



# Self-Regulation or Co-Regulation?

*Prof. Dr. Sandra B. Hrvatin*  
*SRDF Broadcasting Council, University of Ljubljana*

When the Slovakian trade union of journalists and the publishers' association were setting up the Press Council Foundation, the European Union sent them two consultants within the Phare programme. Contrary to all previous experiences in setting up such bodies, they recommended that the Slovakian parliament should establish the Media Council and also appoint four of the Council's fifteen members.<sup>1</sup>

The Slovakian case and the controversies we mention clearly point out fundamental incomprehension and the lack of knowledge that is needed to perceive the distinctive differences between the concepts of self-regulation and co-regulation. Self-regulation has become a widely accepted method of strengthening the responsibilities of journalistic communities, mainly because it is based on a voluntary agreement of journalists and publishers (authors and owners) about fundamental professional standards of journalistic and editorial work. Co-regulation, on the other hand, does not depend on any voluntary agreements. It introduces a legally certified set of rules imposed by certain regulatory bodies in the name of the public interest.

Self-regulation is therefore an *agreement* between journalists and publishers to set up ethical and professional criteria – together with the representatives of the public – which they can select freely. This ensures respect for those rules, so that everybody involved can recognise and admit possible violations and penalise them in certain cases. "The fundamental purpose of self-regulation is to ascertain that the media will be accountable to the public and will respect journalistic standards." That is why penalties should not be the most important instrument in the hands of control/supervising bodies – such as ethics commissions, press councils etc. Public confession that a certain media player has made a mistake, realised it and is ready to amend it, should be considered more important.

One of the most typical self-regulating bodies is the Press Council. To summarise the thoughts of one of the experts on European press councils, Prof. Claude-Jean Bertrand from the French Press Institute, a press council is a non-governmental association of individuals or institutions who want to protect the freedom and quality of information of the media in order to make them more responsible to the public. They perform their role (among others) by accepting and processing public complaints and giving their opinion about these complaints. Press councils do not have the authority to penalize (with the rare exception of the Swedish Press Council) media offenders. What they can do is publicly

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1) Wolfgang Mayer, a member of the EFJ Steering Committee said that "there can not be a coexistence of a Media Council, sponsored by Parliament, and a Press Council on the basis of self-regulation". Oscar Mascarenhas (one of the consultants) replied to Mayer, saying "what kind of blindness (or compromise) makes you throw away the chance of having a real independent body (Media Council) in exchange for a Press Council that has no power over journalists or newspapers and has not a single journalist or former journalist in its composition. Is this self-regulation?" IFJ General Secretary, Aidan White, intervened, saying that "although the consultants acted in good faith, ethical rules could not be imposed on journalists against their will" (Peter McIntyre, "Commission to scrutinise media policy in accession states" in *Journalists' Newsline*, no.6, June 2002).

expose the violations or enforce the publication of special public notices (corrections and rights of reply).<sup>2</sup>

The press council usually comprises media owners, journalists and representatives of the public. The council is established by the first and second-mentioned group (or their representative organisations), while the public representatives are chosen by the founders of the council (so-called "1/3-1/3-1/3 model"). Many experts say that the participation of public representatives is necessary to ensure the democratic character and credibility of a press council.<sup>3</sup> It is important to add that press councils do not only control the media but also protect them from attacks by political authorities or big business interests.

However, the vagueness of the terminology opens up yet other conceptual questions. Can self-regulation actually be voluntary? Or, can self-regulation – at least in some aspects – be equated with self-censorship? Is it not a form of "privatised censorship", as David Sobel, an American legal representative would call it? Ronald Koven would say that self-censorship is still censorship and self-regulation is still regulation.<sup>4</sup> For self-regulation to be voluntary, it should invariably allow for the possibility of non-co-operation in a self-regulating system.

Self-regulation is not self-censorship. Self-censorship is prompted by a fear of influential people and of the ruling power which leads journalists to remove unpleasant parts from their texts beforehand in order to avoid informal pressure that might ensue. Self-regulation, on the other hand, is a conscious move agreed upon by people working for the media; its purpose is not to evade the potentially negative effects of published articles, but to reinforce the journalistic fortress thus enabling the profession to develop firm ethical rules.<sup>5</sup>

Bertrand also prefers to avoid the term "self-regulation". In his view the only relevant concept is the quality of the media. "Good media" offer credible information; they do not manipulate people and do not sacrifice truth in the struggle for profit. So the basic question in every country should be: how can the media be improved? The market regulation and the legislative framework may prove to be extremely insufficient. So, there is a need for a third force – media ethics. As Bertrand says: "Note that I used the term media ethics, which is not the same as self-regulation". One solution that could bring the media to recognise the need for ethical principles is not self-regulation but media accountability.<sup>6</sup>

There are other questions to answer: which media should be monitored by a self-regulating system (differences between printed and broadcasting media with the latter being much more regulated because of the allocation of frequencies, internet etc.), which areas should be subject to self-regulation (violence, pornography, privacy issues etc.) and what should be the legal status of self-regulating mechanisms? It is obvious that governments or legislators are constantly tempted by the urge to turn self-regulatory bodies into statutory bodies.

Self-regulation is also a means of preventing the state (e.g. various political interests) from deciding arbitrarily on core issues concerning the journalistic profession, from setting its own rules and enforcing them using the legislation. If journalists agree to self-regulate themselves it also means that they readily accept (and put into force) ethical and professional standards, set by the journalistic profession to guarantee its credibility. Co-regulation, being somewhere in between self-regulation and legislation, "transposes" the responsibility to judge media professional errors from media people to the third party – public representatives ("quasi-public" or "delegated public interests").

2) Claude-Jean Bertrand 1999. *Tiskovni sveti so v interesu novinarjev*. V *Medijska preža*/Media Watch, 6:15.

3) Bertrand recommends the development of a wider "media accountability system" (MAS). A media accountability system includes all non-governmental activities aimed at bringing the media to recognise the needs and wishes of the public. Such activities furnish the media with methods for establishing to what extent they actually meet the needs of the public. Internal media accountability systems include: error correction columns, in-house criticism, reports on the state of the media, code of ethics, ethical corrections, an ombudsman and media monitoring. External media accountability systems should include critical publications dealing with the mass media, alternative media, media NGOs, media education and regulatory agencies. There are also some co-operative media accountability systems that include representatives of the public on editorial boards, public access and reader's response pages. Cf. Bertrand, C.J. 1997. *Media Ethics and Accountability Systems* (Paris: *Presses universitaires de France*); and *Quality Control – Media Ethics and Accountability Systems* (Paris: *Presses universitaires de France*, 1997)

4) Ronald Koven. 1999. *Samoregulacija ja, soregulacija (z vlado) ne*. V *Medijska preža*/Media Watch, 6:14

5) Bervar, Gojko. 2002. *Freedom of non-accountability. Self-regulation in the media in Slovenia*. Ljubljana: Mediawatch (pp.20)

6) Bertrand, C.J. Paper presented at the International Press Institute Conference, Vienna, October 1999.

Self-regulation and co-regulation also open up the general question of media regulation. Who should regulate the media? Who should be the one to judge and evaluate their performance? It is obvious that the task should not be left to either the state or the market. Can we do it by using self-regulating mechanisms? Are mass media dependable enough to take care of their own self-regulation? Do journalists have the proper amount of self-criticism to ensure, within their own media organisations, respect for the basic rules of journalistic and social ethics? If media today enjoy the "power without responsibility", who can make their power responsible again, and in whose interests should it be carried out? At this point the difference between self-regulation and co-regulation becomes obvious. With self-regulation power and penalties are not the main issue. Rather, it is awareness that the media should offer professionally and ethically irreproachable products to the public (readers, audiences, viewers).

A self-regulating model can not be automatically and unquestioningly "exported" from one country to another if we want it to function successfully. There is no simple formula or universally acceptable model. Self-regulating models develop in specific local environments, they arise from specific needs and demands, and have two main purposes: to protect freedom of the press and the tradition of investigative journalism, and to protect the public from media intrusions and untruth.

The role of the self-regulating body in Slovenia is at the moment performed by the Association of Journalists' and Union of Slovenian Journalists' Ethics Commission. Its function is perceived quite differently among Slovenian journalists. One of the prevailing opinions is that the Ethics Commission should primarily defend a journalist's integrity against the violence of the state. In principle, that is true. But it should not protect a journalist's integrity by tolerating media irresponsibility. Instead, it should stand for professional and ethical standards set by journalists themselves. And there is one more thing: the Ethics Commission (its members are all journalists) handles disputes *between a journalist and a reader* (complainant), while the press council manages affairs *between a certain media player and a complainant*. The Ethics Commission discusses supposed violations of the journalistic code committed by one of its members, and a press council deals with the medium that published the controversial feature.

With the introduction of media freedom in Slovenia in the 1990s, the role of the Ethics Commission began to be questioned and its decisions ignored. The media no longer published its adjudications and certain newspapers accused of violations have even proudly declared that the violator (one of their journalists) openly resigned his membership from the association of journalists when proved guilty.

The result of the research conducted in 1993 on how the requirements of the journalistic code were met in practice showed that Slovenian daily newspapers manifestly violated many precepts of the code on a daily basis.<sup>7</sup> Failures to quote information sources were particularly problematic. Expressions, such as "one can hear", "as far as we have been informed", "reportedly", "allegedly", "it is said", were often used. Information was not cross-checked against various sources, and even unverified news often found its way into the press. The requirement that published "facts and evidence" must be truthful was seriously violated, mainly by investigative journalists. The requirement that information must be clearly separated from commentary was ignored on a daily basis. The prescribed distinction between editorial content and advertising messages was often disregarded. There were many invasions of privacy, particularly in the areas where the code required "special caution" (for example when reporting accidents or personal tragedies). Many journalists did not respect the rule of "presumed innocent until proven guilty", but proclaimed suspects or defendants guilty even before the court ruling. Breaches of the clause prohibiting publication of groundless accusations, attacks, lies, insults or defamation were the order of the day.

The research conducted in 2000 on the level of professional ethics in Slovenia, in which 22 journalists and editors from the main Slovenian media also took part, shows that 55% of them think that the level of professional ethics is decreasing. When asked if they would support internal media code in their media organisations, 82% of them answered affirmatively.<sup>8</sup>

Since March 2001 a group of journalists, lawyers and media analysts has been taking various actions aimed at stimulating debates on self-regulation in journalism and Slovenian media. They have also

7) Košir, M. and Poler, M. 1996. *Utemeljitev novinarske etike in svoboda slovenskih novinarjev in Mediji, etika in deontologija* (Media Series), Ljubljana: Faculty of Social Sciences.

8) Verhovčak, Matea. 2000. *Vprašalnik o tiskovnem svetu. V Medijska preža/Media Watch*, 9:27.

made attempts to answer the question of whether there is a need to establish a press council as one of the means of self-regulation. Throughout this period the group insisted that there should be a wide consensus in the media community and media industry before a press council could be founded. The main factors determining the acceptability and successful functioning of such an institution are the level of consensus and the number of professional associations and media institutions that are willing to join in. Based on experiences from other states the group concluded that press councils bring about a decrease in the number of lawsuits against journalists and media companies. What is more, press councils enhance public trust in the media.

The Association of Journalists' standpoint at the moment is, however, not to support the initiative to found a press council. They argue that new media legislation (in force since May 2001), and some changes in the penal code, legalised "dangerous limitations" to journalistic work. Moreover, the inclusion of representatives of the public in the press council would open the way for "seemingly ideologically neutral" (while in fact politically motivated) interests to take control over the media.

"Co-operation of the association of journalists in self-regulation appears to be unseemly. It would be reasonable if the political powers conceded to the concept of press freedom and did not restrain or limit the media with restrictive legislation. But since Slovenian law-makers decided to ensure accuracy of information and correctness of conduct through a broadly defined right of correction and right of reply, backed up by the judicial system, and to ensure accountability through police-style supervision of and legal actions against journalists who dare pry into secrets of the ruling power, the idea about additional self-regulation, which presupposes the participation of civil society, which is usually a synonym for ideologically non-neutral interest groups, seems to me to be a ridiculous and servile waste of time and money." The above is the opinion of Peter Jančič, a journalist for the daily newspaper *Večer* and a member of the Ethics Commission, expressed in a pro-et-contra public debate over the foundation of a press council.<sup>9</sup> The president of the association of journalists holds a similar opinion. The main concern of the press council is how to protect the public from journalists' faults. As Slovenian authorities decided to protect the public from the media extremely well - by means of a comprehensive media law - why should journalists come up with any additional regulating measures in order to protect the public?<sup>10</sup>

The advocates of a press council answer that they put forward the model in which public representatives are appointed by mutual agreement between journalists and publishers. Therefore, the possibility for non-governmental organisations (or any political forces hiding behind them) to gain control over the media is diminished.<sup>11</sup>

Another important argument in support of a press council is the attempt of the European Union to substitute self-regulation with co-regulation; in other words - to replace agreement with constraint. "A press council is therefore reasonable as long as the initiative is in the hands of the concerned party. (...) And if co-regulation works its way through the mills of European bureaucracy and turns from a non-paper document into a recommendation or a binding directive/resolution, it is not difficult to envisage how servile the state of Slovenia will be in implementing that instruction from the top".<sup>12</sup>

According to the president of the Association of Journalists, the second pitfall connected with the press council would be a potential bringing down of the "high wall" that currently separates the management of the print media from its editors. His own experience, and that of the other media, has confirmed that this "wall" still exists in most press companies. The establishment of a press council is a good opportunity for the representatives of the publisher company to enter a space until now off-limits for them, if only for reasons of decency. It is necessary to keep in mind that journalists disagree with publishers on most issues. The two groups oppose each other when it comes to labour rights (an attempt to put an additional clause in editors' individual contracts which would link their wages to the number of copies sold - market success of their newspapers) and with regard to the demarcation line between advertising and editorial content. Recently these issues have been exacerbated.

9) Peter Jančič. 2001. *Kdo ustanavlja tiskovni svet? V e-NOVINAR*, 5: 5-6. In further discussion, Jančič emphasises his resistance towards the foundation of a press council by stating that "if the journalists association recommended that a press council should be founded, it would be similar to a sheep asking a wolf to protect her. An idea wolf himself would not dare to put forward." (e-NOVINAR, [www.novinar.com/e-novinar/enovinar.22.05.2002](http://www.novinar.com/e-novinar/enovinar.22.05.2002))

10) Grega Repovž. 2001. "Iskanje lastne poti" v *Medijska preža/Media Watch*, 12:46

11) Bervar, Gojko. *Peter, hvala!*, e-NOVINAR, 6-7:13-15.

12) Bervar, Gojko. *Ibidem*.

Media owners continue to exert pressure to achieve high profits on both the media and journalists. Professional journalistic standards are increasingly less observed. The number of hybrid articles/advertorials that pretend to be editorial content but are in fact paid advertisements, has been increasing too. Financial sources available for investigative journalism are ever more scarce, while infotainment, one type of content readily combining with advertisements, is increasingly abundant.

The Association of Journalists in Slovenia has been pointing out that the distinction between management and editorial tasks within media companies is increasingly blurred, and that the role of the editors-in-chief has been reduced to that of "copy-editors" with their responsibility for the implementation of programming concepts being disregarded contrary to the requirements of Article 18 of the Mass Media Law. In October 2002 the general assembly of the Association adopted the new journalistic code. Certain clauses of the old code (dating from 1991) were supposedly too general, or insufficiently expedient for everyday journalistic work as well as for the public which should evaluate journalists' conduct. Among the novel features of the 2002 code is the clause prescribing that journalists who publish charges against individuals are obliged to obtain the response of the affected party. Another article that underwent changes was the one relating to the quoting of the information source and its protection. According to the new code, a journalist should quote the source of information whenever possible. The public has the right to be informed about the source of information in order to be able to assess the significance and credibility of information. If information cannot be revealed, the journalist is allowed to protect the anonymity of the source. If the source of information is protected, the code observes the dictum of the Mass Media Law (Article 21) stipulating that the editor, journalists and other authors are not obliged to disclose the source of information except in cases subject to the penalty code. The biggest change in the new code is that relating to the chapter on the conflict of interests. The new code prohibits intertwining or merging of editorial and advertising contents and requires a clear distinction between the two. Journalists should refuse gifts, services or awards, extra jobs in the field of politics, state administration or other public institutions, as well as any benefit that could influence their work. Furthermore, they should make obvious every potential conflict of interests or eliminate it from their articles. The concluding clauses of the new code summarize certain parts of the IFJ code, namely those stating that journalists will take into account only the opinions of their professional colleagues in cases in which the professionalism of their performance is judged. This means that the journalistic code is the only criterion used both by the journalists and the public when establishing the (non)professionalism of journalists' performance. Preventing the public from sharing in the decision on the quality and professionalism of journalistic work is justifiable in the short run, but harmful in the long run. In endeavoring to achieve the autonomy of the profession (defying the pressures of politics and capital), the journalists demonstrated their distrust of those whose interests they should serve *i.e.* the public.

The second unsuccessful self-regulating attempt is the Journalistic Code of Slovenian Public Radio and Television (RTV Slovenia), passed in 2000. In that code an entire chapter is dedicated to the office of ombudsman who should take care that ethical standards are respected. Although it has been two years since the Code was adopted by RTV Slovenia's council, the ombudsman has not yet been established. For the time being, the role of the ombudsman is performed by the 25-member council. The council, more than half of whose members are "the representatives of the public", has by now proved that it does not represent the public, or the interests of civil society.

Paradoxically, journalists of public service radio and television were forced to ask parliament for help – to protect journalists' and public interests against, in their opinion, "the irresponsible behaviour" of the council's members.<sup>13</sup>

By introducing an internal ombudsman, the Code also triggered a debate on whether the observance of professional standards within public RTV company should be monitored by a collective body or by one person. Also certain parts of the Code – for example the clause that each interview with the prime minister must be followed by an equally long interview with an opposition representative – has been increasingly used as a screen shielding editors from the accusations of politicians and political parties.

The epilogue to the public service's crisis came in 2002 when on the proposal of the government the Slovenian parliament passed the Act on Salaries and Reimbursement of the Public Sector which

13) Sandra B. Hrvatin. 2002. *Državni ali javni servis. Perspektive javne RTV v Sloveniji*. (Serving the State or the Public. The Outlook for Public Service in Slovenia). Ljubljana: Mediawatch.

also refers to all employees of the public institution RTV Slovenia in addition to other public sector employees. During the public debates that preceded the adoption of this law only one out of nine trade unions within RTV Slovenia (the union of television employees) was against such a solution. The majority who supported this proposal did so because of the short-term benefit *i.e.* an increase in salaries. Therefore, this legal provision, which will seriously jeopardize the autonomy of the public service, was not adopted under political pressure but by employees' consent. The above-mentioned act treats the public service RTV Slovenia (with 75% of its revenues coming from the license fees and less than 1% from the state budget) as a public sector institution and its employees as public sector employees. The journalists working for the public service company, who should serve the public interest (in an autonomous way), were therefore turned into civil servants. They were turned from critical supervisors of public institutions' work and watchdogs into political "lapdogs".

The Association of Journalists sharply opposed this law. In September 2002 the Secretary General of IFJ expressed his protest against such a solution in a letter addressed to the head of state. Among other things he said: "The impact of this law makes Slovenia exceptional among European countries. It is, in fact, contrary to the principle of financial independence of public broadcasters, and constitutes an infringement of international standards such as that set out under recommendation 96/10 of the Council of Europe on the guarantee of the independence of public service broadcasting. (...) Putting journalists into the rigid civil servant system could represent an indirect form of pressure and interference with the independence of the public service broadcaster, which is not in accordance with any European practice or regulation".<sup>14</sup> The demand of television employees that the public radio and television employees should be excluded from this law is now supported by the RTV Council (in which the majority of members represent the interests of the public) and by the management of RTV Slovenia.

Debates on self-regulation, co-regulation and general regulation of journalism in Slovenia are accompanied by increasingly stronger pressures exerted by the media owners. In other words, economic pressures have replaced political pressures. The number of lawsuits against journalists has been increasing – demands for penalties have been replaced by exorbitantly high compensation claims. When defending journalistic autonomy, journalists have only one ally – the public. If the essential guideline for journalists is the "public's right to be informed", as is specified in the preamble to the new journalistic code, then the most effective self-regulation is one which protects the interests of the public. ■

14) *Novinarski dnevi 2002. e-novinar (posebna številka 8)* (pp.14).



# What are the Conditions for Setting-up (for the first time) a Co-Regulatory System?

*Prof. Dr. Roberto Mastroianni*  
*University of Naples*

## 1 - Co-regulation in the Media Sector:

Pros (rapid answers to the evolution of the markets) and cons (fundamental rights are often involved). Distinction between television broadcasting and on-line Information Society services? Different approaches for different markets (traditional broadcasting, DTV, Internet)? Compatibility and complementarity between legislation and co-regulation in the media field, with a view to promoting public policy objectives. In shaping detailed rules, where legislation is often slow, self-regulatory systems are faster, flexible and readily adaptable to individual circumstances. On the other hand, legal uncertainty should be avoided.

## 2 - Conditions for Setting-up for the First Time a Self-regulatory System: Three Basic Issues:

a - “*geographical*”: at which level should the co-regulatory mechanism be established? When is State intervention sufficient, in conformity with the principle of subsidiarity?

Fields already covered by European rules, such as television broadcasting. Implementing EC Directives through co-regulation: conditions and limits according to the EC Treaty and to the Court of Justice of the European Communities case-law.

Are there cases where a *European-wide code of conduct* better suits the internal market imperatives in order to avoid further obstacles to its proper functioning? The inherent nature of television broadcasting as a “transfrontier” provision of services and the basic “home country rule” should be taken into account in choosing the appropriate level of intervention. The “Television without Frontiers” Directive is a rather detailed EC Directive. Under some circumstances, a uniform application of the common rules is probably to be preferred. Examples: protection of minors, rules on advertising.

The role of the Court of Justice as a privileged interpreter of the “Television without Frontiers” Directive. Case-law of the Court of Justice of the European Communities concerning the interpretation of terms included in Article 11 “Television without Frontiers” Directive: “scheduled duration” of audiovisual works (*Pro Sieben* judgement); “series” of audiovisual works (*RTL* case, pending).

Access to justice or to “other authorities” according to Article 3, par. 3, “Television without Frontiers” Directive.

b - *Definition of content*: clear indication of the matters that can be open to co-regulation. In some fields, given the social and political choices involved and the need for balancing different basic rights and obligations, the competence (and responsibility) of the public authority should be

maintained (e.g. rules on media concentration, protection of minors, advertising for certain products). In such cases, at least a general legislative framework is needed.

Co-regulation appears a very positive legal instrument whenever defining and public enforcing of common standards is particularly difficult, so that an active and deep involvement of the actors concerned is required (e.g. protection of minors on the internet).

- c - *Procedure*: Which actors should be involved? Should a total delegation of powers to the private sector be avoided? How should the public interest be represented in a co-regulatory body (consumer associations, independent experts, State or regional representatives)? At which stage should the co-regulation mechanism intervene? Should access to justice as well as full awareness of the rights always be guaranteed (Court of Justice of the European Communities C-96/95, *Commission v. Germany*, Rec. 1997, I-1653)? How to deal with new actors, given the progressive liberalisation of the markets? ■

# The Implementation and Enforcement of Co-Regulation Codes in a Transfrontier Context

*Dr. Maja Cappello*

*Autorità per le Garanzie nelle Comunicazioni (Italy)*

## **Scope**

The aim of the forthcoming presentation is to explore the conditions required in order to ensure an efficient enforcement of codes of conduct in the European media sector. Far from proposing definitive solutions, the main objective of the presentation is to provide the floor with elements for a discussion.

Existing legislation seems to necessarily imply the involvement of public authorities in monitoring and sanctioning activities in the case of non-compliance with the provisions laid down in codes of conduct. This statement is seen to be true, at least where the organisational apparatus underpinning the codes is not able to ensure dissuasive sanctions for violations of the codes of conduct that are proportionate to the nature of the violation. As a consequence, the codes that are referred to in this presentation are co-regulation codes, according to the definition provided by the preparatory document for this workshop.

As a study-case it will here be mainly in reference to the medium of television broadcasting. The considerable amount of regulation in this sector will provide elements that are useful in order to verify which conditions are required for the successful implementation and enforcement of codes of conduct, either as substitutes for, or in addition to, already existing legislative provisions.

The geographic dimension concerned is the receiving country, which in each relevant case might be affected by the transmission in question. Evidently, the latter could either be produced and transmitted by a national broadcaster - and fall directly under the jurisdiction of the country of reception - or by a broadcaster established in another State complying with the provisions of that country, these might or not be in conformity with those of the country of reception. A transfrontier environment needs, moreover, to distinguish between cases where the countries involved are both Member States of the European Community, and cases where one of the countries is only a party to the Convention on Transfrontier Television (ECTT) and is not bound by the provisions laid down by the "Television without Frontiers" Directive (TVWF), in order to define which internal legislation and codes are going to be applied.

## **Implementation**

The implementation of co-regulation codes in a transfrontier context requires a definition of the relevant provisions. As a general rule, in a European Community environment, the mutual recognition principle underlying the provisions relating to the freedom to provide services implies that the reception of transmissions that comply with provisions adopted by the home country may not be restricted unless there are general reasons of public policy, public security or public health, or in the specific circumstances laid down by the "Television without Frontiers" Directive relating to the protection of minors.

The main question is whether the reference to the “rules of the system of law” applicable to broadcasts intended for the public in a Member State made in article 2 of the “Television without Frontiers” also includes codes of conduct:

Art. 2(1) “Television without Frontiers” Directive

Each Member State shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction comply with the rules of the system of law applicable to broadcasts intended for the public in that Member State.

If codes of conduct are recognized by a Member State as part of its system of law, the “Television without Frontiers” Directive implies that, when defining the norms that apply to monitoring and sanctioning activities, reference has to be made to public regulation and codes of conduct/codes of ethics/best practices that are part of the juridical system of the involved country.

Where the relevant directives explicitly refer to codes of conduct as instruments that may be used directly for their implementation – such as in the Directive on Electronic Commerce,<sup>1</sup> according to Art. 16 of which codes of conduct may contribute to a proper implementation of part of its provisions – or as means of secondary level implementation – such as in the Data Protection Directive,<sup>2</sup> according to Art. 27 of which codes of conduct may contribute to the proper implementation of national provisions adopted pursuant to the Directive –, then codes are considered as being part of a “system of law” by a Community act and thus relevant according to Art. 2 of the “Television without Frontiers” Directive.

Evidently, the inclusion of codes of conduct within the system of law of a certain country depends on the constitutional order of that country, which may eventually decide not to accept or use co-regulation for the implementation of Community law. For this reason, directives that make explicit reference to codes of conduct qualify them only as a possible contribution to the implementation of Community law. This is also the reason why the Mandelkern Report on Better Regulation<sup>3</sup> requires, as a condition for co-regulation as a possible regulatory alternative, the maintaining of the primacy of the public authority.

## Enforcement

Once it is established whether codes of conduct may be included in the system of law that will have to be applied in each relevant case, and having specified the applicable provisions, the next step is to verify the conditions required for the proper enforcement of them. For this purpose the “Television without Frontiers” requires each Member State to ensure effective compliance with its provisions and the access to judicial or “other authorities”:

Art. 3, “Television without Frontiers” Directive

2. Member States shall, by appropriate means, ensure, within the framework of their legislation, that television broadcasters under their jurisdiction effectively comply with the provisions of this Directive.

3. The measures shall include the appropriate procedures for third parties directly affected, including nationals of other Member States, to apply to the competent judicial or other authorities to seek effective compliance according to national provisions.

The reference to the access to an “effective” remedy for third parties is a measure considered by the Directive as a necessary instrument for proper implementation. The question is thus to verify whether the complaints systems provided for by codes of conduct may fall within the definition of “authorities”. The preamble to the Directive<sup>4</sup> specifies that the assertion of the rights of third parties who are

1) Directive 2000/31/EC of the European Parliament and the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178 of 17 July 2000, p. 1.

2) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23 November 1995, p. 31.

3) Final Report of the Mandelkern Group on Better Regulation, of 13 November 2001, available at <http://www.csl.gov.pt/docs/groupfinal.pdf>

4) Recital n. 17 of the “Television without Frontiers” Directive provides that “Whereas directly affected third parties, including nationals of other Member States, must be able to assert their rights, according to national law, before competent judicial or other authorities of the Member State with jurisdiction over the television broadcasting organization that may be failing to comply with the national provisions arising out of the application of Directive 89/552/EEC as amended by this Directive”.

nationals of other Member States who are directly affected has to be made according to national law. Consequently, the enforcement of codes of conduct depends on the definition of judicial (or quasi-judicial) authority that it applies in the country concerned.

According to the Court of Justice of the European Communities,<sup>5</sup> the correct implementation of a directive requires that the sanctions chosen by a Member State that are to be imposed for breaches of its provisions must have a real dissuasive effect and must be adequate in relation to the damage sustained, in order to ensure that those measures may be effectively relied on before the national courts by the persons concerned.

Only a case-by-case analysis might show if the remedies envisaged by codes of conduct are able to satisfy the requirements imposed by Community law. The Italian experience up to now has not been shown to be particularly effective: the sanctions imposed do not seem to have had a real dissuasive effect because the obvious conflict between the regulator and the regulated body, as expressed in a self-regulation code is difficult to overcome; when a legal provision has entrusted a public institution with the power to monitor compliance with codes of self-regulation, there is a lack of competence with regard to the application of sanctions that are demanded by the complaints bodies; if the actors sanctioned do not comply with the sanction there is no enforceable remedy before the courts; the only existing case of co-regulation code - which is still a draft and deals with party political broadcasts - does not give the public institution entrusted with regulatory powers the power to sanction violations of the code but only those related to the framework legal provisions; etc.

Should these codes be applied in a transfrontier context the problems would only be more complex. Before encouraging co-regulation codes, a serious amount of co-operation at a supra-national level seems to be necessary, in order to create a common platform for the main enforcement issues that this forthcoming presentation will attempt to address more deeply. ■

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5) Case 14/83 Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] ECR p.1891, paras. 18 and 23.



# EASA's Working Cross-Border Complaints System: Illustrated and Explained

*Oliver Gray, PhD*  
*Director-General of the EASA, Brussels*

As I mentioned earlier, the two principal advantages of self-regulatory systems over statute law are their flexibility and adaptability. This is well demonstrated in the handling of Cross-Border Complaints. EASA has since 1992 been running the foremost example of a working cross-border complaints system. In the next few minutes I propose to explain why the system was set up, how it operates, with some examples and data and finally to review some of the key issues arising.

## **Why the Cross-border System Was Set Up?**

EASA's cross-border complaints system has been in operation since 1992. It was set up in response to the forthcoming Single Market and the need to address problems arising from advertising circulating in one EU Member State but carried in media originating in another (the latter being part of the challenge thrown up in 1992 by Sir Leon Brittan to the advertising industry). The EASA co-ordinates and assists its members in resolving cross-border complaints, with the aim of consumer redress.

## **What Is a Cross-border Complaint and How Does It Work?**

EASA's system for dealing with complaints about cross-border advertising is designed to provide a complainant with the same redress available to consumers in the country of origin of the media in which the advertisement appears. The system thus operates via the network of 28 self-regulatory bodies in membership covering the entire EU, many of the countries of wider Europe, and four countries outside Europe. EASA also liaises with industry associations in membership to resolve specific problem cases or issues arising such as directory publishing or sales promotions.

A cross-border complaint is where the complainant is situated in a country other than that in which the medium carrying the advertisement originates; e.g. a consumer situated in the Republic of Ireland complaining about an ad appearing in a British newspaper, but circulating in Ireland. On many occasions the country of origin and the country where the complainant is situated share a common language *i.e.* United Kingdom-Ireland, Switzerland-France, Belgium-Netherlands. But it is not always the case, as for example the Netherlands is favoured as a re-mailing point or a postal contact for an advertiser.

National self-regulatory organisations (SROs) can depend on the support of their national media, but they have no control over media based in other countries. To overcome this difficulty, the EASA system is based on the principle of the "country of origin", a concept enshrined in EC law to facilitate the functioning of the Single Market by ensuring that advertisements circulating in more than one country have to comply with only one set of rules.

The Cross-border Complaints system normally requires advertisements to comply with the rules of the country where the media in which they appear is published. The only exception is in the case of

complaints about direct mail advertising. The absence of conventional “media”, together with the fact that mailings are often despatched from countries other than those where the advertisers are established, means that complaints about direct mail or Internet can be more effectively handled by the SRO in the country where the advertiser is based and this is treated as the “country of origin” in direct mail and internet cases. Complaints are dealt with by the SRO in the country of origin, irrespective of the country where they originate.

The intention is to extend to consumers in other countries the same redress available to consumers in the country of origin, so the EASA member SRO in the country of origin deals with a cross-border complaint according to its own procedures. In some cases these are different - and different rules apply - from those in the complainant’s country: for example, ideas of taste and decency vary widely between European countries. EASA member organisations endeavour, where their national law allows, to apply a second principle, known as “mutual recognition”. This means accepting the rulings of their counterparts in the country of origin and, wherever possible, accepting advertisements which comply with the self-regulatory rules in the “country of origin”, even if those rules are not exactly the same as their own. Since the EASA ensures that national self-regulatory rules are applied within a European network, a third principle can be seen to be in place, namely that of subsidiarity.

## Data and examples

EASA has handled and closed over 700 cases (726 up to summer 2002) since 1992. Already in 2002 we have handled and closed 74 cases by August, a very different story to the 25 a year we had in 1992. As at national level, the largest category is misleading advertisements followed by taste and decency issues. A large proportion of the complaints relate to direct mail followed by press and television. The biggest complainers are the United Kingdom (which at domestic level has 20000 complaints a year) and Ireland, Switzerland and the Netherlands are the most common bases for advertisers or remaining points. The majority of complaints are from consumers.

The best way to understand the system is through some examples:

My first example concerns an ad that appeared in a Eurostar magazine for the popular Interrail pass which once purchased allows unlimited travel on Europe’s railways for all under 26 years of age over a time period. The ad says buy the pass “You’ve the rest of your life to be good” which featured 12 yellow condoms arranged in a circle on a blue background in an imitation of the EU flag and referred to the EU’s year of Europe against AIDS. The complaints came from Irish, Belgian and UK consumers concerning a) the suitability of the slogan and the ethic which it seemed to portray, and b) the abuse of the European flag. The complaint was upheld and the ad was discontinued.

Sisley Shoes example: Complaint (Offensive) to the *Deutsche Werberat* (DW), (Germany) from a German consumer regarding a poster advertisement for shoes, which showed a female model wearing a short skirt with a split up the back revealing her bottom. The complainant objected that the image was disparaging to women especially since the ad contained no reference to the company’s products, shoes. The DW wrote directly to the advertiser in Italy but received no response, despite assistance from the Italian SRO, the *Istituto dell’Autodisciplina Pubblicitaria* (IAP). The DW therefore upheld the complaint on the basis that the advertisement was denigrating to women and issued a press release announcing its decision. Complaint upheld.

My third example is a classic case of misleading advertising, where Irish consumers complained about an insert in a UK magazine for Rugrats, which offered the product free on subscription but when applied for there was a postage and packaging charge for Ireland. The Advertising Standards Authority (ASA) of the United Kingdom subsequently upheld the complaint and the asked for the insert to be altered and recommended that further inserts should get copy advice. This is a typical example of an advertiser having made a mistake.

In certain circumstances, about 1-2% of all complaints relate to rogue advertising at a domestic level. Unfortunately at a cross-border level this is increased due to the further opportunities for operators to move from one jurisdiction to another. These operators disregard rules of any type whether legal or self-regulatory and design schemes typically to catch the unwary in the form of lotteries in which you won a prize without entering but must pay a handling fee, the collection of a present in return for a fee, the inclusion in a business directory when you were asked to just check details and veiled threats of violence or bad things to come if you don’t respond to a clairvoyant, slimming claims and lotteries etc to name a few. Often direct mail is used or e-mail from one country and a post-box



is set up with a fulfilment house in another country. The advertiser is usually elsewhere. Here we investigate and through our extensive database can identify scams. We collect info and then when sure issue a Euro-Ad alert to all SROs, consumer groups and authorities and transfer the dossier to statutory authorities for full official investigation. Self-regulation is designed to work with the responsible not the deliberately irresponsible. Here we behave like good citizens by warning the consumer in the first place to beware. But it is surprising how many people expect something for nothing and are tempted to be greedy. The following is a typical example of an ad alert case.

WORLD BUSINESS CORPORATION (GB): Complaints (misleading) from French consumers regarding a mailing sent from Malta which led consumers to believe they had won a car, and only had to pay FRF 159 in participation costs. When they received the prize, it turned out to be a miniature toy version of the car. The advertisement mentioned a UK address, but the cheque had to be sent to an address in France. The *Bureau de Vérification de la Publicité* (BVP) (FR) wrote to the French and English addresses and contacted the ASA (UK). The ASA contacted Folkestone Trading which appeared to be a forwarding address. The director of the organisation appeared to be based in Luxembourg. CLEP (L) was consequently contacted and found out that the Luxembourg address did not exist. CLEP wrote a letter to the address to see what would happen, but received no reply. The EASA decided to issue a Euro-Ad Alert to all interested parties. CASE CLOSED, Euro Ad Alert Issued.

With the new technologies details of all Ad Alerts, complaint reports and warnings are on our site as well as appearing in our quarterly newsletter. So we have full transparency. We have recently added an online complaint form facility, which is being used by consumers and online forms are also appearing on member websites.

Cross-border cases are always complex due to their cross-border nature and the number of countries involved. Thus limitations can come from poor communication or misrouting of dossiers. That is why the EASA secretariat manages the system and we have a dedicated compliance officer and weekly review of cases, which are entered into a database. The EASA Secretariat is included in all correspondence relating to the cases, and keeps a watchful eye on their progression. The system works through co-operation between the SROs who want to get the best results for consumers. Of course, this does not mean that the outcome of a complaint is always to the complainant's satisfaction, or guarantee the same result the complainant might have expected in the case of an advertisement published in the media of his or her own country. It does mean, however, that the EASA Member dealing with the complaint demonstrates the effectiveness of its own system in dealing with complaints from other countries.

I was asked at the beginning of this session to highlight some of the problem areas. There are a few. Firstly, to discover the country of origin related to cases concerning direct-marketing. We have increased our success rate but often we end up at a PO box, or a fulfilment house. Only with good intelligence-gathering are we able to reduce the number of such situations. The lack of legal harmonisation has left huge loopholes across Europe and some of the biggest discrepancies between self-regulatory regimes. We have noticed that even where rules are similar that interpretations are strongly influenced by national culture and education. We have also experienced some bureaucratic approaches to self-regulation and have put in place a benchmarking exercise to reduce delays, raise standards and increase efficiency. Reporting of self-regulation is varied and again we have set in place a plan to improve this in 2003 including a pan-ad campaign to consumers across Europe encouraging them to go to their local SROs with complaints about advertising.

For an evaluation of the CBC system I quote Commissioner Byrne "The EASA has already done a great deal to improve the handling of cross-border complaints. This is a fine example of how effective self-regulation can be when there is the will to find solutions". ■

5. September 2002



# Self-Regulation and Co-Regulation: a Broadcasting Perspective

*Marie-Laure Lulé<sup>1</sup>*

*RTL Group European Regulatory Affairs Manager*

## **Business Context and Market Dynamics**

The European TV industry accounted for 0.73 per cent of GDP in Europe. Although still less developed than in the USA - accounting for 0.96 per cent of GDP - it has been a high growth sector for the last decade and has represented a major engine of growth with an average growth of 9 per cent a year. Is this past trend to be pursued? Rather questionable. But there is absolutely no doubt that television, as the most popular media in Europe, will still claim 24 hours a week of attention from the average European adult and will account for one quarter of all media and entertainment revenues. In insecure economic circumstances, the success and the future of commercial broadcasting groups is indeed dependent on the existence of a proper business level-playing field based on the conditions of the market, people's responsiveness to new technological and economic challenges and the legal certainty on the markets they are operating in.

In the context of self- and co-regulation, it is important to position this debate also in an industry perspective as broadcasters will have to comply at the end of the day with all regulations whether at a local, national or European level. As far as self-regulation and co-regulation are concerned, it is understood that they are used effectively in compliance with the law,<sup>2</sup> and no part of these processes should deprive a consumer of the protection provided by the law. As stated by Commissioner Liikanen,<sup>3</sup> "alternative regulatory approaches have the potential to achieve decisions that are supported by most of those who are likely to be affected. Not just because they agree with the desired outcome but, more importantly, because those players have been able to contribute to their shaping".

## **Regulatory Context in Europe: Need for Legal Certainty and Predictability**

The media sector in Europe is one of the most strictly and heavily regulated. The laws regulating this sector are changing quite often. Also, as far as the European level is concerned, the "Television without Frontiers" Directive,<sup>4</sup> has been revised and another revision is expected to take place starting by the end of 2002. At the national level, audiovisual laws are revised on a regular basis with each change of government, on average every two years.

1) Personal views of the author. <http://www.rtlgroup.com>

2) Article 3, "Television without Frontier" Directive: Member States shall, by appropriate means, ensure, within the framework of their legislation, that television broadcasters under their jurisdiction *effectively* comply with the provisions of this Directive.

3) Erkki Liikanen, Member of the European Commission, responsible for Enterprises and the Information Society - Speech on Better Regulation: from Principles to Practice Alternative Regulatory Models, Brussels 6 February 2001.

4) Directive 97/36/EC of the European Parliament and the Council of 30 June 1997 amending Council Directive 89/552/EEC of 3 October 1989 on the Coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L202/60 of 30 July 1997.

In such a context, the basic rationale for future regulation, whether at national or European level, should be the failure of the market to achieve the public policy objectives pursued. Moreover, regulation must be transparent, proportionate, consistent and justified. That means it must - at a minimum - achieve these public interest objectives. Regulators should ensure a flexible regulatory framework that encourages innovation and transition, even more in a declining advertising market. Legislation should neither slow down exciting and challenging processes nor restrict consumer benefits.

But flexibility does not mean laxity. The new UK Communications Bill<sup>5</sup> has heightened interest. It is a "light-touch" regulation relying substantially on self- and co-regulation. One should be inspired by it, in the perspective of a review, if any, of the "Television without Frontiers" Directive.

## Semantic Loopholes

From one market to another, regulators have made use of self-regulation and co-regulation in a variety of manners according to topics and objectives to pursue.<sup>6</sup> For instance, self-regulation is the governance tool used in most of the countries with regard to advertising issues, whereas most of the "content" dimension of broadcasting activities is dealt with by co-regulation (ratings, scheduling).

The Council Recommendation on Safer Use on the Internet<sup>7</sup> refers explicitly to self-regulation whereas the Directive on Television Without Frontiers, governing the media sector, does not at all refer to the above-mentioned terminology of self and/or co-regulation. There is however no doubt that Article 3 § 3 of the "Television without Frontiers" Directive encompasses elements of self- or co-regulation, in the sense that "other authorities than public ones" are open to European individuals to enjoy the rights provided by Community law and, where appropriate, rely on them before competent judicial or "other authority" to seek effective compliance with the provisions of the Directive.

It is generally accepted among practitioners that, due to the lack of definitions, the terms "self-regulation" and "co-regulation", are not used consistently. As stated by Carmen Palzer, these differences in the use of relevant terminology arise equally on the national and on the European levels. The recent debates at European level on the White Paper on Governance and Better Regulation<sup>8</sup> as well as different European initiatives with respect to the Electronic communications Package, the E-commerce or the Protection of consumers issues have led to a further opening of the debate on self- and co-regulation, without really improving the state of the already existing confusion.

It is fascinating indeed, that most of the time these notions confront or contradict each other. Within the European Commission for instance, meanings vary from Directorates to Directorates and from time to time. From a media perspective, what matters is that the principle of legal certainty is respected to allow broadcasters to fully operate in the single market.

## Self-regulation

In the broadcasting sector, the methodology of self-regulation is systematically used and encouraged by the European Commission<sup>9</sup> in the areas of the protection of minors, with respect to the fight against illegal and harmful content<sup>10</sup> and also concerning advertising and marketing practices.

By self-regulation, I mean drawn up, implemented, managed, funded<sup>11</sup> and enforced,<sup>12</sup> either "in-house" by broadcasters, or by professional sector organisations (deontology, journalist liability,

5) <http://www.communicationsbill.gov.uk/>

6) The EU Committee Position Paper on Alternative Regulatory Models, Part 1, Brussels November 2000.

7) Council Recommendation on the Protection of Minors and Human Dignity of 24 September 1998, OJ L 270/48, 7 October 1998, p.48 and implementation and evaluation Reports, COM(2001) 106 final.

8) European Commission White Paper on European Governance, 25 July 2001 – COM (2001) 428 final. [http://europa.eu.int/comm/governance/white\\_paper/index\\_en.htm](http://europa.eu.int/comm/governance/white_paper/index_en.htm)

9) European Commission Communication on the Principles and Guidelines for the Community's Audiovisual Policy in the digital age, COM(1999) 657 final. [http://europa.eu.int/comm/avpolicy/index\\_en.htm](http://europa.eu.int/comm/avpolicy/index_en.htm)

10) Council Recommendation on the Protection of Minors and Human Dignity of 24 September 1998, OJ L 270/48, 7 October 1998, p.48 and implementation and evaluation Reports, COM(2001) 106 final.

11) See the paper on Self-regulation, the Swedish Model by Pär-Arne Jigenius.

12) EASA guidance principles on self-regulatory systems, 2002.

ethics). It is commonly agreed that such rules may take the form of technical or qualitative requirements or even codes of conduct defining fair trade practice between similar operators. This definitely sounds to broadcasters like something familiar based on the editorial responsibility that is nowadays part of a wider corporate responsibility.

At this stage, there is no need to involve any public authorities, national independent bodies or consumer organisations, the governments or the Parliaments. "Self-regulation is self" and shall remain self. It is an industry-led approach, which is user-friendly, flexible enough and effective.

## Co-regulation

By co-regulation, I mean that the regulator or government sets the objectives that are to be achieved. A more active involvement of an independent body in seeking a solution to an emerging concern or perceived need for regulation is fixed. The main criterion for the distinction between co-regulation and self-regulation is the degree of autonomy of the co-regulatory organisation from state influence, as shared by Carmen Palzer, e.g. "the extent to which it can take its own decisions, or whether representatives of the public authority can exert influence over the rule- or the decision-making of the co-regulatory body". Additionally, the funding issue is also of high relevance in determining the degree of autonomy.

In the independent body, consumer groups - in particular with respect to the audiovisual sector - viewers' group - alongside with the industry may be fully involved in the process, so that the interests of industries and consumers match. In the case of broadcasting content, a co-regulatory approach is often favoured through the work of independent bodies like the *Conseil supérieur de l'audiovisuel* in France and Belgium, and the ITC<sup>13</sup> - in the UK.

Also, more specifically focused initiatives, like the NICAM<sup>14</sup> Institute in the Netherlands, are being developed under a co-regulatory approach. This filtering and rating classification scheme contains questions concerning the following content categories: violence, sex, fear, discrimination, drugs and alcohol abuse and swearing. There are at the moment attempts to classify video games content in a uniform manner under NICAM's umbrella. Even a long-lasting traditional self-regulatory organisation like the *Freiwillige Selbstkontrolle Fernsehen* (FSF) which works independently of state interference in the field of voluntary self-control television broadcasting in Germany, is to join the co-regulatory "club" after the entry into force of the reform of the media youth protection system in Germany.

## Self-regulation and Co-regulation Relationships with Law

Self- and co-regulation are first of all only legal mechanisms to achieve the objectives set up, if any, by law, *i.e.* by public authority<sup>15</sup> regulations. In my opinion, both approaches are accurate and appropriate to improve proper governance and better regulation. The use of one of these two techniques preferably varies whether there is no regulation or whether a regulation exists at European or/and national level. In case studies where there is no regulation, self-regulation is obviously to be favoured. When a regulation exists, whether this regulation is a framework or a sufficiently detailed set of rules will also have an impact upon the alternative use of self- or co-regulation. These uses will vary both from sector to sector and policy to policy.

## No Regulation & Self-regulation

In many cases, the market faces problems of public concern and develops its own solutions. The effectiveness of the market in responding to different social and societal values, or to public opinion, should not be underestimated. The case studies here refer to the situation where there is no

13) According to the Office of Communications Act 2002 of 19 March 2002 this approach shall in future also be followed by Ofcom, *s.* also: <http://www.itc.org.uk>

14) NICAM - *Nederlands Instituut voor Classificatie van Audiovisuele Media* - <http://www.kijkwijzer.nl>

15) As Carmen Palmer wrote, "this term describes the traditional regulatory system: (the) public authority being the all-embracing regulator, setting the relevant legislative or regulatory rules, monitoring compliance with them and equally enforcing them by/with sanctions. (...) The responsibility for implementing rules for the purpose of achieving public policy aims always remains with the State".

Community harmonisation or simply no regulation at all (new area, impossibility to regulate the field). In the first case, Member States are often free to regulate. It happens that they do not regulate. As a consequence, the advertising and the broadcasting industries themselves draw up the rules in place, alongside the principle of editorial responsibility. According to this principle, media professionals themselves have the primary responsibility for the content of the messages, words or images they disseminate. They also take into account social and technological changes as well as consumer receptiveness.

#### New technological developments: WIPO ICANN Dispute Resolution Mechanism

One of the first worries for companies to invest in e-commerce stemmed from the risk of misuse of names that are registered. WIPO has set up an arbitration mechanism to prevent cyber-squatters from occupying domain names.

#### E-commerce and consumer confidence

In this field, for instance, the private sector has developed alternative dispute resolution mechanisms (ADR). They are voluntary instruments that respond to the rapid growth of e-business and cross-border transactions and ensure a high level of consumer confidence by offering a user-friendly access to a single and effective redress mechanism. It is not necessary to consider that, if nevertheless, a dispute arises, it would in most cases be resolved by the company itself.

#### Taste and decency

Throughout Europe, the advertising business has developed self-regulatory systems, based on rules drawn up and enforced by advertisers, advertising agencies and the media. These rules are enshrined in the code of advertising practice of the International Chamber of Commerce<sup>16</sup> (ICC). It is to ensure that advertisements are "legal, decent, honest and truthful". They cover areas such as taste and decency, which the law would find difficult to tackle.

#### Portrayal of violence

In their editorial responsibility, the media are particularly vigilant and cautious when portraying violent content, whether in news, current affairs or TV programming, in adherence to the guidelines of the Council of Europe.<sup>17</sup>

#### Fundamental principles and ethics

One of the primary purposes of regulation in the audiovisual sector justified by regulators is to safeguard very sector-specific public interest objectives, such as: freedom of information and speech, pluralism, cultural and linguistic diversity, the right of reply and the protection of human dignity.<sup>18</sup> Most of these principles are drawn up, implemented, managed, funded and enforced,<sup>19</sup> either "in-house" by media journalists, or by professional sector organisations representing their interests<sup>20</sup> (Union of journalists).

#### Criminal offences

In the case of illegal and harmful Internet content, a self-regulatory approach is most of the time favoured through the work of an independent body like the Internet Watch Foundation in UK, which is an industry body handling complaints about child pornography and other illegal material,<sup>21</sup> through filtering and rating systems along the advisory guidelines of the Council of Europe after the Thessaloniki Conference in 1997.<sup>22</sup>

In most of the areas concerned with fundamental principles, ethics and criminal offences, there is little scope for a co-regulatory approach, insofar as prejudiced parties usually directly challenge any attempt to infringe these principles before criminal Courts. The remedy is direct and known by all parties, whether we deal with defamation, or criminal liability for obscenity or blasphemy. There is very little scope for the involvement of independent bodies in most continental laws.

16) The International Code of advertising practice was originally published in 1937.

17) Recommendation nr. R(97) 19 on the portrayal of violence in the electronic media.  
<http://cm.coe.int/ta/rec/1997/97r19.html>

18) Article 10(2), ECHR.

19) EASA guidance principles on self-regulatory systems, 2002.

20) Council of Europe, Prague Conference (1994) - Resolution nr.2 on Journalistic Freedoms and Human Rights.

21) Council Recommendation on the Protection of Minors and Human Dignity of 24 September 1998, OJ L 270/48, 7 October 1998, p.48.

22) Council of Europe Resolution nr.2 on the development of self-regulatory measures to new information society services.

## Regulation

### Detailed Regulation & Self-regulation

In most cases, self-regulation has provided the basic keys to set up Community legislation.

For instance, detailed *advertising* regulations exist - whether at national or European level -, with regard to the European Community Directive on misleading and unfair advertising, or the European Community Directive on Sales promotions, currently being negotiated. The ICC code has served as a basis for the setting up of the European Community Directive on misleading and unfair advertising in 1987 and the EC Directive on "Television without Frontiers" with respect to television advertising in 1984.

In the *e-commerce* field, on one hand, the EU Domain Names Directive sets up the creation of the .eu-top level domain (TLD) to boost electronic commerce in the e-Europe initiative. It envisages the establishment of a Registry Body to be managed on behalf of the public interest. On the other hand, the Brussels Regulation - adopted in 2001 - put in place the legal framework to ensure a safety net, which will foster consumer confidence in buying off- and on-line cross-border goods and services. In this context, the private sector has first developed voluntary alternative dispute resolution mechanisms, which on a second stage have been endorsed by public authorities under certain conditions.

The process that - for the sake of regulatory consolidation - existing and well-enforced codes of conduct need to be implemented or transposed into law, does not preclude that self-regulation is no longer in use. On the contrary, as mentioned earlier, there are still a number of advertising-related issues to be left to self-regulation. The previous example of taste and decency is of relevance in this case. But law should only tackle free-rider behaviour. As a consequence, self-regulation then provides an essential complement to existing national or Community legislation governing e-commerce and advertising issues.

### Framework Regulation & co-regulation

In contrast to the UK White Paper on the Communications Bill, the European Commission White paper on Governance, in its conditions for the use of co-regulation, does not refer at all to the involvement of independent bodies. This specific point is open to discussion insofar as recently-adopted Community Directives are imposing the obligations for member States to set up national regulatory authorities (NRAs), as for instance in the *Electronic Communications Package*. According to the *e-commerce Directive*<sup>23</sup> as well, we should remind ourselves that codes of conduct might also contribute to the proper implementation of Articles 5-15 into national provisions.

The role and the independence of the so-called NRAs is a matter of considerable interest for the industry as a whole, and the audiovisual industry in particular. NICAM as a national support service is, for instance, an independent institution under private law. The European Commission used to be, as the Guardian of the Treaty, the sole administrative redress for companies to defend their interests. In the implementation process, as far as Competition and/or single market cases are concerned, the European Regulator should guarantee to the operators that the same conditions of transparency and legal certainty are delivered in a uniform manner in the single market. Any attempt by Member States to misuse this secondary rule-making competence, by over-regulating, would hinder the development of the market, harm Europe's audiovisual competitiveness and skip away the confidence of pan-European operators in the benefits of the Single market.

A word on *standardisation* should however be mentioned at this stage in the co-regulation discussion. Standardisation introduces a separation of responsibility between, on the one hand, public authorities and certification bodies for regulation, and, on the other, operators and standardising bodies for appropriate technical solutions. Some discuss whether standardisation proceeds from a self- or a co-regulation process. In reference to the above, standardisation bodies are usually fully independent. As an example, there is no legal connection between the CEN/ISSS initiative on data protection and the corresponding Directive 95/46. By way of contrast, the Universal Service Directive<sup>24</sup> refers to co-regulation as an appropriate way of stimulating enhanced quality standards, in particular as regards technical standards for digital set-top boxes or receivers, when industry-led initiatives (*i.e.* self-regulation) are not achieving the expected results in a limited time.

23) Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market, OJ L 178 of 17 July 2000, p.1.

24) Directive 2002/22/EC, Recital 48.

It is nevertheless debatable whether the adoption of “technical requirements” is a public policy goal. This will surely depend, on the one hand, on the practical application of the terms of the October 1999 Council Resolution on standardisation stating “(...) standards should be fit for [their] purpose and have a high degree of acceptability as a result of the full involvement of all relevant interested parties”, and, on the other, whether the independent standardisation bodies may receive a mandate from public authorities to reach a common public interest objective in a specific field.

## Conclusion

### Legal Certainty

The current status of the “Television without Frontiers” Directive is a case for reflection. The provisions of the Directive constitute the minimum level of harmonisation that is necessary to ensure the freedom to provide broadcasting services in the European single market. As a sector-specific framework Directive, the Directive combines elements of self- and co-regulation even though it is not explicitly stated in the text of the Directive. Alongside the debates as to whether to lift regulatory burdens through “deregulation” or “better regulation”, limits to public or statutory regulation have also been recognised.

The “Television without Frontiers” Directive is clearly an example of a legal instrument that goes far beyond the current “light touch mood” existing in various Member States (e.g., UK Communications Bill,<sup>25</sup> German Review of consumer protection laws). It is the regulators’ duty to ensure that regulation does not involve the imposition of burdens which are unnecessary; or the maintenance of burdens which have become unnecessary. In the context of a review of the Directive, this regulation should be kept at a minimum level and, where effective competition has developed, regulatory rules should be lifted.

In this framework, there are still some places and margins of manoeuvre for self- and co-regulation to apply, to prevent Member States from misusing the margin of manoeuvre left to regulate more strictly most of the provisions contained in the “Television without Frontiers” Directive. There is a high risk that, in a more consolidated market, these national restrictions are re-fragmenting the audiovisual single market. This phenomenon would definitely hamper the consistent development of the broadcasting business in Europe.

### Better Public Governance and Improved Corporate Responsibility

Self- and co-regulation should be the ultimate means to avoid fragmentation of the single market for the reason that national legislation, legitimately justified by the principles of subsidiarity and mutual recognition, would undermine the benefits of harmonisation. The solution resides in making sure the 15 interpretations are consistent and suit business.

As a consequence, self- and co-regulation are never a panacea, but should increase businesses’ needs for legal certainty and predictability and consumer confidence in insecure markets. They are and will only remain instruments for better regulation. In all of Europe’s markets, broadcasters are invited to reflect on a complete new model of implementing rule, from a less prescriptive model to a more cooperative one, based on consensus-building and enhanced dialogue. This on-going process is a learning exercise for the mutual benefit of the audiovisual industry and its viewers, based on a mixture of shared collective and individual responsibility.

Most of all, if it is to be effective and accepted by the public, it requires a serious commitment and full engagement on the part of industry. However, it is also a matter of principle that public authority sanctions are provided by civil law (fines, financial penalties or exclusion) and/or corporation sanctions, when free-rider attitudes are discovered.

Only at a last resort should the regulator have the scope to impose more formal regulation if the industry’s response is ineffective or not delivered in a sufficiently timely manner. As a consequence, a framework of overall objectives, basic rights, enforcement and appeal mechanisms and conditions for monitoring compliance could be set up within national or Community legislation. Last but not least, it is unnecessary to remind ourselves that self- and co-regulation should never undermine the legislative role of parliaments and governments. ■

*Firenze, September 2002*

<sup>25</sup> A new future for Communications, Cm 5010 (2000) at <http://www.communicationswhite paper.gov.uk>







# Part III

## Self- and Co-Regulation Verbatim: Examples of Texts and Other Background Material

This third part contains example texts for self- and co-regulation from the five areas of advertising, protection of minors, incitement to hatred, independence of journalists and technical standards. The texts were selected in view of the examples discussed at the workshop.

To supplement the articles contained in the first and second part of this IRIS Special, various excerpts from European Community and Council of Europe documents referred to in the aforementioned articles are reproduced below.



# Examples of Texts

## **EASA's Common Principles and Operating Standards of Best Practice**

*The following material has been reprinted with the kind permission of the European Advertising Standards Alliance (EASA). For more information on the EASA see <http://www.easa-alliance.org/>*

### **Common Principles**

These principles apply to the activities of EASA members with regard to self-regulation by laying down a common approach throughout the Alliance network with regard to best practice in the execution of self-regulation.

June 13 2002

### **SELF-REGULATION - A STATEMENT OF COMMON PRINCIPLES AND OPERATING STANDARDS OF BEST PRACTICE**

#### **THE COMMON PRINCIPLES OF SELF-REGULATION**

11. The consumer benefits
12. Independence
13. Transparency and accessibility
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15. Efficient Complaint Handling and Enforcement
16. Self-regulation and the Law
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#### **RECOMMENDED STANDARDS FOR OPERATING BEST PRACTICE IN SELF REGULATION.**

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22. Terms of reference for Self-Regulatory Organisations (SROs)
23. Funding and other resources
24. Codes, their development and review
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27. Effective cross-border consumer protection and co-ordination
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## **SELF-REGULATION - A STATEMENT OF COMMON PRINCIPLES AND OPERATING STANDARDS OF BEST PRACTICE**

1. Advertising self-regulation is the response of the advertising industry to the challenge of dealing with issues affecting commercial communications through co-operation rather than etailed legislation. Through advertising self-regulation, the industry demonstrates its ability to regulate itself responsibly, by actively promoting the highest ethical standards in commercial communications and safeguarding consumers' interests. National self-regulatory bodies (SROs), actively supported by the constituent parts of the industry, are responsible for administrating their respective self-regulatory systems and applying national codes of advertising practice -based on those of the International Chamber of Commerce (ICC) - in such a way that advertisements which fail to meet those standards are quickly corrected or removed.

2. The European Advertising Standards Alliance (EASA) is the single voice of the advertising industry in Europe on advertising self-regulation. It acts as the European coordination point for advertising self-regulatory bodies and systems across Europe. All of these systems contain two essential elements: a set of rules (codes) and a procedure to handle complaints submitted about specific advertisements.

3. EASA was set up in 1992 to support and promote self-regulation, coordinate the handling of cross-border complaints and to provide information and research on self-regulation

4. The purposes of the EASA include:

... to encourage best practice and common high standards in advertising self-regulation ... to stimulate improvements where necessary of national self-regulatory systems...to work to establish common principles of best practice and towards greater convergence of the key principles...

5. To help meet these objectives, the members of EASA have agreed a statement of common principles and recommended best operating practice for use by national SROs which are designed to guide all participants in the self-regulatory process in their work. This statement applies to the self-regulation of both on and off-line advertising.

6. The codes are drawn up by the advertising business including advertisers, agencies and media. The codes are applied and the systems managed nationally by independent self-regulatory bodies.

7. Self-regulation provides an essential complement to national legislation governing advertising. It has a crucial role in maximising consumer confidence in advertising.

Self-regulation is proven to be the best method of responding quickly, efficiently, and effectively to consumers' concerns about advertising.

8. It also plays an important part in educating the advertising business and preventing breaches of the codes. This set of principles and practices, and the advice that they offer, draws on the experience of self-regulation over more than 65 years. As has been the case during this time we expect that the principles and practices will evolve as society evolves. There will thus be a regular review of these in order to assess their suitability.

9. In this paper the common principles are the core values that should underpin every self-regulatory system in membership of the EASA. The operating best practices are the recommended standards, which all national systems should seek to achieve. The continued acceptance of self-regulation by European consumers and government at both national and EU levels will be made more certain by the visible presence of the common principles and the standards of best practice in all national self-regulation systems. The EASA will ensure that these are maintained throughout its membership.

### **THE COMMON PRINCIPLES OF SELF-REGULATION**

10. Successful self-regulation depends upon the application of a set of principles that underpin the process and are common to all systems. These common principles set out to maximise the benefits of self-regulation to consumers.

#### 11. The consumer benefits

11.1 The purpose of a self-regulatory system is to maintain consumer confidence in advertising by offering a rapid and effective response to consumer concerns. It facilitates consumer protection by providing a route for the individual consumer to express a view directly to the advertising business and the advertiser. It enables brands to compete on a level playing field to the benefit of the consumer. In all this, the advertising business will also be seen to be actively, continuously, and responsibly engaged with the consumer.

11.2 Self-regulatory systems should, above all, ensure that the individual consumer is the focus of attention.

#### 12. Independence

12.1. Self-regulation must be and be seen to be impartial.

12.2. Operation and outcome/decisions of the self-regulatory systems should be made independently of government, specific interests and interest groups.

13. Transparency and accessibility

- 13.1. Access to the complaints process should be easy and at no cost to the consumer.
- 13.2. The right of a consumer to access the self-regulatory system and the means of doing so should be well known.
- 13.3. The workings and outcome/decisions of a self-regulatory system should be transparent to all parties.

14. Effectiveness

- 14.1. Notwithstanding the national legislative framework, self-regulation must be and seen to be effective, in both its operation and outcome.
- 14.2. Self-regulation must be rapid, flexible, current and applied in a non-bureaucratic manner.
- 14.3. Self-regulatory rules and procedures should be applied in both the spirit and the letter, and regularly reviewed.

15. Efficient Complaint Handling and Enforcement

- 15.1. A self-regulatory system should have a means to handle consumer complaints, which should be handled free of charge.
- 15.2. A self-regulatory system must have adequate and credible sanctions to support its decisions.
- 15.3. A self-regulatory system should have the power to enforce effectively its decisions, i.e. sufficient moral and practical support from the constituent parts of the advertising industry.

16. Self-regulation and the Law

Self-regulation must always be in compliance with the law, and no part of the self-regulatory process should deprive a consumer of the protection provided by the law.

17. Cooperation

Self-regulatory systems and bodies in membership of the EASA have a duty to co-operate with each other in order to handle complaints effectively and converge on best practice.

18. Resources

- 18.1. Self-regulatory systems must be sufficiently resourced and supported to be able to meet their objectives.
- 18.2. Industry members should ensure adequate moral and financial support for advertising self-regulation and its implementing organisations.

**RECOMMENDED STANDARDS FOR OPERATING BEST PRACTICE IN SELF REGULATION**

19. Self-regulation is the system by which the advertising industry actively polices itself. The self-regulatory organisations (SROs) in membership of EASA undertake to uphold the recommended standards of best practice listed below in the operation of their self-regulatory systems and their handling of cross-border complaints.

20. SROs set out to maintain these quality standards in their operations for the benefit of consumers and to promote industry best practice. The standards meet the aims set out in EASA's Articles of Association, in particular «...to encourage best practice and common high standards in advertising self-regulation including monitoring, complaints handling and compliance...» We believe that in this way advertising self-regulation will continue to provide enforcement that is efficient, effective and evaluated.

21. Constitution & membership

The constitution and membership of all SROs should be published and regularly reviewed.

22. Terms of reference for Self-Regulatory Organisations (SROs)

These will include:

- 22.1 Responsibility for the development and implementation of codes that will help maintain and sustain consumer trust and confidence in advertising standards by providing an efficient means of meeting consumer concerns and delivering consumer protection
- 22.2 Practical responsibility for regulating advertising standards, including the power to enforce their decisions with the moral and practical support of the advertising business
- 22.3 The promotion of advertising self-regulation and the demonstration that it is more effective than detailed legislation as a means of regulating advertising and of protecting the consumer.

23. Funding and other resources

Sufficient support from the constituent parts of the advertising industry (or, in the case of sectoral bodies from the sector for which they are responsible) should be made available to ensure effectiveness and credibility.

24. Codes, their development and review

- 24.1 Self-regulatory codes are based on the following basic principles, enshrined in the general Code of Advertising Practice of the International Chamber of Commerce (ICC): «the content of advertising should be legal, decent, honest and truthful with a due sense of social responsibility and respect for the rules of fair competition.»
- 24.2 All codes must be applied both in the spirit and to the letter.

- 24.3 Codes should reflect national culture, law, and commercial practices, within the spirit of mutual recognition.
- 24.4 SROs should ensure that self-regulatory principles for advertising content are applied to new areas of advertising and commercial communications.
- 24.5 Self-regulatory rules and procedures should be regularly reviewed in the light of regulatory, social and technological developments, including consumer attitudes to advertising.

#### 25. Operation of the self regulatory system

- 25.1 Independence. Decisions taken by SROs and self-regulatory systems should be reached in an independent and impartial manner and this should be reflected in the manner in which the complaints are handled.
- 25.2 Transparency.
  - 25.2.1 The codes, standards and rules that SROs apply and the procedures by which they operate and by which complaints are handled, should be published (print/website) and made available to all interested parties.
  - 25.2.2 It should be easy for consumers and advertisers to know what evidence to provide
  - 25.2.3 The complainant should be notified of the receipt of the complaint and, at the end of the process, of its outcome.
- 25.3 Adversarial principle. Those subject to complaint should be invited to comment on the complaint and to provide evidence in support of the claims made
- 25.4 Effectiveness.
  - 25.4.1 All complaints, whether consumer or intra-industry, should be handled rapidly and efficiently; Self-regulatory rules and systems should be regularly reviewed to ensure that they remain appropriate and effective.
  - 25.4.2 A flexible, non-bureaucratic, approach should be adopted, in particular with regard to the interpretation of rules and complaint handling.
  - 25.4.3 There should be rapid identification of the nature of the complaint and the appropriate jurisdiction in terms of origin, particularly in cases of fraud or sharp practice.
  - 25.4.4 There should be a suitable appeals or review procedure.
- 25.5 Liberty and representation. Legal representation does not form part of the self-regulatory system, but parties should be entitled to representation by third parties should they wish.
- 25.6 Self-regulation and the Law.
  - 25.6.1 No procedure or decision in the self-regulatory process should deprive a consumer of the protection provided by the law.
  - 25.6.2 Decisions and the reasons for them should be communicated promptly to the parties involved.
- 25.7 Enforcement.
  - 25.7.1 Sanctions must be effective and designed to prevent repeat offences. They should include publication of breaches of the codes, the moral and practical support of member and supporting organisations, and the acceptance by all practitioners of their application.
  - 25.7.2 An important sanction for breaches of the codes should be that a description of the activities of SROs, including information on the number and nature of decisions taken, should be published on a regular basis to both consumer and industry practitioners.

#### 26. Consultation with stakeholders

- 26.1 SROs should ensure that all advertising practitioners are aware of the national self-regulation system, its rules and its procedures
- 26.2 SROs should regularly promote the system to consumers, other relevant organisations, politicians and regulators.
- 26.3 SROs should ensure that in the development of codes the relevant views of all stakeholders are taken into account.
- 26.4 SROs should ensure the provision of education and training programmes, as well as the provision of advice in order to avoid breaches of the codes.

#### 27. Effective cross-border consumer protection and co-ordination

- 27.1 The EASA Secretariat is responsible for the co-ordination of the cross-border complaints system and liaison with appropriate bodies at an EU level to ensure the swift resolution of complaints. Regular reports on the handling of complaints are published in its newsletter and on its website.
- 27.2 SROs should adhere to the procedures of EASA's cross-border complaints system when handling complaints about advertising carried in the media of another member country.
- 27.3 SROs should apply the country of origin principle, as established in the EASA cross-border complaints procedure\*, to identify the competent SRO.
- 27.4 SROs should transfer cases promptly and co-operate in their resolution
- 27.5 SROs should notify each other and the EASA Secretariat of the receipt, progress and outcome of a cross border case.
- 27.6 SROs should keep cases confidential within the EASA network and not reveal them to third parties, except to the extent necessary to resolve them, until they are ready to be published or transferred to the appropriate authorities.

#### 28. Promotion and Best Practice

- 28.1 EASA members should work towards the convergence of self-regulatory systems, their administration and procedures, based on identified best practice.



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28.2 EASA members should assist EASA to strengthen existing self-regulatory systems where appropriate and to encourage the creation of self-regulatory systems where they do not exist.

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\*That is, the country of origin of the media carrying the advertisement –where applicable–, and the country of origin of the advertiser for cases such as direct marketing, Internet/new media, etc.

# **ICC International Code of Advertising Practice (1997 Edition) Commission on Marketing, Advertising and Distribution, 21 April 1997**

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For more information on the ICC see <http://www.iccwbo.org>*

## **Introduction**

This edition of the ICC International Code of Advertising Practice follows the well-established policy of the ICC of promoting high standards of ethics in marketing via self-regulatory codes intended to complement the existing frameworks of national and international law.

The Code, which was first issued in 1937, and revised in 1949, 1955, 1966, 1973 and 1987, is an expression of the business community's recognition of its social responsibilities in respect of commercial communications. The globalization of the world's economies, and the intense competition which ensues therefrom, require the international business community to adopt standard rules. The adoption of these self-disciplinary rules is the best way that business leaders have of demonstrating that they are motivated by a sense of social responsibility, particularly in light of the increased liberalization of markets. A manifestation of this commitment to social responsibility is to be found in the ICC's decision to incorporate formally within this code the former ICC Guidelines for Advertising Addressed to Children.

This edition combines past experience with current thinking based on the concept of advertising as a means of communication between sellers and customers. In this respect the ICC considers freedom of communication (as embodied in article 19 of the United Nations International Covenant of Civil and Political Rights) as a fundamental principle.

The Code is designed primarily as an instrument for self-discipline but it is also intended for use by the Courts as a reference document within the framework of applicable laws.

The ICC believes that this new edition of the Code will promote adherence to high standards of commercial communications leading to efficient international markets and significant consumer benefits.

## **Scope of the Code**

The Code applies to all advertisements for the promotion of any form of goods and services. It should be read in conjunction with the other ICC Codes of Marketing Practice, namely:

- ICC International Code of Sales Promotion
- ICC International Code of Practice on Direct Marketing
- ICC Code on Environmental Advertising
- ICC Code on Sponsorship
- ICC/ESOMAR International Code of Marketing and Social Research Practice

The Code sets standards of ethical conduct to be followed by all concerned with advertising, whether as marketers or advertisers, advertising practitioners or agencies, or media, and is to be applied against the background of the applicable law.

## **Interpretation**

The Code is to be applied in the spirit as well as in the letter.

Because of the different characteristics of the various media (press, television, radio and other broadcast media, outdoor advertising, films, direct mail, fax, e-mail, Internet and online services, etc.) an advertisement which is acceptable for one medium may not necessarily be acceptable for another. Advertisements, therefore, should be judged by their likely impact on the consumer, bearing in mind the medium used.

The Code applies to the entire content of an advertisement, including all words and numbers (spoken and written), visual presentations, music and sound effects.

## **Definitions**

For the purpose of this code:

the term «advertisement» is taken in its broadest sense, and means any form of advertising for goods or services, regardless of the medium used; the term «product» refers to any good or service; the term «consumer»

refers to any person to whom an advertisement is addressed or who can reasonably be expected to be reached by it whether as a final consumer or as a trade customer or user.

### **Basic Principles**

#### Article 1

All advertising should be legal, decent, honest and truthful.

Every advertisement should be prepared with a due sense of social responsibility and should conform to the principles of fair competition, as generally accepted in business.

No advertisement should be such as to impair public confidence in advertising.

### **Decency**

#### Article 2

Advertisements should not contain statements or visual presentations which offend prevailing standards of decency.

### **Honesty**

#### Article 3

Advertisements should be so framed as not to abuse the trust of consumers or exploit their lack of experience or knowledge.

### **Social Responsibility**

#### Article 4

1. Advertisements should not condone any form of discrimination, including that based upon race, national origin, religion, sex or age, nor should they in any way undermine human dignity.

2. Advertisements should not without justifiable reason play on fear.

3. Advertisements should not appear to condone or incite violence, nor to encourage unlawful or reprehensible behaviour.

4. Advertisements should not play on superstition.

### **Truthful presentation**

#### Article 5

1. Advertisements should not contain any statement or visual presentation which directly or by implication, omission, ambiguity or exaggerated claim is likely to mislead the consumer, in particular with regard to

a. characteristics such as: nature, composition, method and date of manufacture, range of use, efficiency and performance, quantity, commercial or geographical origin or environmental impact;

b. the value of the product and the total price actually to be paid;

c. delivery, exchange, return, repair and maintenance;

d. terms of guarantee;

e. copyright and industrial property rights such as patents, trade marks, designs and models and trade names;

f. official recognition or approval, awards of medals, prizes and diplomas;

g. the extent of benefits for charitable causes.

2. Advertisements should not misuse research results or quotations from technical and scientific publications. Statistics should not be so presented as to exaggerate the validity of advertising claims. Scientific terms should not be used to falsely ascribe scientific validity to advertising claims.

### **Comparisons**

#### Article 6

Advertisements containing comparisons should be so designed that the comparison is not likely to mislead, and should comply with the principles of fair competition. Points of comparison should be based on facts which can be substantiated and should not be unfairly selected.

### **Denigration**

#### Article 7

Advertisements should not denigrate any firm, organization, industrial or commercial activity, profession or product by seeking to bring it or them into public contempt or ridicule, or in any similar way.

## Testimonials

### Article 8

Advertisements should not contain or refer to any testimonial or endorsement unless it is genuine, verifiable, relevant and based on personal experience or knowledge. Testimonials or endorsements which have become obsolete or misleading through passage of time should not be used.

## Portrayal or imitation of personal property

### Article 9

Advertisements should not portray or refer to any persons, whether in a private or a public capacity, unless prior permission has been obtained; nor should advertisements without prior permission depict or refer to any person's property in a way likely to convey the impression of a personal endorsement.

## Exploitation of goodwill

### Article 10

Advertisements should not make unjustifiable use of the name, initials, logo and/or trademarks of another firm, company or institution nor should advertisements in any way take undue advantage of another firm, person or institution's goodwill in its name, trade name or other intellectual property, nor should advertisements take advantage of the goodwill earned by other advertising campaigns.

## Imitation

### Article 11

1. Advertisements should not imitate the general layout, text, slogan, visual presentation, music and sound effects, etc., of any other advertisements in a way that is likely to mislead or confuse the consumer.

2. Where advertisers have established distinctive advertising campaigns in one or more countries, other advertisers should not unduly imitate these campaigns in the other countries where the former may operate, thus preventing them from extending their campaigns within a reasonable period of time to such countries.

## Identification of advertisements

### Article 12

Advertisements should be clearly distinguishable as such, whatever their form and whatever the medium used; when an advertisement appears in a medium which contains news or editorial matter, it should be so presented that it will be readily recognized as an advertisement.

## Safety and health

### Article 13

Advertisements should not without reason, justifiable on educational or social grounds, contain any visual presentation or any description of dangerous practices or of situations which show a disregard for safety or health.

## Children and young people

### Article 14

The following provisions apply to advertisements addressed to children and young people who are minors under the applicable national law.

## Inexperience and Credulity

Advertisements should not exploit the inexperience or credulity of children and young people.

Advertisements should not understate the degree of skill or age level generally required to use or enjoy the product.

Special care should be taken to ensure that advertisements do not mislead children and young people as to the true size, value, nature, durability and performance of the advertised product.

If extra items are needed to use it (e.g., batteries) or to produce the result shown or described (e.g., paint) this should be made clear.

A product which is part of a series should be clearly indicated as should the method of acquiring the series.

Where results of product use are shown or described, the advertisement should represent what is reasonably attainable by the average child or young person in the age range for which the product is intended.

Price indication should not be such as to lead children and young people to an unreal perception of the true value of the product, for instance by using the word 'only'. No advertisements should imply that the advertised product is immediately within reach of every family budget.

### **Avoidance of Harm**

Advertisements should not contain any statement or visual presentation that could have the effect of harming children and young people mentally, morally or physically or of bringing them into unsafe situations or activities seriously threatening their health or security, or of encouraging them to consort with strangers or to enter strange or hazardous places.

### **Social Value**

a. Advertisements should not suggest that possession or use of a product alone will give the child or young person physical, social or psychological advantages over other children or young people of the same age, or that non-possession of the product would have the opposite effect.

b. Advertisements should not undermine the authority, responsibility, judgment or tastes of parents, taking into account the current social values. Advertisements should not include any direct appeal to children and young people to persuade their parents or other adults to buy advertised products for them.

### **Guarantees**

#### Article 15

Advertisements should not contain any reference to a guarantee which does not provide the consumer with additional rights to those provided by law. Advertisements may contain the word «guarantee», «guaranteed», «warranty» or «warranted» or words having the same meaning only if the full terms of the guarantee as well as the remedial action open to the purchaser are clearly set out in the advertisements, or are available to the purchaser in writing at the point of sale, or come with the goods.

### **Unsolicited products**

#### Article 16

Advertisements should not be used to introduce or support the practice whereby unsolicited products are sent to persons who are required, or given the impression that they are obliged to accept and pay for these products (inertia selling).

### **Environmental behaviour**

#### Article 17

Advertisements should not appear to approve or encourage actions which contravene the law, self-regulating codes or generally accepted standards of environmentally responsible behaviour. Advertisers should respect the principles set forth in the ICC Code on Environmental Advertising.

### **Responsibility**

#### Article 18

1. Responsibility for the observance of the rules of conduct laid down in the Code rests with the advertiser, the advertising practitioner or agency, and the publisher, media owner or contractor.

a. Advertisers should take the overall responsibility for their advertising.

b. Advertising practitioners or agencies should exercise every care in the preparation of advertisements and should operate in such a way as to enable advertisers to fulfil their responsibilities.

c. Publishers, medium-owners or contractors, who publish, transmit or distribute advertisements should exercise due care in the acceptance of advertisements and their presentation to the public.

2. Those employed within a firm, company or institution coming under the above three categories and who take part in the planning, creation, publishing or transmitting of an advertisement have a degree of responsibility commensurate with their positions for ensuring that the rules of the Code are observed and should act accordingly.

### **Rules apply to entirety of advertisement**

#### Article 19

The responsibility for observance of the rules of the Code embraces the advertisement in its entire content and form, including testimonials and statements or visual presentations originating from other sources. The fact that the content or form originates wholly or in part from other sources is not an excuse for non-observance of the rules.

**Effect of subsequent redress for contravention**Article 20

While an advertiser's subsequent correction and appropriate redress for a contravention of the Code are desirable, they cannot excuse the original contravention of the Code.

**Substantiation**Article 21

Descriptions, claims or illustrations relating to verifiable facts should be capable of substantiation. Advertisers should have such substantiation available so that they can produce evidence without delay to the self-regulatory bodies responsible for the operation of the Code.

**Respect of self-regulatory decisions**Article 22

No advertiser, advertising practitioner or agency, publisher, medium-owner or contractor should be party to the publication of any advertisement which has been found unacceptable by the appropriate self-regulatory body.

**Implementation**Article 23

This Code is to be applied nationally and internationally, and should be the basis for the decisions by bodies set up for the purpose of self-regulation.

Any request for interpretation of the principles contained in this Code should be submitted to the ICC Code Interpretation Panel.\*

\* FOOTNOTE: See the Terms of Reference of the ICC Code Interpretation Panel - [www.iccwbo.org](http://www.iccwbo.org)

Document No. 240/381 Rev.

International Chamber of Commerce  
The World Business Organization

## **Regulations for the Conduct of an Examination of the Voluntary Self-Regulation Authority for Television (*Prüfordnung der Freiwilligen Selbstkontrolle Fernsehen – PrO-FSF*) of 30 June 1995 (last amended on 19 April 2002)**

*The following material has been reprinted with the kind permission of the Freiwillige Selbstkontrolle Fernsehen (FSF). The original text is in German. This translation is the sole responsibility of the European Audiovisual Observatory. For more information on the FSF, see <http://www.fsf.de>*

### **I. Pre-transmission examination of programmes**

#### Section 1 - Reasons for examination

(1) Broadcasters who are FSF members shall submit to the FSF Examining Boards any programme which, taking into account its scheduled transmission time, may be considered harmful to minors. This shall apply to both fiction and non-fiction programmes, although in the latter case only insofar as this is reasonable in view of the topicality of the programme.

[...]

#### Section 2 - Application rights

(1) Applications for examination may be made by FSF members, represented by their youth protection officers, by the regional media authorities or by members of the FSF Committee.

(2) Applications for examination of non-fiction programmes may only be made by the broadcaster wishing to transmit the programme concerned.

...

#### Section 5 - Role of the FSF Administration

When an application is received the FSF Administration shall ensure that the programme concerned is examined within a reasonable period of time, which shall generally be no longer than one week.

#### Section 6 - Membership of Examining Boards

(1) Examining Boards shall comprise 5 [...] persons, selected by the FSF Director from the list of examiners drawn up by the FSF Committee.

(2) The list of examiners shall be composed of individuals who, on account of their professional experience or training, are qualified to make accurate decisions and produce expert reports. They shall be nominated for a renewable two-year term.

(3) Examiners may not be employees of an FSF member, nor of other companies owned by shareholders of, or programme suppliers of, an FSF member.

(4) [...]

(5) Examining Boards shall be chaired by the examiner nominated by the FSF Committee Presidents. [...] The Examining Board Chair shall draft the examiners' report.

#### Section 7 - Adherence to examination criteria

Examiners shall not be bound by outside instructions when making their decisions. They shall observe the examination criteria laid down in Sections 19 to 23.

....

#### Section 9 - Validity of examiners' decisions

(1) The 5-member Examining Boards shall take their decisions by a simple majority.

[...]

#### Section 10 - Conditions

(1) Examining Boards may attach conditions to their decisions, requiring editorial changes to the programme concerned.

(2) Examining Boards may also lay down conditions requiring a programme to be broadcast at a certain time or in a certain version.

#### Section 11 - Cases of fundamental importance

Examining Boards shall immediately refer all cases of fundamental importance to the Appeal Board.

#### Section 12 - The examiners' report

(1) Examiners' reports shall be submitted in writing. They shall comprise the examiners' decision, details of the programme content relevant to the decision and the grounds for the decision. [...]

(2) The examiners' decision shall contain the information needed to identify the programme and shall stipulate whether or not it may be broadcast. Should the examiners decide that the programme may be broadcast but attach conditions relating, *inter alia*, to the time of the broadcast (see Section 10), those conditions shall be stated in full in the decision.

(3) The grounds shall include the main considerations behind the decision and explain on which provisions of law or of the present Examination Regulations it is based.

(4) Any other broadcaster may refer back to an examiners' report on a programme for which it subsequently acquires broadcasting rights.

...

#### Section 15 - Confidential examinations

In exceptional cases, a broadcaster may oblige the FSF to treat the details of the examination process and the examiners' report as confidential. This shall apply particularly when a decision to purchase the programme concerned may depend on the examiners' report. Confidentiality need only be maintained for as long as the broadcaster has sufficient reason to request it. The FSF Director shall decide whether this is the case.

#### Section 16 - Appeal

(1) Applicants may refer an Examining Board's decision to the Appeal Board. If the applicant is a regional media authority or a member of the FSF Committee, the broadcaster concerned shall also be entitled to appeal.

(2) The Appeal Board shall comprise seven people, selected by the FSF Director from a list drawn up by the FSF Committee. The list shall contain examiners who are particularly experienced or competent on the grounds of their professional work. [...] Examiners who were party to the disputed decision shall not be members of the Appeal Board.

(3) The Appeal Board shall be chaired by the examiner nominated by the FSF Committee Presidents. [...] The Appeal Board Chair shall draft the appeal report.

(4) The Examining Board that issued the disputed decision may appoint one of its members to explain that decision to the Appeal Board. The appointed member shall be invited by the FSF Administration to attend the Appeal Board meeting. The Examining Board may also submit a written statement, which shall be passed to the Appeal Board by the FSF Administration.

(5) [...]

(6) Appeal Boards shall take their decisions by a simple majority. [...]

(7) Should its decision or the grounds for its decision differ from the original examiners' report, the Appeal Board shall explain the main reasons for this in its report. The report shall be sent to the members of the Examining Board that issued the disputed decision.

(8) [...]



### Section 17 - Examination by the FSF Committee

(1) The parties entitled to appeal (see Section 16.1) may appeal to the FSF Committee against an Appeal Board decision if re-examination of the decision appears necessary for the further development of the FSF's principles of examination or for the purposes of consistent decision-making. Authorisation to appeal shall be granted by the FSF Director in agreement with the FSF Committee President.

(2) For appeals made in accordance with Section 17.1, the FSF Committee shall form a board of six members who were not appointed by broadcasters. This board shall take its decision by a simple majority. Members of the FSF Committee who lodged the appeal shall not form part of the board. Members of the FSF Committee who were party to an earlier examination of the programme concerned may form part of the board but shall not be entitled to vote.

(3) [...]

### Section 18 - Re-examination

(1) An applicant may submit a programme for re-examination after making significant changes to it. The FSF Director shall decide whether these changes are sufficient for the programme to be recognised as a substantially amended version.

(2) A programme may be submitted unchanged for re-examination if the applicant can show that, on the basis of a new interpretation by the FSF Examining Boards, a second examination could have a different outcome from the initial decision. The FSF Director shall decide whether to accept such a programme for re-examination.

(3) Appeals against negative decisions may be lodged with the Appeal Board. Section 17 shall apply accordingly.

### Section 19 - General examination criteria

(1) The aim of the examination process shall be to prevent danger and harm to children and young people, particularly their social or ethical disorientation through television programmes.

(2) Such examination shall be founded on the provisions of Art. 3 of the *Rundfunkstaatsvertrag* (Agreement between Federal States on Broadcasting), on other current legal provisions and on the following principles:

(3) In any examination, the structure, context and overall framework of the programme shall be taken into consideration.

(4) Where artistic programmes in the sense of Art. 5.3.1 of the *Grundgesetz* (Basic Law) are concerned, the examiners' report shall carefully weigh up the artistic merits as against the interests of youth protection; this shall particularly apply to programmes which may be classified as inadmissible under Section 20. Expert opinions on these programmes (eg by film critics) shall be taken into consideration.

### Section 20 - Inadmissibility criteria

The following programmes may not be broadcast:

1. Programmes that glorify or trivialise extreme violence in all its physical, psychological and social forms.

Particular consideration should be given to whether:

a. violence, as a tried and tested form of action, is depicted without properly fitting into the context of the programme;

b. violence is portrayed so continuously that the problems of using violence to resolve conflict are not sufficiently conveyed;

c. scenes of violence are shortened to the extent that the consequences and effects on the victim, for example, are not shown;

d. individual portrayals of violence are shown so frequently and in such graphic detail that they far exceed what is needed for dramatic effect;

e. violence against persons who come across as different on account of their appearance, cultural or social identity, habits, or way of thinking, is depicted as trivial or justified.

2. Programmes which, apart from pornography (see Art. 184 of the *Strafgesetzbuch* - Criminal Code), contain sexual material and

a. condone physical or other violence carried out for the purposes of sexual gratification;

b. portray rape as an experience that the victim enjoys;

c. tend to degrade one particular sex;

d. include a significant number of scenes that degrade individuals on the basis of their sexual orientation.

3. Programmes that glorify war or depict war as a heroic adventure providing an opportunity to display exceptional courage.

4. Programmes that incite to racial hatred or hatred of persons, groups of persons or minorities.

#### Section 21 - Time of broadcast

(1) Provided a programme is not inadmissible under the law or Section 20, the decision on when it should be broadcast shall take into consideration whether it should be scheduled in the daytime, early evening, prime-time slot or late evening, and whether on weekdays or at the weekend. To this end, its impact on the actions, views and experiences of the viewers shall be assessed separately. Particular attention shall be paid to the extent to which, for different age categories of children and young people, a programme's content or dramatic technique (i) promotes the view that violence is acceptable, (ii) is excessively frightening, or (iii) is socially or ethically disorientating. Evaluation of these factors shall take into account the context of the programme as well as the effects of the aforementioned risks on different age groups, which should be explained clearly in the examiners' report.

(2) The following broadcast periods shall be distinguished:

*(The FSF Committee shall prepare a separate scheduling structure and regulations for daytime broadcasting, based on the viewing habits of children and young people.)*

##### 1. Daytime programmes

From 6 am to 8 pm, programmes should comply with the rules governing television content suitable for children under 12.

##### 2. Prime-time evening programmes

Between 8 pm and 10 pm, programmes should comply with the rules governing television content suitable for children aged between 12 and 16.

##### 3. Late evening (until 11 pm) and night-time (from 11 pm to 6 am) programmes

For the period up to 11 pm, according to the FSK classifications, programmes should comply with the rules governing television content suitable for minors

With regard to programmes that are on the borderline of admissibility under Section 20, the Examining Boards shall recommend that they should not be broadcast before midnight from Sunday to Thursday and not before 1 am on Friday and Saturday nights.

##### 4. Weekend programmes

Programmes broadcast at the weekend (Friday and Saturday evenings), whether as part of the early evening, prime-time or late evening schedules, shall comply with the rules governing content suitable for children and young people, in conjunction with the principles set out for weekday programming for younger age groups. However, it shall also be remembered that weekend programmes are often viewed in a family situation.

(3) When deciding which programmes may be shown during the broadcast periods described in para.2, the Examining Boards shall assess separately the three types of risk, ie condoning or promotion of violence, creation of excessive fear and social or ethical disorientation, in connection with the various age groups. These assessments shall form part of the overall risk evaluation. The fear factor shall generally be afforded less weight where over-12s are concerned than with younger age groups. In principle, assessment of the risk to a particular age group shall take into account the context of the individual programme.

1. Indicators of the condoning or promotion of violence shall particularly include:

- a. the portrayal of role models with violent or other socially irresponsible behaviour patterns;
- b. the depiction or justification of violence as the only means of resolving conflict;
- c. the portrayal of violence as an effective substitute for communication;
- d. scenes that promote a desensitisation to violence by trivialising or omitting to show the effects of violence.

2. Indicators of the creation of excessive fear shall particularly include:

- a. graphic portrayal of violence;
- b. graphic portrayal of sexual activity;
- c. insufficient portrayal of realistic content that is particularly frightening for children because of their own situation (eg family conflict);
- d. unrealistically excessive portrayal of violence, creating a sense of constant danger.

3. Indicators of social or ethical disorientation shall particularly include:

- a. inadequately explained portrayal of real violence (eg war);
- b. portrayal of fiction as reality or vice versa in such a way that it is very difficult or impossible to distinguish the two;
- c. uncritical portrayal of prejudice or violence against people with different opinions;
- d. anonymous portrayal of war;

- e. condoning of extremely one-sided or outdated negative stereotypes,
- f. condoning of degrading sexual activity or practices.

(4) The guidelines contained in paras. 2 and 3 shall be confirmed and supplemented as examinations are carried out.

#### Section 22 - Examination of series

Series shall be examined according to the same principles as other programmes. In particular, the specific characteristics of series (where a relationship is built with the viewers) shall be taken into consideration. Previous reports on individual episodes of a series shall be taken into account when further episodes are examined.

#### Section 23 - Reporting

Persons responsible for news reporting are urged to refrain from showing the victims of crime, accidents or disasters in a voyeuristic manner. For example, when the victims of war or other violent conflicts are shown, the relevance of the images to the news story shall be carefully weighed up against the dignity and privacy of the person portrayed.

## Protection of Human Dignity and Prohibition of Hate Speech

### **The International Covenant on Civil and Political Rights (ICCPR).**

Available at: [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)  
For quotes of some relevant articles see text by Tarlach McGonagle

### **The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).**

Available at: [http://www.unhchr.ch/html/menu3/b/d\\_icerd.htm](http://www.unhchr.ch/html/menu3/b/d_icerd.htm)  
For quotes of some relevant articles see text by Tarlach McGonagle

### **The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)**

Available at: <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>  
For quotes of some relevant articles see text by Tarlach McGonagle

### **Council of Europe Committee of Ministers, Recommendation No. R (97) 20 of the Committee of Ministers to Member States on «Hate Speech» (Adopted by the Committee of Ministers on 30 October 1997, at the 607<sup>th</sup> meeting of the Minister's Deputies).**

Available in English at <http://www.coe.fr/cm/ta/rec/1997/97r20.html>  
and in French at <http://cm.coe.int/ta/rec/1997/f97r20.html>

### International Mechanisms for Promoting Freedom of Expression

#### **JOINT STATEMENT ON RACISM AND THE MEDIA**

by

#### **The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression**

[..]

#### **Adopt the following Joint Statement:**

Promoting an optimal role for the media in the fight against racism, discrimination, xenophobia and intolerance requires a comprehensive approach which includes an appropriate civil, criminal and administrative law framework, and which promotes tolerance, including through education, self-regulation and other positive measures.

These efforts must be taken with the realisation that respect for freedom of expression and information ensures that all citizens have access to information which helps them form their opinions and challenges their views, and which they need to make decisions.

#### Civil, Criminal and Administrative Law Measures

Any civil, criminal or administrative law measures that constitute an interference with freedom of expression must be provided by law, serve a legitimate aim as set out in international law and be necessary to achieve that aim. This implies that any such measures are clearly and narrowly defined, are applied by a body which is independent of political, commercial or other unwarranted influences and in a manner which is neither arbitrary nor discriminatory, and are subject to adequate safeguards against abuse, including the right of access to an independent court or tribunal. If these safeguards are not in effect, there is a very real possibility of such measures being abused, particularly where respect for human rights and democracy is weak, and hate speech laws have in the past been used against those they should be protecting.

In accordance with international and regional law, hate speech laws should, at a minimum, conform to the following:

- no one should be penalised for statements which are true;
- no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- no one should be subject to prior censorship; and
- any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

These standards should also apply to new communications technologies such as the Internet, which are of enormous value in promoting the right to freedom of expression and the free flow of information and ideas, particularly across frontiers and at the global level. Any restrictions on these new communications technologies should not:

- limit or restrict the free flow of information and ideas protected by the right to freedom of expression; or
- enable the authorities to interfere with the work of, or intimidate, human rights defenders.

Defamation laws have in some cases been used to limit the right to freely identify and openly combat racism, discrimination, xenophobia and intolerance. To prevent this from happening, defamation laws should be brought into line with international standards on freedom of expression, in particular as outlined in our Joint Declaration of 30 November 2000.

#### Freedom of Information

The free flow of information and ideas is one of the most powerful ways of combating racism, discrimination, xenophobia and intolerance. There should be free access to information which exposes or otherwise helps to combat these problems, whether that information is held by public or private bodies, unless denial of access can be justified as being necessary to protect an overriding public interest. In addition, States should ensure that the public has adequate access to reliable information relating to racism, discrimination, xenophobia and intolerance including, where necessary, through the collection and dissemination of such information by public authorities.

#### Promoting Tolerance

Media organisations, media enterprises and media workers – particularly public service broadcasters – have a moral and social obligation to make a positive contribution to the fight against racism, discrimination, xenophobia and intolerance. There are many ways in which these bodies and individuals can make such a contribution, including by:

- designing and delivering media training programmes which promote a better understanding of issues relating to racism and discrimination, and which foster a sense of the moral and social obligations of the media to promote tolerance and knowledge of the practical means by which this may be done;
- ensuring that effective ethical and self-regulatory codes of conduct prohibit the use of racist terms and prejudicial or derogatory stereotypes, and unnecessary references to race, religion and related attributes;
- taking measures to ensure that their workforce is diverse and reasonably representative of society as a whole;
- taking care to report factually and in a sensitive manner on acts of racism or discrimination, while at the same time ensuring that they are brought to the attention of the public;
- ensuring that reporting in relation to specific communities promotes a better understanding of difference and at the same time reflects the perspectives of those communities and gives members of those communities a chance to be heard; and
- promoting a culture of tolerance and a better understanding of the evils of racism and discrimination.

*The following material has been reprinted with the kind permission of the Swedish Press Ombudsman.*

## **Code of Ethics for the Swedish Press, Radio and Television**

Issued by *Pressens Samarbetsnämnd*, 1999

*Pressens Samarbetsnämnd* is a Joint Committee founded by the leading media organisations in Sweden: The Newspapers Publishers Association, The Union of Journalists and The National Press Club.

These three organisations are responsible for the Charter of the Press Council and the Standing Instructions for the Press Ombudsman. They all contribute to the financing of the Press Council and the Office of the Press Ombudsman.

The concept of self-regulation means that the parties formulate the ethical and professional guidelines and see to it that these guidelines are respected.

The Press Ombudsman  
Box 12708  
S-112 94 Stockholm  
SWEDEN  
Tel: 0046-8-692 46 00

### **CODE OF ETHICS FOR THE PRESS, RADIO AND TELEVISION**

The press, radio and television shall have the greatest possible degree of freedom, within the framework of the Freedom of the Press Act and the constitutional right of freedom of speech, in order to be able to serve as disseminators of news and as scrutinizers of public affairs. In this connection, however, it is important that the individual is protected from unwarranted suffering as a result of publicity.

Ethics does not consist primarily in the application of a formal set of rules but in the maintenance of a responsible attitude in the exercise of journalistic duties. The code of ethics for the press, radio and television is intended to provide support for this attitude.

#### **I. RULES ON PUBLICITY**

##### **Provide accurate news**

1. The role played by the mass media in society and the confidence of the general public in these media call for accurate and objective news reports.
2. Be critical of news sources. Check facts as carefully as possible in the light of the circumstances even if they have been published earlier. Allow the reader/listener/viewer the possibility of distinguishing between statements of fact and a comments.
3. Newsbills, headlines and introductory sections must be supported by the text.
4. Make sure of the authenticity of pictures. See to it that pictures and graphical illustrations are correct and are not used in a misleading way.

##### **Treat rebuttals generously**

5. Factual errors are to be corrected when called for. Anyone wishing to rebut a statement shall, if this is legitimate, be given the opportunity to do so. Corrections and rebuttals shall be published promptly in appropriate form, in such a way that they will come to the attention of those who received the original information. It should be noted that a rebuttal does not always call for an editorial comment.
6. Publish without delay statements of censure issued by the Swedish Press Council in cases concerning your own newspaper.

##### **Respect individual privacy**

7. Be careful in giving publicity where it can trespass upon an individual's privacy. Refrain from such action unless it is obviously in the public interest.

8. Exercise great caution in publishing notices concerning suicide and attempted suicide, particularly out of consideration for the feelings of relatives and in view of what has been said above concerning the privacy of the individual.
9. Always show the greatest possible consideration for victims of crime and accidents. Carefully check names and pictures for publication out of consideration for the victims and their relatives.
10. Do not emphasize race, sex, nationality, occupation, political affiliation, religious persuasion or sexual disposition in the case of the persons concerned if such particulars are not important in the context or are disparaging.

#### **Exercise care in the use of pictures**

11. Where applicable, these rules also apply to pictures.
12. Making a montage, retouching a picture by an electronic method, or formulating a picture caption should not be performed in such a way as to mislead or deceive the reader. Always state, close to the picture, whether it has been altered by montage or retouching. This also applies to such material when it is filed.

#### **Listen to each side**

13. Endeavour to give people, who are criticized in a factual report the opportunity, at the same time, to reply to the criticism. Endeavour also to state the views of all parties involved. Bear in mind that the sole objective of reports of various kinds may be to cause harm to the subjects of the reports.
14. Remember that, in the eyes of the law, a person suspected of an offence is always presumed to be innocent until he is proved guilty. The final outcome of a case that is described should be reported.

#### **Be cautious in publishing names**

15. Give careful thought to the harmful consequences that might follow for persons if their names are published. Refrain from publishing names unless it is obviously in the public interest.
16. If a person's name is not to be stated, refrain from publishing a picture or particulars of occupation, title, age, nationality, sex, etc., which would enable the person in question to be identified.
17. Bear in mind that the entire responsibility for publication of names and pictures rests with the publisher of the material.

#### **COMMENTS ON PART I**

Where the press is concerned, the Swedish Press Council is primarily responsible for interpreting the concept "good journalistic practice"; in matters not referred to the Press Council, the Press Ombudsman has this responsibility. It should be noted that the Press Council and the Press Ombudsman do not deal with cases of departure from the rules applying to radio or television programmes. The Broadcasting Commission, appointed by the Swedish government, is responsible for scrutinizing such programmes.

In addition to the criticized newspaper, the Press Council's ruling, in the form of a brief factual report, is published in *Pressens Tidning* (Press Journal) and in *Journalisten* (The Journalist). A subscription for Press Council decisions may be placed with the Swedish Newspaper Publishers Association (*Tidningsutgivarna*).

Rulings given by the Broadcasting Commission may be requested from the Commission Secretariat.

99-11-22

## European Telecommunications Standards Institute (ETSI) Directives – April 2002

*This material has been reprinted with the kind permission of the Telecommunications Standards Institute (ETSI)*

*The full text of all ETSI Directives is available at <http://portal.etsi.org/directives/home.asp>*

### Foreword

These ETSI Directives contain the following individual documents:

- ETSI Statutes;
- ETSI Rules of Procedure;
- ETSI Board Working Procedures;
- Powers and Functions of the Board;
- ETSI Financial Regulations;
- Terms of Reference of the Operational Co-ordination Group (OCG);
- ETSI Technical Working Procedures.

[...]

### Statutes of the European Telecommunications Standards Institute

**Version adopted by General Assembly #36 on 22 November 2000.**

...

#### Article 1: The Institute

In accordance with the French law of 1 July 1901 and the decree of 16 August 1901, an association is founded by the signatories to these Statutes.

The Association shall have the title "EUROPEAN TELECOMMUNICATIONS STANDARDS INSTITUTE" and may be known by the acronym "ETSI" and hereinafter referred to as the Institute.

The European Telecommunications Standards Institute shall be non-profit making.

#### Article 2: Purpose

The objective of the Institute is to produce and perform the maintenance of the technical standards and other deliverables which are required by its members. As a recognized European standards organization, an important task shall be to produce and perform the maintenance of the technical standards which are necessary to achieve a large unified European market for telecommunications and related areas.

At the international level, the Institute shall aim to contribute to world-wide standardization in the fields described above.

The objective of the Institute may be achieved by any means. The Institute may carry out any action relating directly or indirectly, wholly or in part, to its objective or which may develop or facilitate the achievement of its objective.

#### Article 3: Scope of activities

The principal role of the Institute shall be technical pre-standardization and standardization at the European level in the following fields:

- Telecommunications
- Areas common to telecommunications and information technology in co-ordination with CEN and CENELEC
- Areas common to telecommunications and broadcasting (especially audio-visual and multi-media matters) in co-ordination with CEN, CENELEC and the EBU.

In addition, the Institute shall be open to co-operation with other organizations when appropriate.

The activities of the Institute shall contribute to the production and the promotion of new harmonized world-wide standards and furthermore shall build upon world-wide standards, existing or in preparation.

....

#### Article 6: Membership

6.1 Membership of the Institute shall be divided into the following categories:

- Administrations, Administrative Bodies and National Standards Organizations
- Network Operators
- Manufacturers
- Users
- Service Providers, Research Bodies, Consultancy Companies/Partnerships, and others

....



## Rules of Procedure of the European Telecommunications Standards Institute

Version adopted by General Assembly #39 on 18 April 2002.

...

### Article 1: Full membership, associate membership, observership and Counsellor status

....

#### 1.5 Counsellors' Status

Representatives of the European Commission as well as representatives of the Secretariat of the European Free Trade Association (EFTA) shall have a special status as Counsellors.

Counsellors have the right to attend the meetings of the General Assembly, and may participate in the work of the Board, of Special Committees and of the Technical Organization, without the right to vote.

### Article 2: Structure

ETSI shall consist of:

- a General Assembly
- a Board
- a Technical Organization
- Special Committees
- a Secretariat headed by the Director-General assisted by the Deputy Director-General.

...

### Article 6: Technical Organization

6.1 The Institute shall have a Technical Organization, which provides a structure in which technical experts can work together efficiently and effectively. The work of the Technical Organization shall be structured to provide for market-driven technologically-oriented activities in Technical Committees and ETSI Projects and in ETSI Partnership Projects. Specialist Task Forces may be established to fulfil specific tasks, of a limited duration, in support of the standardization activities.

6.2 The Technical Organization shall be defined in the Technical Working Procedures in such a way that it is open and transparent to all ETSI Members, as well as to all other organizations with which ETSI maintains working relations.

6.3 The Technical Organization shall be supported by the ETSI Secretariat.

6.4 The General Assembly shall ensure that the Technical Organization is kept in line with the requirements of ETSI members to ensure effective, market-oriented standardization and that the Technical Organization is able to respond to standards-based regulatory needs.

...

### Article 13: Elaboration, Approval and Implementation of European Standards

#### **13.1 Elaboration**

ETSI shall adopt and publish European Standards (ENs) in the telecommunications series in accordance with the provisions of this Article. Other ETSI deliverables shall be prepared according to Article 14 or the Technical Working Procedures as appropriate.

#### **13.2 National Standards Organizations**

Each National Delegation shall inform the Director-General and the relevant Counsellor, in writing, of the recognized National Standards Organization or organizations (hereafter referred to as NSOs) having the exclusive responsibility for carrying out the standstill, the Public Enquiry, the establishment of the national position for the vote, and the transposition requirements, and those relating to the withdrawal of standards referred to in this Article, together with their rules which govern how these functions are carried out.

Any member and the Counsellors shall have the right to inspect a copy of these rules held by the Director-General and bring to the attention of the General Assembly any problems arising from their application.

The respective responsibilities of ETSI and NSOs according to this Article shall be laid down in a Memorandum of Understanding signed by ETSI and each NSO.

#### **13.3 Standstill Period**

##### 13.3.1 Principles

For the purpose of these Rules of Procedure, standstill is the obligation accepted by the NSOs and the members of ETSI not to undertake any national standardization activity which could prejudice the preparation of an EN (telecommunications series) and, for the NSOs, not to publish a new or revised standard which is not completely in line with an existing EN (telecommunications series).

Standstill applies to an individual work item leading to an EN (telecommunications series) and accepted by the General Assembly, with a precise scope and target date. It does not apply to areas or programmes of work as such.

##### 13.3.2 General provisions

The decisions to impose or release standstill and associated dates shall rest with the General Assembly.

Standstill continues in force until withdrawal of the EN (telecommunications series), unless it is released by decision of the General Assembly.

Any member of ETSI or any NSO shall be entitled at any time to request a review of a standstill on a particular work item.

[...]

An NSO shall submit a written request to the General Assembly seeking derogation from standstill if, on a subject where standstill is in force and [...] the NSO wishes to:

- 1) change an existing national standard;
- 2) publish a new national standard;
- 3) adopt a draft EN (telecommunications series) as a national standard;
- 4) take any other action nationally which might prejudice the harmonization intended.

The General Assembly shall deliver a decision as rapidly as possible and in any case, not later than six months from the date of receipt of the NSO's request.

#### **13.4 Public Enquiry**

Before a draft EN (telecommunications series) is submitted for ETSI approval and notwithstanding Article 13.5, a Public Enquiry should have been carried out for this draft by the NSOs. The administration of the Public Enquiry within ETSI shall be the responsibility of the Director-General. Any comments received during the time set shall be given due consideration by ETSI.

The Director-General may, following a proposal from the Chairman of the Technical Committee, ETSI Project or ETSI Partnership Project concerned, decide to use a one-step approval procedure for EN (telecommunications series) where Public Enquiry and weighted national voting are combined in one phase.

#### **13.5 Approval Procedure**

##### **13.5.1**

A draft EN (telecommunications series) shall be approved by the weighted national voting procedure of Article 11.2.1. The national position for the vote is established in accordance with the rules referred to in Article 13.2.

##### **13.5.2**

The vote shall be taken by correspondence except where the Chairman of the General Assembly decides that the vote is to be taken at a meeting [...]

##### **13.5.3**

When the vote on a draft EN (telecommunications series) has taken place, a separate counting of the votes of the EU countries shall take place according to Article 148 of the EU Treaty. The result of this separate counting shall determine whether or not the standard shall be adopted in the EU countries. A standard thus adopted in the EU countries shall also be adopted in other countries having voted in favour of the said standard.

#### **13.6 Withdrawal Procedure**

An EN (telecommunications series) may be withdrawn using the procedure given in Article 13.5.

#### **13.7 National transposition and national withdrawal**

- National transposition

The NSOs shall take measures to ensure the visibility of EN (telecommunications series) at national level, either by publication of an identical text, or by endorsement (that is, by publication of an endorsement sheet or by announcement in an official journal) within a short time of their adoption according to Article 13.5. [...]

ENs (telecommunications series) thus published or endorsed shall have the status of national standards.

- National withdrawal

When an EN (telecommunications series) has been approved and adopted according to Article 13.5 on a specific matter, then on an agreed date set by the General Assembly, the NSOs shall ensure that all conflicting national standards on that specific matter are withdrawn.

#### **13.8 World-wide Telecommunications Standardization**

The promotion of ETSI documents as the basis of world-wide recommendations and standards shall be supported by the members within world-wide organizations, particularly in the ITU and in the context of relevant agreements with standardization organizations such as ISO/IEC JTC1.

Where world-wide recommendations and standards exist or are in preparation, the activities of ETSI shall build upon and contribute to them.

The General Assembly shall be responsible for approving arrangements for the promotion of ETSI documents as described above.

In addition, members of ETSI shall support common positions for the ITU which have been adopted by the General Assembly, in so far as such support is compatible with their obligations under European or national law.

#### **Article 14: Elaboration, approval and implementation of ETSI Standards and ETSI Guides**

ETSI may publish documents known as ETSI Standards (ESs) and ETSI Guides (EGs). Such documents shall be drawn up by Technical Committees, ETSI Projects or ETSI Partnership Projects, or be received from other sources, and shall, following approval at that level, be submitted to the Director-General for the membership approval process. Adoption shall be by the weighted voting procedure contained in Articles 11.2.2, 11.2.3 and 11.3. Following adoption, the Director-General shall publish the EGs or ESs.

All full members and all associate members shall have the right to vote for adoption of ETSI Guides (EGs) and ETSI Standards (ESs). If the deliverable is not adopted as a result of the vote, an analysis of the distribution of the votes among associate members and full members shall be conducted. The deliverable shall be adopted for use within Europe if at least 71 % of the weighted votes cast by full members are positive.

EGs and ESs may be withdrawn following a vote by the membership under the procedure contained in Articles 11.2.2 and 11.2.3; ESs may be converted into ENs (telecommunication series) following a Public Enquiry and formal vote according to the provisions of Article 13.

**Article 15: Relationship of ETSI to other Bodies**

ETSI shall co-operate with other European, regional and world-wide organizations in order to obtain proper coordination of relevant standardization activities, the necessary alignment of relevant parts of their working rules and a common approach to future developments in the area of standardization in Europe and at the international level.

....

**ETSI Technical Working Procedures**

**Version adopted by Board #36, 06 December 2001**

**Introduction**

These procedures complement the ETSI Rules of Procedure and apply to all methods of working used by the Technical Organization, including electronic working methods.

[...]

...

**1.6.6 Draft Harmonized Standards prepared under an EC/EFTA mandate**

ETSI may be mandated to draft *ETSI deliverables* that are intended for use in the context of European legislation or policies. The relevant *work items* shall be created by the relevant *Technical Bodies* and they shall be flagged as *Harmonized Standards*.

...

**1.7 Decision making**

**1.7.1 Principles of decision making**

A *Technical Body* shall endeavour to reach *consensus* on all issues, including the approval of draft *ETSI deliverables* and the adoption of *Technical Specifications* and *Technical Reports*. If *consensus* cannot be achieved, the Chairman can decide to take a vote which may be performed by a secret ballot. A vote may be conducted during a *Technical Body* meeting or by correspondence.

Where voting is used, vote results shall be evaluated by the Chairman using the individual weighting of each ETSI full or associate member as described in Article 11 of the Rules of Procedure.

A proposal shall be deemed to be approved if 71 % of the votes cast are in favour. Abstentions or failure to submit a vote shall not be included in determining the number of votes cast.

If a proposal fails to achieve 71 %, the result shall be re-calculated using the votes of ETSI full members only. If the re-calculated result achieves 71 %, the proposal shall be deemed to be approved.

[...]

**1.7.1.1 Voting during a Technical Body meeting**

The following procedures apply for voting during a *Technical Body* meeting:

- before voting, a clear definition of the issues shall be provided by the Chairman;
- if an ETSI full or associate member has more than one representative, only one may vote;
- if manual voting procedures are used, each ETSI full or associate member may only cast the vote once. If electronic voting procedures are used, votes may be changed prior to the closure of the vote;
- the opinions of Counsellors (and in the case of ENs or regulatory documents, associate members) should be noted;
- voting by proxy is not permitted;
- there are no quorum requirements and vote splitting is not permitted;
- the result of the vote shall be recorded in the meeting report.

...

**1.8 Liaising with other bodies**

These procedures complement the Articles 13.8 and 15 of the ETSI Rules of Procedure.

**1.8.1 General**

The *Technical Bodies* should be aware of alignment/compatibility with existing standardization and regulation activities in other bodies, especially CEN and CENELEC in Europe and the international organizations, e.g. IEC, ISO, ITU etc.

*Technical Body* Chairmen should ensure that they are aware of all the relevant agreements with other organizations and that they abide by the agreements as far as they concern the work of the *Technical Bodies*.

**1.8.2 Promotion of ETSI documents in the International Telecommunications Union (ITU)**

**1.8.2.1 Policy matters and information of a general nature**

The Director General is responsible for the promotion of general ETSI policies and for submitting ETSI material of a general nature to the ITU.

#### 1.8.2.2 Support for a common ETSI position adopted by the General Assembly

Where an *EN* or an *ES* exists, or the General Assembly has adopted a common position on a matter of strategic importance, ETSI has taken a formal and definitive position which members shall support in the ITU (in so far as such support is compatible with their obligations under European or national law).

The primary *Technical Body* for co-ordinating the ETSI position for the ITU Study Group concerned shall prepare proposals for decision by the General Assembly on the subject matter and on the strategy to be followed.

The contribution to the ITU shall be submitted as an ETSI contribution, and it shall indicate that it presents an agreed ETSI position.

#### 1.8.2.3 Support for an ETSI contribution agreed by a Technical Body

A *Technical Body* may approve, and submit, a common contribution to the ITU. This requires that the subject is mature enough and that the contribution is agreed using the decision making procedures defined in clause 1.7. ETSI members are encouraged, but not formally obliged, to support the contribution in the ITU.

The contribution should be submitted in the name of one ETSI member which is also a member of the ITU. The contribution should indicate that it presents an agreed position of the ETSI *Technical Body* which approved it.

Changes to the agreed contribution and strategy during an ITU meeting should only occur after consultation amongst the ETSI members attending the meeting.

Individual ETSI members remain free to make their own proposals but, it shall be made clear that in doing so, they are **not** speaking on behalf of ETSI.

...

## 2. Handling of ETSI deliverables

These procedures complement Articles 13 and 14 of the ETSI Rules of Procedure.

### 2.1 Drafting rules

The drafting of an *ETSI deliverable* within a *Technical Body* shall follow the *ETSI Drafting Rules*, using document processing facilities, format, languages and notations advised by the ETSI Secretariat, and on a medium suited for electronic document handling and publishing.

### 2.2 Approval procedures

#### 2.2.1 EN - European Standard (telecommunications series)

##### 2.2.1.1 Adoption

An *EN* (telecommunications series) shall be adopted by application of the *Two-step Approval Procedure* (see Articles 13.4 and 13.5 of the Rules of Procedure), or the *One-step Approval Procedure* (see Article 13.4 of the Rules of Procedure).

The *One-step Approval Procedure* may be used where the *ETSI deliverable* is being converted without modifications, other than of an editorial nature, from an existing *ES* to an *EN* (telecommunications series), or the *ETSI deliverable* has a high degree of maturity.

The approval procedure may in justified cases be interrupted by the responsible *Technical Body*.

##### 2.2.1.1.1 Two-step approval procedure

- The draft, approved by the *Technical Body*, shall be submitted to the ETSI Secretariat within 30 days of the *Technical Body* approval for the *ETSI deliverable* to be despatched for *Public Enquiry*. [...], the ETSI Secretariat shall prepare the draft for submission to the *National Standards Organizations* within 30 days [...].
  - The *National Standards Organizations* shall perform the *Public Enquiry* over a period of 120 days and submit the resulting national comments to the ETSI Secretariat by the *Public Enquiry* closing date. [...]
  - The ETSI Secretariat shall, within 15 days, prepare a compilation of the *Public Enquiry* comments received from *National Standards Organizations* and make them available to the *Technical Body*, the *National Standards Organizations*, the ETSI members, and the ETSI Counsellors.
  - If no comments or only editorial comments have been received during *Public Enquiry*, the ETSI Secretariat shall prepare a final draft for submission to the *National Standards Organizations* for vote within 15 days [...].
  - If technical comments are received during *Public Enquiry*, the *Technical Body* Chairman shall, within a period of 60 days, organize the resolution of the comments received, the preparation of a revised draft, approval of the revised draft at *Technical Body* level, and submission of the revised draft to the ETSI Secretariat. [...]
  - [...], the ETSI Secretariat shall prepare the revised draft for submission to the *National Standards Organizations* for vote within 30 days [...].
  - The *National Standards Organizations* shall undertake national consultations over a period of 60 days and submit the resulting national position (*vote*) to the ETSI Secretariat by the *vote* closing date. [...]. The *vote* cast by each *National Standards Organization* shall be an unconditional "yes" (in favour), a "no" (not in favour), or an abstention. A "no" *vote* shall be accompanied by comments indicating the reason why the draft is not acceptable.
  - The Chairman of the General Assembly may decide that the *vote* shall be taken at a General Assembly meeting. [...]
  - [...]
- The ETSI Secretariat shall, within 15 days, prepare a voting report. [...]

- If the *vote* is unsuccessful, the *Technical Body* Chairman shall decide on how to proceed with the *ETSI work item*. The comments accompanying “no” *votes* shall be passed to the *Technical Body* Chairman for eventual consideration.
- If the *vote* is successful the draft shall be adopted and the ETSI Secretariat shall, within 15 days, publish the *EN* (telecommunications series) without modification (other than editorial). The comments accompanying “no” *votes* shall be passed to the *Technical Body* Chairman for consideration and stored for eventual, later revision of the *EN* (telecommunications series).

#### 2.2.1.1.2 One-step Approval Procedure

- The draft, approved by the *Technical Body*, shall be submitted to the ETSI Secretariat within 30 days of the *Technical Body* approval for the *ETSI deliverable* to be despatched for combined *Public Enquiry* and *vote*. [...], the ETSI Secretariat shall prepare the draft for submission to the *National Standards Organizations* within 30 days [...].
- The *National Standards Organizations* shall undertake national consultations over a period of 120 days and submit the resulting national position (*vote*) to the ETSI Secretariat by the *vote* closing date. [...] The *vote* cast by an *National Standards Organization* shall be an unconditional “yes” (in favour), a “no” (not in favour), or an abstention. A “no” *vote* shall be accompanied by comments indicating the reason why the draft is not acceptable.

The Chairman of the General Assembly may decide that the *vote* shall be taken at a General Assembly meeting. [...]

- [...] The ETSI Secretariat shall prepare a voting report within 15 days. [...]
- If the *vote* is unsuccessful, the *Technical Body* Chairman shall decide on how to proceed with the *ETSI work item*. The comments accompanying “no” *votes* shall be passed to the *Technical Body* Chairman for eventual consideration.
- If the *vote* is successful the draft shall be adopted and the ETSI Secretariat shall, within 15 days, publish the *EN* (telecommunications series) without modification (other than editorial). The comments accompanying “no” *votes* shall be passed to the *Technical Body* Chairman for consideration and stored for eventual later revision of the *EN* (telecommunications series).

#### 2.2.1.2 Maintenance

Subsequent versions of an *EN* (telecommunications series) may be adopted by application of the *One-step Approval Procedure*. [...]

When a need for technical maintenance is identified and where the deliverable was produced by a *Technical Body* which no longer exists, the ETSI Secretariat shall attempt to find an appropriate, existing *Technical Body* to perform the maintenance. [...]

#### 2.2.1.3 Withdrawal

An *EN* (telecommunications series) can be withdrawn according to the following procedure (see Article 13.6 of the Rules of Procedure).

The withdrawal can comprise one, several or all versions of an *EN* (telecommunications series).

Before launching the procedure for the withdrawal of a standard, the ETSI Secretariat shall verify with the European Commission whether or not the standard is referenced in any European regulatory text. Where the standard is referenced in a European regulatory text, the procedure shall take into account the transition period required, by the European Commission, to amend the reference.

If the *EN* (telecommunications series) is normatively referenced in another *ETSI deliverable*, it shall not be withdrawn unless a suitable solution for replacing these normative references has been found.

- The withdrawal proposal, approved by the *Technical Body*, shall be submitted to the ETSI Secretariat without delay. The ETSI Secretariat shall prepare the proposal for submission to the *National Standards Organizations* within 15 days [...].
- The *National Standards Organizations* shall undertake national consultations over a period of 60 days and submit the resulting national position (*vote*) to the ETSI Secretariat by the *vote* closing date. [...] The *vote* cast by each *National Standards Organization* shall be an unconditional “yes” (in favour), a “no” (not in favour), or an abstention. A “no” *vote* shall be accompanied by comments indicating the reason why withdrawal of the *EN* (telecommunications series) is not acceptable. The Chairman of the General Assembly may decide that the *vote* shall be taken at a General Assembly meeting. [...]
- [...] The ETSI Secretariat shall prepare a voting report within 15 days. [...]
- If the *vote* is unsuccessful, the *EN* (telecommunications series) shall not be withdrawn. All accompanying comments shall be stored for future consideration of withdrawal.
- If the *vote* is successful, the ETSI Secretariat shall, within 15 days, withdraw the *EN* (telecommunications series) which will be flagged as “withdrawn” in the *ETSI work programme*.

### 2.2.2 An *EN* (telecommunications series) qualified as a *Harmonized Standard*

#### 2.2.2.1 Adoption

If an *EN* (telecommunications series) is intended to become a *Harmonized Standard* it shall be adopted by the application of the *Two-step Approval Procedure*. If an *EN* (telecommunications series) qualified as a *Harmonized Standard* is based on an existing adopted *ETS*, *EN* or *TBR*, it may be adopted either by the application of the *One-step Approval Procedure* or by the application of the *Two-step Approval Procedure*.

#### 2.2.2.2 Maintenance

Subsequent versions of an *EN* (telecommunications series) qualified as a *Harmonized Standard* may be adopted

either by the application of the *One-step Approval Procedure* or by the application of the *Two-step Approval Procedure*. The choice of procedure is at the discretion of the relevant *Technical Body*. [...]

When a need for technical maintenance is identified and where the deliverable was produced by a *Technical Body* which no longer exists, the ETSI Secretariat shall attempt to find an appropriate, existing *Technical Body* to perform the maintenance. [...]

#### 2.2.2.3 Withdrawal

An *EN* (telecommunications series) designated as a *Harmonized Standard* shall be withdrawn according to the withdrawal procedure for an *EN* (telecommunications series).

#### 2.2.3 ES - ETSI Standard, EG - ETSI Guide

##### 2.2.3.1 Adoption

An *ES* or an *EG* shall be adopted following the *ETSI Membership Approval Procedure* (see Article 14 of the Rules of Procedure).

The approval procedure may in justified cases be interrupted by the responsible *Technical Body*.

##### 2.2.3.1.1 Membership Approval Procedure

- The draft, approved by the *Technical Body*, shall be submitted to the ETSI Secretariat within 30 days of the *Technical Body* approval for the *ETSI deliverable* to be despatched for membership vote. [...], the ETSI Secretariat shall prepare the draft for submission to the members within 30 days.

- The vote shall be performed over a period of 60 days. This involves each ETSI full and associate member in submitting their vote to the ETSI Secretariat by the vote closing date. [...]

The vote cast by each member shall be an unconditional "yes" (in favour), a "no" (not in favour), or an abstention. A "no" vote shall be accompanied by comments indicating the reason why the draft is not acceptable.

- [...]

The ETSI Secretariat shall prepare a voting report within 15 days. [...]

- If the vote is unsuccessful, the *Technical Body* Chairman shall decide on how to proceed with the *ETSI work item*. The comments accompanying "no" votes shall be passed to the *Technical Body* Chairman for eventual consideration.

- If the vote is successful, the ETSI Secretariat shall, within 15 days, publish the *ES* or *EG* without modifications (other than editorial). The comments accompanying "no" votes shall be passed to the chairman for consideration and stored for eventual later revision of the *ES* or *EG*.

##### 2.2.3.2 Maintenance

Subsequent versions containing changes other than editorial to an *ES* or *EG* shall be approved by application of the *Membership Approval Procedure*. [...]

When a need for technical maintenance is identified and where the deliverable was produced by a *Technical Body* which no longer exists, the ETSI Secretariat shall attempt to find an appropriate, existing *Technical Body* to perform the maintenance. [...]

##### 2.2.3.3 Withdrawal

Withdrawal of an *ES* or *EG* shall be made by application of the *ETSI Membership Approval Procedure*.

The withdrawal can comprise one, several or all versions of an *ES* or an *EG*.

If the *ES* or *EG* is normatively referenced in another *ETSI deliverable*, it may not be withdrawn unless a suitable solution for replacing the relevant reference has been found.

- The withdrawal proposal, approved by the *Technical Body*, shall be submitted to the ETSI Secretariat without delay. The ETSI Secretariat shall, within 15 days, prepare the proposal for submission to the members.

- The withdrawal vote shall be performed over a period of 60 days. This involves each ETSI full and associate member in submitting their vote to the ETSI Secretariat by the vote closing date. [...]

The vote cast by each member shall be an unconditional "yes" (in favour), a "no" (not in favour), or an abstention. A "no" vote shall be accompanied by comments indicating the reason why withdrawal of the *ES* or *EG* is not acceptable.

- [...]

The ETSI Secretariat shall prepare a voting report within 15 days. [...] Comments accompanying "no" votes shall be passed to the *Technical Body* Chairman for eventual consideration.

- If the vote is unsuccessful, the *ES* or *EG* shall not be withdrawn. Comments accompanying "no" votes shall be stored for future consideration of withdrawal.

- If the vote is successful, the ETSI Secretariat shall, within 15 days, withdraw the *ES* or *EG* which will be flagged as "withdrawn" in the *ETSI work programme*.

# Background Material

## **Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce)**

...

### **Chapter III Implementation**

#### **Article 16 Codes of conduct**

1. Member States and the Commission shall encourage:

(a) the drawing up of codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(c) the accessibility of these codes of conduct in the Community languages by electronic means;

(d) the communication to the Member States and the Commission, by trade, professional and consumer associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce;

(e) the drawing up of codes of conduct regarding the protection of minors and human dignity.

2. Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with paragraph 1 (a). Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.

## **Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on Free Movement of Such Data**

...

### **Chapter V Codes of Conduct**

#### **Article 27**

1. The Member States and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper implementation of the national provisions adopted by the Member States pursuant to this Directive, taking account of the specific features of the various sectors.

2. Member States shall make provision for trade associations and other bodies representing other categories of controllers which have drawn up draft national codes or which have the intention of amending or extending existing national codes to be able to submit them to the opinion of the national authority.

3. Draft Community codes, and amendments or extensions to existing Community codes, may be submitted to the Working Party referred to in Article 29. This Working Party shall determine, among other things, whether the drafts submitted to it are in accordance with the national provisions adopted pursuant to this Directive. If it sees fit, the authority shall seek the views of data subjects or their representatives. The commission may ensure appropriate publicity for the codes which have been approved by the Working Party.



## **Council Recommendation of 24 September 1998 on the Development of the Competitiveness of the European Audiovisual and Information Services Industry by Promoting National Frameworks Aimed at Achieving a Comparable and Effective Level of Protection of Minors and Human Dignity (98/560/EC)**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 130 thereof,

Having regard to the Commission's proposal,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

(1) Whereas the Commission adopted the Green Paper on the protection of minors and human dignity in audiovisual and information services on 16 October 1996 and the Council received it favourably at its meeting on 16 December 1996;

(2) Whereas the European Parliament, the Economic and Social Committee and the Committee of the Regions have all adopted opinions on the Green Paper;

(3) Whereas the conclusions of the consultation process were submitted by the Commission to the Council at its meeting of 30 June 1997 and unanimously welcomed;

(4) Whereas on 16 October 1996, the Commission adopted the communication on illegal and harmful content on the Internet; whereas on 17 February 1997 the Council and the representatives of the Governments of the Member States, meeting within the Council, adopted the resolution on illegal and harmful content on the Internet; whereas on 24 April 1997 the European Parliament adopted an opinion on the Commission communication on illegal and harmful content on the Internet; whereas this work is continuing in a manner complementary to the present recommendation since it deals with all forms of illegal and harmful content specifically on the Internet;

(5) Whereas the present recommendation addresses, in particular, issues of protection of minors and of human dignity in relation to audiovisual and information services made available to the public, whatever the means of conveyance (such as broadcasting, proprietary on-line services or services on the Internet);

(6) Whereas, in order to promote the competitiveness of the audiovisual and information services industry and its adaptation to technological development and structural changes, the provision of information, the raising of awareness and the education of users are essential; whereas this is also a condition of the European citizen's full participation in the information society; whereas, therefore, in addition to measures to protect minors and to combat illegal content offensive to human dignity, legal and responsible use of information and communication services should be encouraged, through the exercise, *inter alia*, of parental control measures;

(7) Whereas Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, and in particular Articles 22, 22a and 22b of Directive 89/552/EEC, lays down a full range of measures aimed at the protection of minors with regard to television broadcasting for the purposes of ensuring the free movement of television broadcasts;

(8) Whereas the development of audiovisual and information services is of vital importance for Europe in view of their significant potential in the fields of education, access to information and culture, economic development and job creation;

(9) Whereas full achievement of this potential requires the existence of a successful and innovative industry in the Community; whereas it is in the first instance incumbent on businesses to ensure and improve their competitiveness with the support of public authorities where appropriate;

(10) Whereas the establishment of the climate of confidence needed to achieve the potential of the audiovisual and information services industry by removing obstacles to the development and full competitiveness of the said industry is promoted by the protection of certain important general interests, in particular the protection of minors and of human dignity;

(11) Whereas the general competitiveness of the European audiovisual and information services industry will improve through the development of an environment that favours cooperation between the enterprises in the sector on matters concerning the protection of minors and human dignity;

(12) Whereas the existence of certain technological conditions enables a high level of protection of the abovementioned important general interests, in particular the protection of minors and human dignity, and, consequently, the acceptance by all users of these services;

(13) Whereas it is important therefore to encourage enterprises to develop a national self-regulatory framework through cooperation between them and the other parties concerned; whereas self-regulation could provide enterprises with the means to adapt themselves rapidly to the quickening technical progress and to market globalisation;

(14) Whereas the protection of general interests sought in this manner must be seen in the context of the fundamental principles of respect for privacy and freedom of expression, as enshrined in Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and as recognised by Article

F(2) of the Treaty on European Union and by the case-law of the Court of Justice as general principles of Community law;

(15) Whereas any restriction of these rights and freedoms must be non-discriminatory, necessary to achieving the desired objective and strictly proportional with regard to the limitations it imposes;

(16) Whereas the global nature of communications networks necessitates an international approach to the question of the protection of minors and human dignity in audiovisual and information services; whereas, in this context, the development of a common indicative framework at European level makes it possible both to promote European values and make a decisive contribution to the international debate;

(17) Whereas it is vital to distinguish between questions relating to illegal content which is offensive to human dignity and those relating to content that is legal, but liable to harm minors by impairing their physical, mental or moral development; whereas these two types of problem may require a different approach and different solutions;

(18) Whereas the national laws in which Member States have laid down rules and principles on the protection of minors and human dignity reflect cultural diversity and national and local sensitivities; whereas, in this regard, particular attention must be paid to the application of the principle of subsidiarity;

(19) Whereas, in view of the transnational nature of communications networks, the effectiveness of national measures would be strengthened, at Community level, by coordination of national initiatives, and of the bodies responsible for their implementation, in accordance with the respective responsibilities and functions of the parties concerned and by the development of cooperation and the sharing of good practices in relevant areas;

(20) Whereas, as a supplementary measure, and with full respect for the relevant regulatory frameworks at national and Community level, greater self-regulation by operators should contribute to the rapid implementation of concrete solutions to the problems of the protection of minors and human dignity, while maintaining the flexibility needed to take account of the rapid development of audiovisual and information services;

(21) Whereas the contribution of the Community, the aim of which will be to supplement Member States' measures to protect minors and human dignity in audiovisual and information services, should be based on the maximum use of existing instruments;

(22) Whereas there should be close coordination of the various relevant initiatives conducted in parallel with the follow-up to the Green Paper, particularly the work on the follow-up to the communication on 'Illegal and Harmful Content on the Internet', including the resolution adopted by the Council and the representatives of the Governments of the Member States meeting within the Council on 17 February 1997, the 1997 European Parliament resolution and the two working party reports submitted to the Council on 28 November 1996 and 27 June 1997, work carried out according to the provisions of Article 22b of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities and the work on cooperation on justice and home affairs;

(23) Whereas the implementation of this recommendation will be closely coordinated with that of any possible new measure resulting from the work on the follow-up to the Commission communication on illegal and harmful content on the Internet,

**I. HEREBY RECOMMENDS** that the Member States foster a climate of confidence which will promote the development of the audiovisual and information services industry by:

(1) promoting, as a supplement to the regulatory framework, the establishment on a voluntary basis of national frameworks for the protection of minors and human dignity in audiovisual and information services through:

- the encouragement, in accordance with national traditions and practices, of the participation of relevant parties (such as users, consumers, businesses and public authorities) in the definition, implementation and evaluation of national measures in the fields covered by this recommendation,
- the establishment of a national framework for self-regulation by operators of on-line services, taking into account the indicative principles and methodology described in the Annex,
- cooperation at Community level in developing comparable assessment methodologies;

(2) encouraging broadcasters in their jurisdiction to carry out research and to experiment, on a voluntary basis, with new means of protecting minors and informing viewers, as a supplement to the national and Community regulatory frameworks governing broadcasting;

(3) taking effective measures, where appropriate and feasible, to reduce potential obstacles to the development of the on-line services industry while sustaining the fight against illegal content offensive to human dignity, through:

- the handling of complaints and the transmission of the necessary information about alleged illegal content to the relevant authorities at national level,
- transnational cooperation between the complaints-handling structures, in order to strengthen the effectiveness of national measures;

(4) promoting, in order to encourage the take-up of technological developments and in addition to and consistent with existing legal and other measures regarding broadcasting services, and in close cooperation with the parties concerned:

- action to enable minors to make responsible use of on-line audiovisual and information services, notably by improving the level of awareness among parents, educators and teachers of the potential of the new services and of the means whereby they may be made safe for minors,

– action to facilitate, where appropriate and necessary, identification of, and access to, quality content and services for minors, including through the provision of means of access in educational establishments and public places.

**II. RECOMMENDS** that the industries and parties concerned:

(1) cooperate, in accordance with national traditions and practices, with the relevant authorities in setting up structures representing all the parties concerned at national level, in order inter alia to facilitate participation in coordination at European and international level in the fields covered by this recommendation;

(2) cooperate in the drawing up of codes of conduct for the protection of minors and human dignity applying to the provision of on-line services, inter alia to create an environment favourable to the development of new services, taking into account the principles and the methodology described in the Annex;

(3) develop and experiment, as regards broadcasting services, on a voluntary basis, with new means of protecting minors and informing viewers in order to encourage innovation while improving such protection;

(4) develop positive measures for the benefit of minors, including initiatives to facilitate their wider access to audiovisual and information services, while avoiding potentially harmful content;

(5) collaborate in the regular follow-up and evaluation of initiatives carried out at national level in application of this recommendation.

**III. INVITES** the Commission to:

(1) facilitate, where appropriate through existing Community financial instruments, the networking of the bodies responsible for the definition and implementation of national self-regulation frameworks and the sharing of experience and good practices, in particular in relation to innovative approaches, at Community level, between the Member States and parties concerned in the various fields covered by this recommendation;

(2) encourage cooperation and the sharing of experience and good practices between the self-regulation structures and complaints-handling structures, with a view to fostering a climate of confidence by combating the circulation of illegal content offensive to human dignity in on-line audiovisual and information services;

(3) promote, with the Member States, international cooperation in the various fields covered by this recommendation, particularly through the sharing of experience and good practices between operators and other concerned parties in the Community and their partners in other regions of the world;

(4) develop, in cooperation with the competent national authorities, a methodology for evaluating the measures taken in pursuance of this recommendation, with particular attention to the evaluation of the added value of the cooperation process at Community level, and present, two years after the adoption of this recommendation, an evaluation report on its effect to the European Parliament and the Council.

**ANNEX**

**INDICATIVE GUIDELINES FOR THE IMPLEMENTATION, AT NATIONAL LEVEL, OF A SELF-REGULATION FRAMEWORK FOR THE PROTECTION OF MINORS AND HUMAN DIGNITY IN ON-LINE AUDIOVISUAL AND INFORMATION SERVICES**

**Objective**

The purpose of these guidelines is to foster a climate of confidence in the on-line audiovisual and information services industry by ensuring broad consistency, at Community level, in the development, by the businesses and other parties concerned, of national self-regulation frameworks for the protection of minors and human dignity. The services covered by these guidelines are those provided at a distance, by electronic means. They do not include broadcasting services covered by Council Directive 89/552/EEC or radio broadcasting. The contents concerned are those which are made available to the public, rather than private correspondence. This consistency will enhance the effectiveness of the self-regulation process and provide a basis for the necessary transnational cooperation between the parties concerned. While taking into account the voluntary nature of the self-regulation process (the primary purpose of which is to supplement existing legislation) and respecting the differences in approach and varying sensitivities in the Member States of the Community, these guidelines relate to four key components of a national self-regulation framework:

- consultation and representativeness of the parties concerned,
- code(s) of conduct,
- national bodies facilitating cooperation at Community level,
- national evaluation of self-regulation frameworks.

## 1. CONSULTATION AND REPRESENTATIVENESS OF THE PARTIES CONCERNED

The objective is to ensure that the definition, implementation and evaluation of a national self-regulation framework benefits from the full participation of the parties concerned, such as the public authorities, the users, consumers and the businesses which are directly or indirectly involved in the audiovisual and on-line information services industries. The respective responsibilities and functions of the parties concerned, both public and private, should be set out clearly. The voluntary nature of self-regulation means that the acceptance and effectiveness of a national self-regulation framework depends on the extent to which the parties concerned actively cooperate in its definition, application and evaluation. All the parties concerned should also help with longer-term tasks such as the development of common tools or concepts (for example, on labelling of content) or the planning of ancillary measures (for example, on information, awareness and education).

## 2. CODE(S) OF CONDUCT

### 2.1. General

The objective is the production, within the national self-regulation framework, of basic rules which are strictly proportionate to the aims pursued; these rules should be incorporated into a code (or codes) of conduct covering at least the categories set out at 2.2, to be adopted and implemented voluntarily by the operators (i.e. primarily the businesses) concerned. In drawing up these rules, the following should be taken into account:

- the diversity of services and functions performed by the various categories of operator (providers of network, access, service, content, etc.) and their respective responsibilities,
- the diversity of environments and applications in on-line services (open and closed networks, applications of varying levels of interactivity).

In view of the above, operators may need one or more codes of conduct.

Given such diversity, the proportionality of the rules drawn up should be assessed in the light of:

- the principles of freedom of expression, protection of privacy and free movement of services,
- the principle of technical and economic feasibility, given that the overall objective is to develop the information society in Europe.

### 2.2. The content of the code(s) of conduct

The code (or codes) of conduct should cover the following:

#### 2.2.1. Protection of minors

Objective: to enable minors to make responsible use of on-line services and to avoid them gaining access, without the consent of their parents or teachers, to legal content which may impair their physical, mental or moral development. Besides coordinated measures to educate minors and to improve their awareness, this should cover the establishment of certain standards in the following fields:

##### (a) Information to users

Objective: within the framework of encouraging responsible use of networks, on-line service providers should inform users, where possible, of any risks from the content of certain on-line services and of such appropriate means of protection as are available.

The codes of conduct should address, for example, the issue of basic rules on the nature of the information to be made available to users, its timing and the form in which it is communicated. The most appropriate occasions should be chosen to communicate the information (sale of technical equipment, conclusion of contracts with user, web sites, etc.).

##### (b) Presentation of legal contents which may harm minors

Objective: where possible, legal content which may harm minors or affect their physical, mental or moral development should be presented in such a way as to provide users with basic information on its potentially harmful effect on minors. The codes of conduct should therefore address, for example, the issue of basic rules for the businesses providing on-line services concerned and for users and suppliers of content; the rules should set out the conditions under which the supply and distribution of content likely to harm minors should be subject, where possible, to protection measures such as:

- a warning page, visual signal or sound signal,
- descriptive labelling and/or classification of contents,
- systems to check the age of users.

Priority should be given, in this regard, to protection systems applied at the presentation stage to legal content which is clearly likely to be harmful to minors, such as pornography or violence.

##### (c) Support for parental control

Objective: where possible, parents, teachers and others exercising control in this area should be assisted by easy-to-use and flexible tools in order to enable, without the former's educational choices being compromised, minors under their charge to have access to services, even when unsupervised.

The codes of conduct should address, for example, the issue of basic rules on the conditions under which, wherever possible, additional tools or services are supplied to users to facilitate parental control, including:

- filter software installed and activated by the user,
- filter options activated, at the end-user's request, by service operators at a higher level (for example, limiting access to predefined sites or offering general access to services).

(d) Handling of complaints ('hotlines')

Objective: to promote the effective management of complaints about content which does not comply with the rules on the protection of minors and/or violates the code of conduct.

The codes of conduct should address, for example, the issue of basic rules on the management of complaints and encourage operators to provide the management tools and structures needed so that complaints can be sent and received without difficulties (telephone, e-mail, fax) and to introduce procedures for dealing with complaints (informing content providers, exchanging information between operators, responding to complaints, etc.).

2.2.2. Protection of human dignity

Objective: to support effective measures in the fight against illegal content offensive to human dignity.

(a) Information for users

Objective: where possible, users should be clearly informed of the risks inherent in the use of on-line services as content providers so as to encourage legal and responsible use of networks. Codes of conduct should address, for example, the issue of basic rules on the nature of information to be made available, its timing and the form in which it is to be communicated.

(b) Handling of complaints ('hotlines')

Objective: to promote the effective handling of complaints about illegal content offensive to human dignity circulating in audiovisual and on-line services, in accordance with the respective responsibilities and functions of the parties concerned, so as to reduce illegal content and misuse of the networks.

The codes of conduct should address, for example, the issue of basic rules on the management of complaints and encourage operators to provide the management tools and structures needed so that complaints can be sent and received without difficulties (telephone, e-mail, fax) and to introduce procedures for dealing with complaints (informing content providers, exchanging information between operators, responding to complaints, etc.).

(c) Cooperation of operators with judicial and police authorities

Objective: to ensure, in accordance with the responsibilities and functions of the parties concerned effective cooperation between operators and the judicial and police authorities within Member States in combating the production and circulation of illegal content offensive to human dignity in audiovisual and on-line information services.

The codes of conduct should address, for example, the issue of basic rules on cooperation procedures between operators and the competent public authorities, while respecting the principles of proportionality and freedom of expression as well as relevant national legal provisions.

2.2.3. Violations of the codes of conduct

Objective: to strengthen the credibility of the code (or codes) of conduct, taking account of its voluntary nature, by providing for dissuasive measures which are proportionate to the nature of the violations. In this connection, provision should be made, where appropriate, for appeal and mediation procedures. Appropriate rules to govern this area should be included in the code of conduct.

### 3. NATIONAL BODIES FACILITATING COOPERATION AT COMMUNITY LEVEL

Objective: to facilitate cooperation at Community level (sharing of experience and good practices; working together) through the networking of the appropriate structures within Member States, consistent with their national functions and responsibilities. Such structures could also allow international cooperation to be extended.

Cooperation at European level means:

– cooperation between the parties concerned:

all the parties involved in the drawing up of the national self-regulation framework are asked to set up a representative body at national level to facilitate the sharing of experience and good practices and to work together at Community and international level,

– cooperation between national complaints-handling structures:

to facilitate and develop cooperation at European and international level, the parties involved in an effective complaint management system are asked to set up a national contact point to strengthen cooperation in the fight against illegal content, facilitate the sharing of experience and good practices, and improve legal and responsible use of the networks.

### 4. EVALUATION OF SELF-REGULATION FRAMEWORKS

The objective is to provide for regular evaluations of the self-regulation framework at national level, to assess its effectiveness in protecting the general interests in question, to measure its success in achieving its objectives and to adapt it gradually to changes in the market, technology and types of use. The parties concerned are asked to set up an evaluation system at national level so that they can monitor the progress made in implementing the self-regulation framework. This should take into account appropriate European-level cooperation, inter alia on the development of comparable assessment methodologies.

## Commission of the European Communities: European Governance – a White Paper 25 July 2001, COM(2001) 428 Final

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### III. PROPOSALS FOR CHANGE

#### 3.2 Better policies, regulation and delivery

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#### *Better and faster regulation – combining policy instruments for better results ...*

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- Fourth, under certain conditions, implementing measures may be prepared within the **framework of co-regulation**. Co-regulation combines binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise. The result is wider ownership of the policies in question by involving those most affected by implementing rules in their preparation and enforcement. This often achieves better compliance, even where the detailed rules are non-binding.
- It has already been used, for example, in areas such as the internal market (agreeing product standards under the so-called “New Approach” directives) and the environment sector (reducing car emissions).
- The exact shape of co-regulation, the way in which legal and non-legal instruments are combined and who launches the initiative – stakeholders or the Commission - will vary from sector to sector.

Under the following conditions the Commission will consider the use of coregulation where it will be an effective way of achieving EU objectives.

#### **Conditions for the use of co-regulation**

Co-regulation implies that a framework of overall objectives, basic rights, enforcement and appeal mechanisms, and conditions for monitoring compliance is set in the legislation.

It should only be used where it clearly adds value and serves the general interest. It is only suited to cases where fundamental rights or major political choices are not called into question. It should not be used in situations where rules need to apply in a uniform way in every Member State. Equally, the organisations participating must be representative, accountable and capable of following open procedures in formulating and applying agreed rules. This will be a key factor in deciding the added value of a co-regulatory approach in a given case.

Additionally, the resulting co-operation must be compatible with European competition rules and the rules agreed must be sufficiently visible so that people are aware of the rules that apply and the rights they enjoy. Where co-regulation fails to deliver the desired results or where certain private actors do not commit to the agreed rules, it will always remain possible for public authorities to intervene by establishing the specific rules needed.

## Mandelkern Group on Better Regulation Final Report 13 November 2001

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### 2.2.3 Regulation and user responsibility

Finding the most appropriate ways of implementing public policies efficiently should lead us to seek solutions that better combine public authority objectives and the responsibility of users or groups of users. It is in this sense that particular attention can be focussed on "co-regulation".

#### 2.2.3.1 Co-regulation

There is no **one** single definition of co-regulation. On the contrary, the effective implementation of public policies may, in order to achieve the same objective, lead to combining legislative or regulatory rules and alternatives to regulation. Several approaches can contribute to this.

a) **Setting of objectives by the regulatory authority and the delegation of the details of implementation.** An initial approach involves establishing, by regulation, global objectives, the main implementation mechanisms and methods for monitoring the application of a public policy. At the same time, the intervention of private players is requested in order to define the detailed rules. This method means that regulations can be avoided which are too general or which are too unwieldy to be applied precisely in fields which require adaptability and flexibility.

b) **Regulatory validation of rules stemming from self-regulation.** A bottom to top approach may also prove effective. If necessary, co-regulation may lead to a noncompulsory application method established by private partners being changed into a mandatory rule by the public authority. Similarly the public authority may penalise companies' failure to honour their commitments without giving any regulatory force to those commitments.

#### 2.2.3.2 Conditions for co-regulation

a) **Maintaining the primacy of the public authority.** Co-regulation does not mean that the responsibility for the rules being implemented is shared. The primacy of the public authority remains intact.

b) **Necessary guarantees.** Co-regulation cannot be used in all areas. This is particularly the case where safety, fundamental rights or citizen equality are at stake. In general, one should first ask whether the proposed option is appropriate and proportionate to the intended objectives. Co-regulation implies that public authorities may act in partnership with credible and representative players. Criteria establishing their representativeness should be used to identify professional or social organisations capable of contributing to the implementation of public policies within the framework of co-regulation. Co-regulation does not mean that the regulatory (or legislative) authority is no longer concerned with the effective application of the rule.

On the contrary, supervisory mechanisms must be set up.

## **Recommendation No. R (2001) 8 on Self-regulation concerning Cyber Content (Self-regulation and User Protection against Illegal or Harmful Content on New Communications and Information Services)**

(\*) Adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies

### **The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,**

Considering that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Having regard to its Declaration on a European policy for new information technologies, adopted on the occasion of the 50th anniversary of the Council of Europe in 1999;

Recalling the commitment of the member states to the fundamental right to freedom of expression and information as guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and to entrusting the supervision of its application to the European Court of Human Rights;

Reaffirming that freedom of expression and information is necessary for the social, economic, cultural and political development of every human being, and constitutes a condition for the harmonious progress of social and cultural groups, nations and the international community, as expressed in its Declaration on the Freedom of Expression and Information of 1982;

Stressing that the continued development of new communications and information services should serve to further the right of everyone, regardless of frontiers, to express, seek, receive and impart information and ideas for the benefit of every individual and the democratic culture of any society;

Stressing that the freedom to use new communications and information services should not prejudice the human dignity, human rights and fundamental freedoms of others, especially of minors;

Recalling its Recommendation No. R (89) 7 concerning principles on the distribution of videograms having a violent, brutal or pornographic content, its Recommendation No. R (92) 19 on video games with a racist content, its Recommendation No. R (97) 19 on the portrayal of violence in the electronic media, its Recommendation No. R (97) 20 on «hate speech» and Article 4, paragraph a of the International Convention on the elimination of all forms of racial discrimination of the United Nations of 1965;

Bearing in mind the differences in national criminal law concerning illegal content as well as the differences in what content may be perceived as potentially harmful, especially to minors and their physical, mental and moral development, hereinafter referred to as «harmful content»;

Bearing in mind that self-regulatory organisations could, in accordance with national circumstances and traditions, be involved in monitoring compliance with certain norms, possibly within a co-regulatory framework, as defined in a particular country;

Aware of self-regulatory initiatives for the removal of illegal content and the protection of users against harmful content taken by the new communications and information industries, sometimes in co-operation with the state, as well as of the existence of technical standards and devices enabling users to select and filter content;

Desirous to promote and strengthen self-regulation and user protection against illegal or harmful content,

### **Recommends that the governments of member states:**

1. implement in their domestic law and/or practice the principles appended to this Recommendation;
2. disseminate widely this Recommendation and its appended principles, where appropriate accompanied by a translation; and
3. bring them in particular to the attention of the media, the new communications and information industries, users and their organisations, as well as of the regulatory authorities for the media and new communications and information services and relevant public authorities.



## **Appendix to Recommendation No. R (2001) 8 - Principles and Mechanisms concerning Self-regulation and User Protection against Illegal or Harmful Content on New Communications and Information Service**

### **Chapter I - Self-regulatory organisations**

1. Member states should encourage the establishment of organisations which are representative of Internet actors, for example Internet service providers, content providers and users.
2. Member states should encourage such organisations to establish regulatory mechanisms within their remit, in particular with regard to the establishment of codes of conduct and the monitoring of compliance with these codes.
3. Member states should encourage those organisations in the media field with self-regulatory standards to apply them, as far as possible, to the new communications and information services.
4. Member states should encourage such organisations to participate in relevant legislative processes, for instance through consultations, hearings and expert opinions, and in the implementation of relevant norms, in particular by monitoring compliance with these norms.
5. Member states should encourage Europe-wide and international co-operation between such organisations.

### **Chapter II - Content descriptors**

6. Member states should encourage the definition of a set of content descriptors, on the widest possible geographical scale and in co-operation with the organisations referred to in Chapter I, which should provide for neutral labelling of content, thus enabling users to make their own judgement concerning such content.
7. Such content descriptors should indicate, for example, violent and pornographic content as well as content promoting the use of tobacco or alcohol, gambling services, and content which allows unsupervised and anonymous contacts between minors and adults.
8. Content providers should be encouraged to apply these content descriptors, in order to enable users to recognise and filter such content regardless of its origin.

### **Chapter III - Content selection tools**

9. Member states should encourage the development of a wide range of search tools and filtering profiles, which provide users with the ability to select content on the basis of content descriptors.
10. Filtering should be applied by users on a voluntary basis.
11. Member states should encourage the use of conditional access tools by content and service providers in relation to content harmful to minors, such as age-verification systems, personal identification codes, passwords, encryption and decoding systems or access through cards with an electronic code.

### **Chapter IV - Content complaints systems**

12. Member states should encourage the establishment of content complaints systems, such as hotlines, which are provided by Internet service providers, content providers, user associations or other institutions. Such content complaints systems should, where necessary for ensuring an adequate response against presumed illegal content, be complemented by hotlines provided by public authorities.
13. Member states should encourage the development of common minimum requirements and practices concerning these content complaints systems. Such requirements should include for instance:
  - a. the provision of a specific permanent Web address;
  - b. the availability of the content complaints system on a twenty-four-hour basis;
  - c. the provision of information to the public about the legally responsible persons and entities within the bodies offering content complaints systems;
  - d. the provision of information to the public about the rules and practices relating to the processing of content complaints, including co-operation with law enforcement authorities with regard to presumed illegal content;

- e. the provision of replies to users concerning the processing of their content complaints;
- f. the provision of links to other content complaints systems abroad.

14. Member states should set up, at the domestic level, an adequate framework for co-operation between content complaints bodies and public authorities with regard to presumed illegal content. For this purpose, member states should define the legal responsibilities and privileges of bodies offering content complaints systems when accessing, copying, collecting and forwarding presumed illegal content to law enforcement authorities.

15. Member states should foster Europe-wide and international co-operation between content complaints bodies.

16. Member states should undertake all necessary legal and administrative measures for transfrontier co-operation between their relevant law enforcement authorities with regard to complaints and investigations concerning presumed illegal content from abroad.

#### **Chapter V - Mediation and arbitration**

17. Member states should encourage the creation, at the domestic level, of voluntary, fair, independent, accessible and effective bodies or procedures for out-of-court mediation as well as mechanisms for arbitration of disputes concerning content-related matters.

18. Member states should encourage Europe-wide and international co-operation between such mediation and arbitration bodies, open access of everyone to such mediation and arbitration procedures irrespective of frontiers, and the mutual recognition and enforcement of out-of-court settlements reached hereby, with due regard to the national *ordre public* and fundamental procedural safeguards.

#### **Chapter VI - User information and awareness**

19. Member states should encourage the development of quality labels for Internet content, for example for governmental content, educational content and content suitable for children, in order to enable users to recognise or search for such content.

20. Member states should encourage public awareness and information about self-regulatory mechanisms, content descriptors, filtering tools, access restriction tools, content complaints systems, and out-of-court mediation and arbitration.

# Annex

## Workshop OBS/IViR/EMR 2002: Co-regulation of the Media in Europe



# Agenda

## Day One : Friday, 6 September 2002

Chair: Pär-Arne Jigenius

### Clarification of definitions/notions

Self-monitoring vs Self-regulation vs Co-regulation

Speaker: Carmen Palzer, EMR

### Part One: Stock-taking

a) How do self-regulation and co-regulation work in practice today? (Descriptive approach)

One should aim at targeting criteria that are relevant in the context of well-functioning models of self-/co-regulation: Under which framework conditions do we have best-practice models (concerning the stages of competitive or pre-competitive situations, Safeguard of competition or of public interest goals, what about external effects etc)? What are suitable market conditions for a best-practice (many or less suppliers/players, mass markets, specialised services etc)? What are the necessary surrounding/accompanying/contributing measures needed to see self-/co-regulation work well (regulated self-regulation, internal/external control/supervision, sanctions, level of sanctions)

Best-practice – Worst practice (to discuss among the following examples):

(1) Advertising

Speaker: Oliver Gray, EASA

(2) Protection of minors

Speaker: Joachim von Gottberg, FSF

(3) Protection of human dignity, Distribution of racist content (hate speech)

Speaker: Tarlach McGonagle, IViR

(4) Independence of journalists

Speaker: Pär-Arne Jigenius

(5) Technical Standards (MHP)

Speaker: Phil Laven, EBU

b) Underlying organisational structures

Setting-up of guidelines, codices of conduct (standards); Supervision; Mechanisms for dispute settlement; Financing

Speaker: Wim Bekkers, NICAM

c) Evaluation of results (in relation to the models discussed)

What are the interests/goals that the given measures are predicting to secure? Do we achieve the results that we aim at? Is there a further need for regulation?

Speaker: Tony Prosser, University of Bristol

Discussion and summary of Day One results

**Day Two: Saturday, 7 September 2002**

Chair: Frithjof Berger, BKM

**Part Two: Further Analysis**

## a) Supporting legislative measures / Framework legislation (Co-Regulation)

What to consider at the European level (EU and Council of Europe), what does already exist in national law? How should the legal framework on both levels be adapted so as to ensure a proper inter-action of regulation and co-regulation?

Speaker: Harald Trettenbrein, European Commission

Statement: Ramon Prieto-Suarez, Council of Europe

## b) What are the conditions for setting-up (for the first time) a self-/co-regulatory system?

Along which procedure should one act in order to achieve a common understanding/compromise with regard to the relevant indispensable standards? What will be the influence of the existing distribution of market and/or policy powers in respect of defining the right margin (- especially with a view on media concentration)?

Speaker: Sandra Basić Hrvatin, University of Ljubljana / SRDF Broadcasting Council

Statement: Roberto Mastroianni, University of Naples

## c) Problems relating to (transfrontier) implementation/enforcement

How should co-regulation be enforced (in a transfrontier context)? Who has competence on this issue? Whose standards to apply?

Speakers:

Maja Cappello, Autorità per le Garanzie nelle Comunicazioni

Oliver Gray, EASA

**Part Three: Perspectives**

Improving/further developing of self-regulation

(Suggested/proposed) possible models; Improving/Balancing co-operation of all stake-holders (on national as well as on European level); Safeguarding interests through procedural precautions?

Speaker: Marie-Laure Lulé, RTL Group

Statement: Chairperson

Discussion and summary of Day Two results; Overall assessment of the workshop's outcome

## List of Participants

Name	Organisation
<b>BÄSIČ HRVATIN Sandra</b>	SRDF BROADCASTING COUNCIL Parmova 53 1000 LJUBLJANA SLOVENIA
<b>BEKKERS Wim</b>	NICAM Post-box 322 1200 AH HILVERSUM NETHERLANDS
<b>BERGER Frithjof</b>	BEAUFTRAGTER DER BUNDESREGIERUNG FÜR ANGELEGENHEITEN DER KULTUR UND DER MEDIEN Referat K 31 Graurheindorfer Strasse 198 53117 BONN GERMANY
<b>CABRERA Francisco</b>	EUROPEAN AUDIOVISUAL OBSERVATORY 76 Allée de la Robertsau 67000 STRASBOURG FRANCE
<b>CAPPELLO Maja</b>	AUTORITA PER LE GARANZIE NELLE COMUNICAZIONI Centro Direzionale Isola B5 Torre Francesco 80143 NAPLES ITALY
<b>CLOSS Wolfgang</b>	EUROPEAN AUDIOVISUAL OBSERVATORY 76 Allée de la Robertsau 67000 STRASBOURG FRANCE
<b>GRAY Oliver</b>	EASA The European Advertising Standards Alliance 10a Rue de la Pépinière B-1000 BRUSSELS BELGIUM
<b>JIGENIUS Pär-Arne</b>	Brevduvegatan 7 SE 426 69 V FROLUNDA SWEDEN
<b>LAVEN Philip</b>	EBU European Broadcasting Union Ancienne Route 17A 1218 GRAND SACONNEX (Geneva) SWITZERLAND

<b>LULE Marie-Laure</b>	RTL GROUP 45 boulevard Pierre Frieden 1543 LUXEMBOURG LUXEMBOURG
<b>MC GONAGLE Tarlach</b>	INSTITUTE FOR INFORMATION LAW (IViR) University of Amsterdam Rokin 84 1012 KX AMSTERDAM NETHERLANDS
<b>MASTROIANNI Roberto</b>	UNIVERSITA DI NAPOLI Dipartimento di scienze internazionalistiche Via G. Sanfelice 49 80100 NAPLES ITALY
<b>NIKOLTCHEV Susanne</b>	EUROPEAN AUDIOVISUAL OBSERVATORY 76 Allée de la Robertsau 67000 STRASBOURG FRANCE
<b>PALZER Carmen</b>	EMR Institute of European Media Law Nell-Breuning-Allee 6 66115 SAARBRÜCKEN GERMANY
<b>PRIETRO-SUAREZ Ramon</b>	COUNCIL OF EUROPE BP 431 R6 67075 STRASBOURG Cedex FRANCE
<b>PROSSER Tony</b>	UNIVERSITY OF GLASGOW The University of Bristol Department of Law Wills Memorial Building BRISTOL BS8 1RJ UNITED KINGDOM
<b>SCHEUER Alexander</b>	EMR Institute of European Media Law Nell-Breuning-Allee 6 66115 SAARBRÜCKEN GERMANY
<b>TRETTENBREIN Harald</b>	EUROPEAN COMMISSION DG EDUCATION ET CULTURE Education - Audiovisuel - Culture Rue de la Loi 200 B 100 7-25 1049 BRUSSELS BELGIUM
<b>VAN LOON Ad</b>	INSTITUTE FOR INFORMATION LAW (IViR) University of Amsterdam Rokin 84 1012 KX AMSTERDAM NETHERLANDS
<b>VON GOTTBURG Joachim</b>	FREIWILLIGE SELBSTKONTROLLE FERNSEHEN E.V. FSF Lützowstr. 33 10785 BERLIN GERMANY