Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe (JUFREX)

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EUROPEAN CO-REGULATION PRACTICES IN THE MEDIA

Comparative analysis and recommendations with a focus on the situation in Serbia

A STUDY FOR

РЕПУБЛИКА СРБИЈА

РЕМ

РЕГУЛАТОРНО ТЕЛО ЗА ЕЛЕКТРОНСКЕ МЕДИЈЕ

WAGNER HATFIELD

MeGI

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About the authors

- Jean-François Furnémont is since 2014 the Founding Partner of Wagner-Hatfield, an independent Brussels-based consultancy specialising in public affairs, policy, regulation and strategy, particularly active in the media sector and digital economy. Previously, he served as Deputy Director General (2000-2003) and as Director General (2003-2014) of the Conseil supérieur de l'audiovisuel (CSA), the media regulatory authority of the French-speaking Community of Belgium, and was also involved in the Board of the European Platform of Regulatory Authorities EPRA, first as vice-Chairman (2008-2011) and later as Chairman (2011-2014). Former freelance journalist and former member of the Board of the Belgian public service media RTBF, Jean-François Furnémont has authored a number of books and publications. He has a University degree in Journalism and Communication Studies, a post-University degree in International Relations and European policy and an inter-University degree in Public Finances.

- Tanja Kerševan Smokvina is a media regulation expert with background in journalism and media research. Before founding MeGI – Media Governance Institute, an independent Ljubljana-based consultancy in media and communications, she spent 18 years in various senior positions in the Slovenian converged regulatory authority AKOS. In 2011-2013 she was Project Manager of the EU co-funded transnational cooperation project SEE Digi.TV for harmonisation of the digital switchover in the Adriatic region, bringing together 15 partners from 10 countries. In 2016 she chaired the ERGA Subgroup on "developing the Digital European Toolkit for efficient and flexible regulation". For 2016-2017, she has been appointed Member of the Committee of Experts on Internet Intermediaries (MSI-NET), a sub-committee of the CDMSI of the Council of Europe. She holds a PhD in Communication Studies from the University of Ljubljana and is a Visiting Professor at the University of Maribor where she teaches media related subjects.

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Executive summary

This study was commissioned by the Council of Europe at the request of Serbia's national regulatory authority (Regulatory Authority of Electronic Media - Regulatorno telo za elektronske medije, hereinafter REM) with the main objectives to provide a comparative analysis of the best European practices regarding self- and co-regulation and recommendations about the potential implementation of self- or co-regulatory schemes in Serbia, taking into account the specificities of the market and policy environment in the country.

The study, authored by Jean-François Furnémont and Tanja Kerševan Smokvina, is divided in nine chapters:

1. The introduction outlines the context of the study and sets out the purpose, scope and methodology of the analysis.
2. The policy background presents the European Union, Council of Europe and regional policy documents and initiatives, as well as relevant supra-national legislation endorsing the principles of self- or co-regulation in the sphere of media.
3. The key concepts are discussed in the conceptual background, with a focus on the contemporary literature and the most relevant policy documents.
4. Traditional areas of implementation of self- or co-regulation (protection of minors, protection of consumers, journalism ethics and non-linear audiovisual media services) are detailed in a specific chapter which also stresses that the European Union has so far not encouraged self- and co-regulation in issues related to fundamental rights or in situations where the rules must be applied in a uniform fashion.
5. The conditions for an effective self- or co-regulatory system, ranging from the level of conception to the level of enforcement, are extensively assessed in one of the two main chapters of the study, which is divided into four sections which detail the challenges:
    - in terms of conception,
    - in terms of implementation,
    - in terms of enforcement and
    - in terms of relationship with statutory regulation.
6. The second main chapter of the study presents four case studies chosen from the most acclaimed or representative examples of co-regulation in the EU Member States. The case studies review systems in place in different areas (protection of minors, protection of consumers, journalistic ethics and regulation of non-linear AVMS) in three countries (Belgium, the Netherlands and the United Kingdom). For the purpose of the study, the systems were reviewed on the basis of the 4-sections matrix from the previous chapter (conception, implementation, enforcement, relationship with statutory regulation).
7. The study concludes with recommendations related to the potential introduction of a co-regulatory system in Serbia and singles out the areas worth considering as the areas where such a system is most likely to be implementable.

8. Additionally, a practical toolkit for assessing the performance of a self- or co-regulatory body from the level of conception to the level of enforcement and articulation with the statutory regulation is provided. It consists of 20 questions to which the designers of a new co-regulatory scheme shall answer to. The questions are built on the Principles for better self- and co-regulation, the Panteia study and comparative analysis conducted for the purposes of this study.
9. The referential literature is listed in a structured manner for general issues and for each of the case study.

The comparative analysis and the lessons learned from other studies revealed that it is impossible to identify a typical European model of co-regulation. To single out a model which could be potentially implemented in Serbia is equally challenging. The characteristics of self- or co-regulatory systems are linked with a combination of elements of national contexts in which they originate. Besides, some studies confirmed that models that function well in some political contexts can be toothless or even detrimental in others (e.g. Hulin 2014a, Hodžić 2015). It is therefore rather difficult to indicate the "best" way forward for the development of self- or co-regulation in Serbia.

The authors suggest opting for an area broadly recognised as requiring an effective response, i.e. protection of minors. This could increase the chance for endorsement by the public, industry and other relevant policy stakeholders, and secure the political will needed for modification of the existent regulation or introduction of a new one. Another area worth considering is the area of basic professional standards in media, where a self-regulatory body already exists. Following good European practices, some statutory recognition of the existing system could be welcome, bearing in mind however, that this should not open the door to political interference and pressures.

1. Introduction

1.1. Context

According to the study commissioner, the possibility of implementing a co-regulation scheme in the media sector has not been extensively investigated or discussed in Serbia so far. There is the perception that there should be more exchange among the different stakeholders in the sector. The rules, after all, have a greater chance to be complied with and fulfil their purpose if the subjects to which they apply to are included in the process of their conception and implementation.

There are two wide-spread systems of governance beyond the classical top down or statutory regulation: self-regulation and co-regulation. The system of co-regulation implies responsibility-sharing between the regulator and industry stakeholders, and is, as examples show, particularly present in regulation of protection of minors. The industry is relatively autonomous in ensuring the compliance with the rules and the regulator only interferes in case the legally set goals are not met. Self-regulation, on the other hand, is traditionally present in self-policing of journalism ethics to safeguard professionalism, and deals among others with hate speech, which is in some countries also within the remit of the national regulatory authority. Other areas where self-regulation is being used are commercial communications and on-demand audiovisual media services.

Both systems are gaining momentum in the media world of today. The changes in media delivery and consumption, as well as the changes in media business models, rendered the legacy regulatory approaches obsolete. The days where access to communication channels was granted to a small number of service providers which were obliged, in return, to take over responsibility towards the public, are over. In the current situation of an abundance of sources, coupled with less transparency and public responsibility, but also with lowered chances for an effective regulatory control, the legislators and regulators, both on the national and supranational (e.g. EU) level, are becoming increasingly supportive of self-regulation and co-regulation. Moreover, they are promoting it also in areas predominantly within the domain of top down regulation and in sectors that have been so far not governed by the rules characteristic for media regulation.

As the European Commission highlighted in its Guidelines for EU support to media freedom and media integrity in enlargement countries, many of the problems that the media encounter in the enlargement zone of which Serbia is a part stem from the civic weakness of the media community in these countries. Its fragmentation and political polarisation allow for clientelism, decline in professional standards and self-censorship. The political divides and affiliations of the media professionals impede agreeing on common interests: be it proper labour relations or effective and representative self-regulation in the sector. For the same reasons, the media self-

regulation for ethical and professional standards cannot make progress. This sometimes serves as grounds for the judiciary to interfere with critical journalism (DG Enlargement 2014, 4).

Additionally, as it can be drawn from the information gathered from the local sources of data for this study, there is little communication between the regulatory and the self-regulatory body (i.e. the REM and the Press Council). In the Serbian media sector there is only one self-regulatory body, the one of journalists – the Press Council, keeping an eye on professional standards. However, the regulator reports facing expectations that the REM should deal with the issues related to professional standards as well. The members of REM staff also recognise some issues typically within the domain of journalistic professional standards as a part of the regulator's remit. The perception of the division between the competencies and areas of work between the REM and the Press Council therefore does not seem to be entirely clear. On the top of that, the regulator does not possess an effective system of sanctions – the path from issuing a warning to withdrawal of the licence is too short to be justified in practice, and there is no possibility of fines. Same is true for the possibility of incentives for participation in a self- or co-regulation scheme, as there is no legal basis allowing financial or other incentives (e.g. access to the subsidies, partial relief of the fees or exemption from punitive measures). The only area where introduction of a co-regulation system is legally encouraged is the advertising of food and drinks high in fat, salt and sugars.

1.2. Objectives and scope

This study was commissioned by the Council of Europe within the framework of the European Union/Council of Europe Joint Programme "Reinforcing Judicial Expertise on Freedom of Expression and Freedom of the Media in South-East Europe" (JUFREX) at the request of Serbia's Regulatory Authority of Electronic Media (REM) to provide a comparable analysis of the best European practices regarding co-regulation, with a specific focus on the situation in Serbia, and recommendations on how to drive the stakeholders in Serbia towards co-regulation.

The objectives of the study are:

1. to understand:
   - the idea of co-regulation and concepts related to it;
   - the role of different stakeholders;
   - the potential areas and scope;
   - the typical mechanisms;
   - the importance, benefits and challenges;
2. to present:
   - examples of good practice from countries with tradition of co-regulation;
3. and to provide:
   - recommendations on how to introduce co-regulation in Serbia.

The case studies were selected to reflect the range of areas where co-regulation can be an adequate or successful regulatory approach. The areas match the priorities identified by the REM. Likewise, the scope of recommendations is tailored to meet the regulator's needs and provide the ideas on applicable possibilities. A special consideration is put into the practices of attracting willingness of the industry and other stakeholders to undertake commitment and participate in co-regulation.

1.3. Methodology

The study draws on interpretative analysis of legal and policy documents of organisations at different levels and peer-reviewed sources. Background information was provided by the commissioner (CoE) and the beneficiary of the study (REM).

1.4. Structure

Following the executive summary and introduction, the content core of the document is roughly divided in five parts. The chapter on policy background presents the main legal and policy documents at the level of the European Union, resolutions and recommendations of the Council of Europe, as well as the regional initiatives promoting self- and co-regulation in media. It is followed by the chapter on conceptual background outlining the key concepts related to co-regulation from the point of view of contemporary literature and policy documents. The conditions for effective self- or co-regulatory systems, ranging from the level of conception to the level of enforcement, are extensively examined in a separate chapter, divided into four subunits. Before concluding with recommendations for implementation of a co-regulatory system in Serbia, the document presents four case studies from three countries (Belgium, the Netherlands and two cases from the United Kingdom) in four different areas (journalism ethics, protection of minors, consumer protection and non-linear audiovisual media services). Additionally, there is a selection of referential literature provided in a structured manner at the end of the document, as well as a toolkit for assessing the performance of a self- or co-regulatory body from the level of conception to the level of enforcement.

2. Policy background

2.1. European Union

Self- and co-regulation have for a long time been promoted by the EU lawmaker. In 2003, the Interinstitutional agreement on better law-making adopted by the European Parliament, the Council and the Commission insisted on the importance of the use of alternative methods of regulation: the three institutions recalled *"the Community's obligation to legislate only where it is necessary, in accordance with the Protocol on the application of the principles of subsidiarity and proportionality. They recognise the need to use, in suitable cases or where the Treaty does not specifically require, the use of a legal instrument, alternative regulation mechanisms"*.

In application of this agreement, the European Commission adopted in 2011 its Communication on A renewed EU strategy 2011-14 for Corporate Social Responsibility. One of the commitments of the strategy was to contribute to improve self- and co-regulation processes, considering the fact that *"when such processes are designed in an appropriate way they can earn stakeholder support and be an effective means of ensuring responsible business conduct"*. The Commission therefore intended to *"launch a process with enterprises and other stakeholders to develop a code of good practice for self- and co-regulation exercises, which should improve the effectiveness of the corporate responsibility process"*.

This process led to the adoption in 2013 of the Principles for better self- and co-regulation (hereinafter the Principles). This initiative was meant to *"help actors involved in self- and co-regulation to do better and get better recognition, respect, and credibility for their efforts"* and to *"help to ensure that self- and co-regulation exercises achieve their intended societal, environmental and governance goals more effectively and more efficiently"*. All stakeholders were invited *"to consider these Principles as benchmark for self- and co-regulation and to promote their use"*. These principles are detailed in chapter 5 of the study.

In the audiovisual field, the Audiovisual Media Services Directive (hereinafter "the AVMSD") provides since 2007 in its Article 4.7 that *"Member States shall encourage co-regulation and/or self-regulatory regimes at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These regimes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement"*. The Recital 44 of the AVMSD explains that in the Commission's Communication to the European Parliament and to the Council on Better Regulation for Growth and Jobs in the European Union, stressed the importance of a careful analysis of the appropriate regulatory approach is necessary, *"in order to establish whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self-regulation should be considered. Furthermore, experience has shown that both co-regulation and self-regulation instruments, implemented in accordance with the different legal traditions of the Member States, can play an*

important role in delivering a high level of consumer protection. Measures aimed at achieving public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with the active support of the service providers themselves. Thus self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves."

The Communication encouraged the Member States to recognise the role an effective self-regulation can play as a complement to the legislative and judicial and/or administrative mechanisms and as a contributor to the achievement of the objectives of the AVMSD. It highlighted, however, that self-regulation should not constitute a substitute for the obligations of the national legislator. As for co-regulation, the Communication explained that it offers, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States, and allows for the possibility of State intervention when the objectives not being met. The co-regulation and/or self-regulatory regimes are not obligatory nor should they "*disrupt or jeopardise current co-regulation or self-regulatory initiatives which are already in place within Member States and which are working effectively*".

The way towards this (then) novelty in the AVMSD was paved by the study on Co-regulation in the media sector made in 2006 for the European Commission by the Hans-Bredow-Institute (hereinafter the Hans-Bredow study). Recently, another study on Effectiveness of self- and co-regulation in the context of implementing the AVMS Directive was also made for the European Commission by Panteia (hereinafter the Panteia study).

It is also worth mentioning that in its report to the European Commission on A free and pluralistic media to sustain European democracy, the High Level Group on Media Freedom and Pluralism encouraged self-regulation by the media: *"Because the trust that the general public places in the media is an asset to them, media organisations themselves should justify this trust by being more proactive in matters of self-regulation. Each media outlet should follow clearly identifiable codes of conduct and editorial lines, and it should be mandatory for them to publish these on their website or to state explicitly where the organisation follows common international codes of conduct and ethical guidelines"*.

Finally, it should be noticed that the European Commission also encourages candidate countries to make steps in this direction: in its Guidelines for EU support to media freedom and media integrity in enlargement countries, DG Enlargement invites editors and media owners to *"adhering to clearly (and publicly) defined editorial and ethical codes"* and considers that *"there should be effective mechanisms in place to deal honestly and transparently with readers/viewers complaints"*.

2.2. Council of Europe

The Council of Europe has a long tradition of promotion of self-regulation.

At the third European Ministerial Conference on Mass Media in 1991, the Ministers adopted a Resolution on Media economics and political and cultural pluralism in which, with a focus on self-regulation in protection of consumers, they *"encourage professional circles concerned to adopt self-regulatory measures so as to contribute to the formulation of national and European policy in regard to advertising, sponsorship and new forms of commercial promotion and funding for broadcasting undertakings"*.

At the fourth European Ministerial Conference on Mass Media in 1994, the Ministers focused on journalism ethics and adopted a resolution on Journalistic freedoms and human rights in which they agreed on a list of eight principles, including the following ones:

- *"Principle 7. The practice of journalism in a genuine democracy has a number of implications. These implications, which are already reflected in many professional codes of conduct, include:*
  a) respecting the right of the public to be accurately informed about facts and events;
  b) collecting information by fair means;
  c) presenting fairly information, comments and criticism, avoiding unjustified infringement of private life, defamation and unfounded accusations;
  d) rectifying any published or broadcast information which subsequently proves to be grossly inaccurate;
  e) observing professional secrecy with regard to the sources of information;
  f) avoiding the promotion of any violence, hatred, intolerance or discrimination based, in particular, on race, sex, sexual orientation, language, religion, politics or other opinions, national or regional origin, or social origin.
- *Principle 8. Bearing in mind the different and changing conditions of the various media, public authorities should exercise self-restraint in addressing the considerations mentioned in Principle 7 and 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."*

With a broader perspective on self-regulatory systems, the 5th European Ministerial Conference on Mass Media adopted in 1995 an Action plan for the promotion of freedom of expression and information at the pan-European level within the framework of the information society. The third action, in the area of self-regulation is "*to encourage, in particular at the transnational level, self-regulation by providers and operators of the new communications and information services, especially content providers, in the form of codes of conduct or other measures, with a view to ensuring respect for human rights and human dignity, the protection of minors and democratic*

values, as well as the credibility of the media themselves" and *"to encourage exchanges of information and experience as well as co-operation at the European and global level in this area"*.

During the same Conference, the Ministers also adopted a resolution on The Impact of new communications technologies on human rights and democratic values in which *"The participating states undertake to ensure that their national legislation or administrative regulations, which are applicable to the new technologies and the new communications and information services, guarantee the respect for human rights and democratic values as set out in the European Convention on Human Rights and other texts of the Council of Europe. They agree to encourage the development by providers and operators of self-regulatory initiatives which also respect these rights and values"*.

Another resolution on Rethinking the regulatory framework for the media "*calls on the participating states [...] to encourage self-regulation by providers and operators of the new technologies and new communications and information services at national and pan-European levels (via codes of conduct, technical procedures for controlling access to content or services, etc.) in order to protect human rights and democratic values, especially respect for human dignity and the rights of others and the protection of minors, in the use of new communications services"*.

This support to alternative methods of regulation has also been extended to the new media environment. At the Conference of Ministers responsible for Media and New Communication Services in 2009, the resolution Towards a new notion of media was adopted in which the Ministers considered that *"as for traditional media, self-regulation should be a key element for ensuring compliance with standards while respecting editorial independence; where necessary, self-regulation can be supported or underpinned by co-regulation. As a form of interference, regulation should be subject to the limits and conditions established by the European Convention on Human Rights and the relevant case law of the European Court of Human Rights and meet the tests elaborated by the latter. Media or media-like regulatory or accountability mechanisms, whether self- or co-regulatory or, if necessary, state driven, must be effective, transparent, independent and accountable. The Council of Europe should explore how to improve the functioning of those mechanisms, in particular how to improve the access to those mechanisms for persons or groups who consider that their rights have been breached by media or media-like service providers"*.

Finally, at the Conference of Ministers responsible for Media and Information Society in 2013, in a resolution on Preserving the essential role of media in the digital age, one of the conclusions of the Ministers was that *"we consider it important to further consolidate effective media self-regulation as a prerequisite for media freedom and independence of the media. Regulation, including its milder form of co-regulation, or 'regulated' self-regulation, should comply with the requirements set out in Article 10 of the European Convention on Human Rights and the standards that stem from the relevant case law of the European Court of Human Rights"*. The Ministers therefore invited the Council of Europe to *"promote truly independent media in Europe based on effective self-regulation"*.

The Parliamentary Assembly also firmly supported self-regulation in the media in its Resolution on ethics of journalism, by stressing the following:

- *"36. Having regard to the requisite conditions and basic principles enumerated above, the media must undertake to submit to firm ethical principles guaranteeing freedom of expression and the fundamental right of citizens to receive truthful information and honest opinions.*
- *37. In order to supervise the implementation of these principles, self-regulatory bodies or mechanisms must be set up comprising publishers, journalists, media users' associations, experts from the academic world and judges; they will be responsible for issuing resolutions on respect for ethical precepts in journalism, with prior commitment on the part of the media to publish the relevant resolutions. This will help the citizen, who has the right to information, to pass either positive or negative judgment on the journalist's work and credibility.*
- *38. The self-regulatory bodies or mechanisms, the media users' associations and the relevant university departments could publish each year the research done a posteriori on the truthfulness of the information broadcast by the media, comparing the news with the actual facts. This would serve as a barometer of credibility which citizens could use as a guide to the ethical standard achieved by each medium or each section of the media, or even each individual journalist. The relevant corrective mechanisms might simultaneously help improve the manner in which the profession of media journalism is pursued".*

Nevertheless, the documents at the EU level highlighted also some pitfalls of self-regulation schemes. Article 4(7) of the AVMSD encourages Member States to use co-regulation and/or self-regulation as complementary approaches to legal provisions, in particular in relation to commercial communications and the protection of minors. However, with respect to audiovisual commercial communications on food and beverages high in fat, salt and sugars targeted at children, the second implementation report revealed that most EU countries neither updated the current codes of conduct nor developed new ones. Without naming them, the report indicates that there are still a number of countries where no adequate measures are in place. Self-regulatory practices have also been promoted at EU level through the EU Platform for Action on Diet, Physical Activity and Health which has obtained over 300 stakeholder commitments to responsible commercial communications. However, while an evaluation report from 2010 concludes that it is too early to judge the actual health impact of commitments. It appears that the impact of the Platform on national policies on nutrition and physical activity was very limited. Most national regulatory bodies do not monitor the implementation of the codes of conduct (except where co-regulatory systems are in place) and rely instead on self-regulatory bodies, few of which report to the regulator in cases of non-compliance.

2.3. Regional initiatives

2.3.1. Media NEThics

The Network of Media Self-Regulatory Authorities in South-East Europe Media NEThics was formally established in July 2015, following the initiative of the Council of Europe within the framework of the Project "Promoting freedom of expression and information and freedom of the media in South-East Europe". The establishment of the network was the result of a series of activities, organised in the period from 2012 to 2015. The aim was to create a platform for regional cooperation and exchange of experience, in order to improve the quality and professionalism of the media and ethical journalism in the region.

Since the rationale stemmed from the similar and cross-border challenges the self-regulatory bodies faced in their countries, one of the objectives of the Media NEThics was addressing the possibilities for the cross-border complaints handling in the region. Another key focus of work was awareness-raising on the basic principles of self-regulation and professionalism in the region.

The representatives of self-regulatory bodies from Serbia, Bosnia and Herzegovina, Kosovo, FYROM and Montenegro have made the decision to register the network in Montenegro, and appointed the Executive Secretary of the Media Council for Self-Regulation of Montenegro as Chairperson.

At that time the creation of the self-regulatory body in Albania was still a work in progress, also with the support of the Council of Europe. The idea was to include them into a newly established network as soon as they were established. After the finalisation of the Council of Europe's project, resulting in the creation of Media NEThics, the EU entrusted all self-regulation activities in the South East Europe to the UNESCO. There were expectations that the network will get support and start with proper functioning through framework of the UNESCO, however no further steps were made into that direction. The founding members of the Media NEThics, together with the Albanian member that joined later, are the following:

- Press Council, Serbia;[1]
- Press Council, Bosnia and Herzegovina;[2]
- Council of media ethics of Macedonia;[3]
- Press Council of Kosovo;[4]
- Albanian Media Council (AMC);
- Media Council for Self-Regulation, Montenegro.[5]

In Montenegro, there were attempts of international organisations to bring together all self-regulatory bodies and convince them to support creation of one, common body, however not all

[1] http://www.savetzastampu.rs/
[2] http://www.vzs.ba/
[3] http://www.semm.mk/en/
[4] http://presscouncil-ks.org/?lang=en
[5] http://medijskisavjet.me/

media wanted to take part in it, so there are also separate media ombudsmen for media companies Vijesti[6] and Dan.[7]

In July 2017 the Media Council for Self-Regulation adopted several amendments to its Statutes. This ended a long period of disagreement over the mandate of this self-regulatory body. It was decided that the body will deal with the appeals exclusively related to its media members to avoid overlapping with mechanisms of self-regulation enacted alternatively through the institution of ombudsman in certain media.

2.3.2. UNESCO project in South East Europe

The ongoing UNESCO media project "Building Trust in Media in South East Europe and Turkey" is a 3-years project with activities around 3 components:

- media self-regulation with a direct support to existing press councils in the region;
- media good governance, promoting labour rights standards in the region and respect for professional standards within media outlets;
- media literacy.

Summary of Chapter 2

Self- and co-regulation in the media have been promoted at the EU level and by the Council of Europe and UNESCO as a complementary approach to legal provisions, in particular with regard to commercial communications and protection of minors, and potentially effective means for ensuring compliance with content standards while respecting media freedom and editorial independence. The evidenced risks are low commitment of the stakeholders and problems with financing the schemes.

[6] ombudsman@vijesti.me
[7] ombudsman@dan.co.me

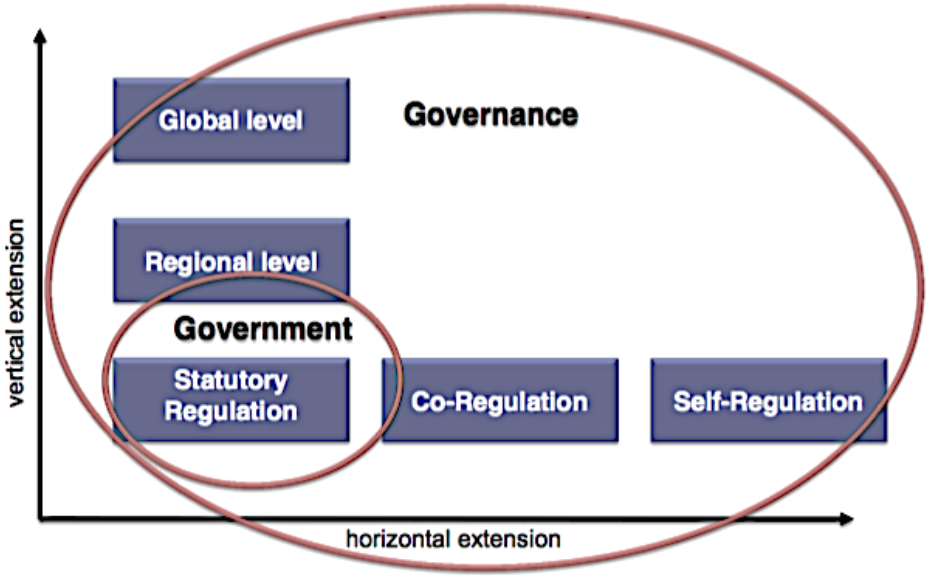
3. Conceptual background

3.1. Terminology

The contemporary theory of media introduced the term media governance covering *"all means by which the mass media are limited, directed, encouraged, managed, or called into account, ranging from the most binding laws to the most resistible of pressures and self-chosen disciplines"* (McQuail 2003, 91). The term has a double meaning. It either refers to the regulatory structure as a whole, i.e. the entirety of forms of rules that aim to organize media systems, or to an analytical concept offering a new way of describing, explaining and criticizing the entirety of forms of rules applying to media systems with a theoretically open, integrated view (Puppis 2011).

In its first meaning the media governance is a broader concept than policy or regulation which refers mostly to formal control (Karppinen & Moe 2012, 188). It encompasses also less formal regimes, such as self-regulation or its legally backed variant co-regulation, but also un-institutionalised, unstructured demands and influences.

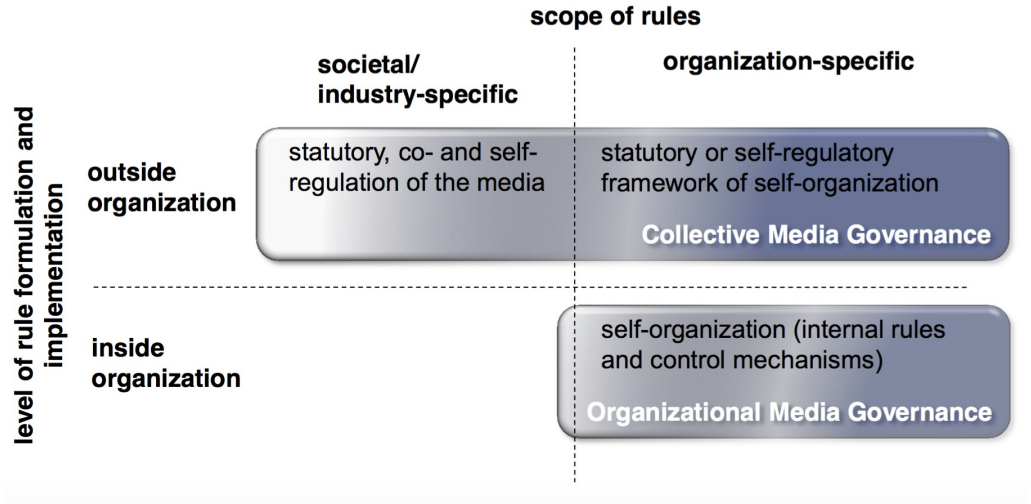
Figure 1: Governance as the entirety of rules applying to media



Source: Puppis 2011

Conception of media governance in its second meaning, for example by Michalis (2007, 17), includes how theoretical understandings shape policy discourse and how they are employed, endorsed and institutionalised by political actors to legitimate or influence the definitions and framing the policy problems.

Figure 2: Governance as an integrated view on rules applying to media



Source: Puppis 2011

Behind every policy there is a normative approach based on certain values. In Europe, the neo-liberal market place of ideas model without any governmental constraints currently prevails – it is a concept based upon classical economic market theory; but the neo-Habermasian public sphere approach is also present, highlighting the importance of various political views and cultural values, the support of which may require State intervention, but which may also be achieved through a range of complementary regulatory approaches, including co- and self-regulation (Valcke 2014, 26). According to Klimkiewicz (2009, 65-66) this so-called regulatory divergence asymmetry, is not exclusively rooted in a dichotomy between '"pro-market" (deregulatory or negative measures) and "market-correcting" (regulatory or positive measures), or a dichotomy between economic and political/cultural objectives. The dividing line is a result of two different ways of perceiving media networks in a context of larger societies or political systems: one is seeing the media as an increasingly politically autonomous and differentiated system, playing a central role in a process of competitive globalization; the second is perceiving the media as a part of a deliberative democratic system. The systems with long and successful tradition of self-regulation or co-regulation tend to be backed by the former.

Traditional statutory regulation is stipulated by primary and secondary legislation, created, adopted and implemented within the power of a State. This form of governance, also being called top-down or State regulation, is deterministic, static, and takes more time to change and adapt to new media realities and challenges.

Genuine self-regulation, on the other hand, is created and implemented by non-State actors; the initiative comes from and is pursued by the industry itself. In comparison with statutory

regulation it is less rigid and can be adjusted more quickly. There is a long tradition of self-regulation in the media. The world's first code of conduct in journalism was produced by the NUJ (National Union of Journalists for the UK and Ireland) in 1936.

Co-regulation is a combination of both above. Referred to also as a socially shared regulation or regulated self-regulation, it assumes cooperation between industry and regulator(s). In accordance with the legal framework, the regulation is entrusted to the industry but the regulator retains backstop powers to intervene in case the system is not functioning. Given the limitations of self-regulation in terms of effectiveness and the rigidness of statutory regulation, co-regulation appears a good alternative to both and is increasingly referred to in the EU policy documents.

3.2. Self-regulation in legal and policy documents

According the Interinstitutional agreement on better law-making, *"self-regulation is defined as the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)"*.

The AVMSD uses a similar definition, providing that *"self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves"*.

The NGO active in the field of freedom of expression Article 19 considers that *"self-regulation in any profession or sector entails the development and enforcement of rules by those whose conduct is to be governed, with the ultimate aim of improving the service offered to consumers, claimants or – in the case of the media – the public at large. It requires standards to be set and agreed on by the individuals and institutions to which they will apply and the development of procedures and mechanisms for enforcing them. Fundamental to self-regulation is the principle of voluntary compliance. Law courts play no role in adjudicating or enforcing the standards set and those who commit to them do so not under threat of legal sanction, but for positive reasons, such as the desire to further the development and credibility of their profession. Self-regulation relies first and foremost on a common understanding by members of the values and ethics at the heart of their professional conduct"*.

The key concept in self-regulation revolves around the notion of "code of conduct", which is sometimes translated in similar notions such as *"standards"* or *"guidelines"*. Indeed, the shortest definition of self-regulation, as suggested by Conpolicy in their study on Recommendations to improve the conditions for effective coregulation in the information society is that of *"standards setting by private legal entities"*.

The notion of code conduct is harmonized at the European Union level by the Unfair Commercial Practices Directive: according to its article 2f, *"code of conduct means an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors"*.

3.3. Co-regulation in legal and policy documents

According the Interinstitutional agreement on better law-making, *"co-regulation means the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations)"*. In the same vein, the AVMSD provides that *"co-regulation gives, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. Co-regulation should allow for the possibility of State intervention in the event of its objectives not being met"*.

The Hans-Bredow Institute study for the European Commission on self-regulation also highlighted that *"co-regulation means combining non-state regulation and state regulation in such a way that a non-state regulatory system links up with state regulation"* and should include:

- regarding the non-state component of regulation:
  - *"the creation of specific organisations, rules or processes*
  - *to influence decisions by persons or, in the case of organisations, decisions by or within such entities*
  - *as long as this is performed – at least partly – by or within the organisations or parts of society whose members are addressees of the (non-state) regulation"*;
- regarding the link between a non-state regulatory system and state regulation, the systems which meet the following criteria:
  - *"the system is established to achieve public policy goals targeted at social processes*
  - *there is a legal connection between the non-state regulatory system and the state regulation*
  - *the state leaves discretionary power to a non-state regulatory system*
  - *The state uses regulatory resources to influence the outcome of the regulatory process"*.

The main way to differentiate between self- and co-regulatory schemes resides therefore in the role of the State, which is not present in case of self-regulation and which takes part in the scheme in one way or another in case of co-regulation. Such a participation can occur both at the conception level (by giving a mandate) or at the enforcement level (by keeping back-stop powers). As pointed out by the Panteia study, *"we can speak at the very least of a co-regulatory approach in that there is a collaboration of some form between public and private interests to achieve a public goal"*. Earlier, the Hans-Bredow study also stressed that *"although there are various – implicit and explicit – approaches to defining co-regulation and although there are terms*

with overlapping meaning that have to be taken into account, there is one basic assumption that all definitions have in common: co-regulation consists of a state and a non-state component to regulation".

Summary of Chapter 3

The key differentiation between different forms of media governance is the role of the State, being the highest in classic, statutory regulation, and the lowest in self-regulation. The co-regulation lies in between with both State and non-State component to regulation.

4. Potential areas of implementation

According the Interinstitutional agreement on better law-making, self- and co-regulation *"must represent added value for the general interest. These mechanisms will not be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States. They must ensure swift and flexible regulation which does not affect the principles of competition or the unity of the internal market"*.

It is beyond any doubt that the goals followed by media policy represent an added value for the general interest. Moreover, since the AVMSD has only the goal to coordinate legislation between Members States and not to fully harmonize them: this why its article 4 insists on the fact that *"Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law"* and that its recital recalls their freedom *"to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently"*.

Traditionally, in the field of media policy, self- and co-regulation have been implemented in three areas:

- protection of minors, such as the Kijkwijzer system implemented in the Netherlands by the Netherlands Institute for the Classification of Audio-visual Media – NICAM, to which more than 2,200 companies and organisations are affiliated, either through their sector organisations or directly.
- protection of consumers, such as the Committee of Advertising Practice (CAP) Code implemented in the United Kingdom by the Advertising Strands Authority (ASA) under a co-regulatory contract with the Broadcasting regulator Ofcom;
- journalism ethics, in which self-regulation usually takes the forms of what is usually called a Press Council or a Commission (or a single person such as an ombudsman) such as the Belgian Conseil de déontologie journalistique (CDJ) who is charge of the respect by all the media of a code of journalism ethics adopted by them.

More recently, self- and co-regulation in the field of media has also been implemented not for one specific area, but cross-sector in order to impose the same regulatory system on a certain category of media players, i.e.:

- non-linear audiovisual services. It used to be case between 2009 and 2015 in the United Kingdom with the Association for Television On-Demand (ATVOD) which was designated by OFCOM to regulate VOD services, but whose designation was withdrawn in December 2015 by Ofcom, who now act as a regulator for both linear and non-linear services. It is still the case in Ireland with the Code for On-Demand Audiovisual Services (ODAS), under a fully self-regulatory framework.

An even broader scope and new areas of deployment can be expected with the new AVMSD which is currently in the trilogue discussion between the European Commission, the European Council and the European Parliament. The European Commission is advocating broadening the scope of regulation to video-sharing platforms (social media included), especially with regard to protection of minors and incitement to violence and hatred. The list of means suggested by the proposal of the AVMSD contains reporting and rating mechanisms, verification systems (transparency required), contributing to media literacy, co-/self-regulation, creation and regular updating of lists of video-sharing-platforms within the Member States' jurisdiction.

Co-regulation is encouraged also for other services within the scope of AVMSD (classic linear and non-linear services) and for other areas (e.g. fatty food, alcohol), provided that it is broadly accepted, clear, ambiguous, and there is effective and transparent enforcement foreseen, as well as regular, transparent and independent monitoring. There is also a reference to development of Union Codes of Conducts where appropriate and in line with the principles of subsidiarity and proportionality.

Summary of Chapter 4

Where the self- or co-regulation is being used: protection of minors, advertising in general and specific advertising areas (e.g. alcohol products or food high in fat and sugar), protection of consumers, nonlinear media (discussed also video-sharing platforms) and journalistic standards. The EU has so far not been encouraging self-regulation and co-regulation in issues related to fundamental rights or in situations where the rules must be applied in a uniform fashion. The latter may change with the introduction of the EU Codes of Conduct (as foreseen with the proposal of the new AVMSD).

5. Conditions for an effective self- or co-regulatory system

Considering the widely spread recognition of their quality and completeness, the Principles for better self- and co-regulation (the Principles), which were adopted by the European Commission in 2013 with the involvement of a wide range of stakeholders, constitute the basis on which we suggest to assess the effectiveness of a self- or co-regulatory system. The ten principles detailed in sections 5.1. and 5.2. below can be translated into twice five questions which have to be raised during the setting-up and during the implementation of a self- or co-regulatory system and to which the answer should ideally be positive for most if not all of them.

These ten principles translated into ten questions are supplemented in section 5.3. by three criteria meant to provide an assessment in terms of enforcement of the decisions taken by self- or co-regulatory bodies. These additional criteria were used by the authors of the Panteia study. These three criteria partly overlap with some of the ten principles, but provide useful additional ways to describe the most suitable conditions for an effective self- or co-regulatory system.

Section 5.4. ends this chapter with the conditions that have to be met in order to secure an efficient and trustful relationship between self- or co-regulatory bodies and regulatory authorities.

5.1. At the level of conception

5.1.1. Is the participation of most of the actors of the sector secured?

Participation of as much representatives of the sector as possible is fundamental for the credibility and effectiveness of the system. According to the Principles, *"Except in cases where the competitive nature of an initiative makes this inappropriate, participants should represent as many as possible of potential useful actors in the field concerned, notably those having capacity to contribute to success. In case some organisations, notably SMEs, do not have the capacity to commit directly to the action, they may be represented by a relevant umbrella organisation. Where, at launch, not all possible parties have come on board, later engagement should remain possible, and the conditions for it should be clearly stated. Participants are each fully accountable and respected for their specific contributions"*.

The participation of representatives of the sector is essential and shall remain an option in the later phases also.

According to the Panteia study, *"for schemes developed in the context of the AVMS Directive, stakeholders from media and broadcasting companies, and advertising industries should ideally be represented, along with public authorities, regulators, civil society, and consumer protection groups. Where specific products or sectors receive extra focus within a regulatory scheme, actors from these sectors should naturally be represented too so that all relevant stakeholders are involved. Concerning the protection of minors from harmful audiovisual content, the presence of consumer or civil society groups are considered to be especially relevant"*.

It appears from this study that in most self- or co-regulatory systems throughout Europe, the participation of representatives of the industry is indeed secured, but that it is less often the case for representatives coming from civil society.

When designing a new system, participation of representatives of the civil society shall be encouraged.

5.1.2. Is the conception process open to all stakeholders?

According to the Principles, *"envisaged actions should be prepared openly"* by including any interested parties: public authorities, enterprises, legislators, regulators and civil society. Public authorities should be ready to convene, moderate or observe, as most helps the process and if deemed appropriate.

The initial blueprint for any action should be multi-stakeholder and developed via open exchange between interested parties.

Where the field (and the number of stakeholders) is too large to be effectively managed, the leaders of the action may select those mainly having capacity to contribute to success, at least in the initial phases. Others can join later.

The initiative and its constitutive texts shall be widely publicised and easily accessible.

In practice, this might for example mean that, as detailed in the study, *"in some cases the scheme owners organised workshops, meetings and public events to further include a broad variety of stakeholders. Such measures seek to involve both the industry, the relevant stakeholders as well as other interested parties, thus contributing to the openness regarding the conception of a self- or co-regulatory scheme"*.

5.1.3. Is the involvement in the system driven by good faith?

The Principles stress that *"participants should bring to the preparatory process all information available to them that can contribute to a full analysis of the situation. Similarly, in launching an*

action, participants should ensure that their activities outside the action's scope are coherent with the aim of the action. Both in developing and in executing self- and co-regulatory actions, participants are expected to commit real effort to success".

This is the most difficult principle to assess since it rests on intentions. As highlighted by the study, this is a relative statement and quite broad: *"In practice, discovering whether real effort or commitment [is] made by the participants involved [is] somewhat difficult to establish as the exact capacities of each stakeholder involved [is] often not known".*

It might be considered that if the first two principles are followed, then this one will also probably be. On the contrary, if the first two principles raise concerns, a deeper assessment of the real commitment of the parties involved might be appropriate.

5.1.4. Are the objectives of the system clearly set out?

According to the Principles, *"the objectives of the action should be set out clearly and unambiguously. They should start from well-defined baselines, both for the issue on which change is being pursued and for the commitments that participants have made. They should include targets and indicators allowing an evaluation of the impact of the action undertaken".*

This is an important principle to assess since the study stressed the fact that *"concrete and unambiguous objectives, operationalised for monitoring and evaluation are rarely in place"* and that *"in the vast majority of the self- and co-regulatory schemes, no indicators and targets are specifically established for monitoring and evaluating the scheme objectives".*

5.1.5. Is legal compliance ensured?

The Principles advise that *"initiatives should be designed in compliance with applicable law and fundamental rights as enshrined in EU and national law. Participants are encouraged to have recourse to existing guidance provided by public authorities. In case of doubts, an assessment clarifying, inter alia, impact and complementarity with the acquis and with the Charter of Fundamental Rights should be conducted".*

This principle usually does not raise any concern, since the systems in place either refer to or derive from a specific law.

5.2. At the level of implementation

5.2.1. Is there room for iterative improvements of the system?

The Principles stress that *"successful actions will usually aim for a prompt start, with accountability and an iterative process of 'learning by doing'. A sustained interaction between all participants is required. Unless the action covers a short time-span, annual progress checks should be made, against the chosen objectives and indicators, as well as any available broader background data"*.

The Panteia study adds that *"in practice this criterion means that a self- or co-regulatory scheme should have a systematic process in place for identifying areas for improvement or adjustments to the scheme to achieve the set objectives. The assessment of the need for adjustments should be made with regularity, and preferably on an annual basis. The assessments should be carried out in close cooperation with the relevant participants of the scheme"*. It also stresses the importance to formalize these iterative improvements in order to avoid the risk of not having them being undertaken in practice: *"although in many cases there [are] processes for identifying improvements or new areas of focus, these processes are not always carried out systematically or made explicit"*.

5.2.2. Is there a monitoring of the system?

According to the Principles, *"monitoring must be conducted in a way that is sufficiently open and autonomous to command respect from all interested parties. Each participant shall monitor its performance against the agreed targets and indicators. Monitoring results are shared by each actor for discussion with the participants as a whole, and are made public. A monitoring framework or template will be commonly agreed. The results of the monitoring will be aggregated where possible. This should be done in a way that is transparent and objective"*.

This principle is often not respected. The Panteia study revealed that *"the only quantitative indicator that is often monitored to assess the performance of the scheme is that of consumer complaints. Using complaints as an indicator can be very useful, but is not enough in itself to base a monitoring system on which adheres to the requirements set out in the Principles above"*. Monitoring should rather be *"carried out in an open and autonomous manner, to measure the performance of a scheme based on established indicators and targets, within an agreed upon framework"*.

5.2.3. Is there an evaluation of the system?

The Principles advise that the participants to the system should *"regularly and collectively assess performance not only against output commitments, but also as to impact. This should identify any short-fall in expected collective impact, any scope to improve the efficiency or effectiveness of the action, and any other desirable improvements"*.

This principle appears as being also frequently breached. The assessment conducted during the study led to the conclusion that *"while annual reports are developed, almost two thirds of the schemes collected [have] no formal evaluation system in place in line with the requirements for this criterion. Only a few evaluation systems [are] in place which [undertake] regular assessments of the scheme, the broader impact of the scheme, as well as its performance, and possible areas for improvement"*. This can probably *"be related in part to the lack of explicit and operationalised objectives"* which have also been highlighted by the Panteia study.

5.2.4. Is there a procedure for resolving disagreements?

As stressed by the Principles, *"disagreements inevitably arise involving either participants or others. As part of the iterative process of improvement, such disputes should receive timely attention, with a view to resolving them. These procedures may be confidential. In addition, complaints by non-participants should be submitted to a panel of independent assessors which consist of majority of non-participants. The outcome of their work is made public. Non-compliance should be subject to a graduated scale of sanctions, with exclusion included"*.

This principle usually does not raise difficulties, although the procedures are not always formalised. What appears as a good approach in this regard is, as suggested by the study, to *"involve independent assessors, the majority of whom are not participants of the scheme. Independent experts or members of civil society or consumer groups should therefore ideally be represented in these adjudicating bodies"*.

5.2.5. Is there an adequate and transparent financing of the system?

Finally, the Principles stress that *"participants to the action will provide the means necessary to fulfil the commitments. Public funders or others may in addition support the participation of civil society organisations lacking fully adequate means themselves to play their appropriate role. Such financial support should be made publicly known"*.

It appears from the practice of a majority of self- or co-regulatory bodies that a mixed funding is often present. However, one of the findings of the Panteia study is that *"the level and distribution of financing of self- and co-regulatory schemes is often not publicly available"*. What appears also important with a view to secure a high and diverse level of participation is that the fees are proportionate to the contributing capacity of each member.

5.3. At the level of enforcement

5.3.1. How is the complaint resolution mechanism functioning?

Consumer complaints resolution mechanisms can be examined on the basis of:

- the existence itself of such a mechanism (which is not always present although it of course should be);
- the amount of complaints received (which can indicate a high level of compliance by the participants or on the contrary a low level of knowledge of the system by the public);
- the speed with which these complaints are dealt with (timely responses are an obvious indication of effectiveness);
- the existence of a fast-track procedure in case of serious damage;
- the way in which the cases are resolved (a system in which most if not all the complaints are rejected might appear as rather self-justification than self-regulation);
- the promptness of the compliance by participants with the decisions taken.

5.3.2. What is the outcome of the decision?

This criterion focuses on:

- the consumer satisfaction with the complaints procedure (if measured, which is most of the time not the case) and on
- whether the procedure contributes to a better overall compliance with the system by the participants and better understanding of the functioning of the system by the public.

5.3.3. Can there be sanctions and if yes are they enforced?

The last criterion which can be used to measure effectiveness is:

- the existence of sanctions for non-compliance (including the existence of a graduated system of sanction which can guarantee that the violation is sanctioned with due proportionality) and
- their effective enforcement (especially in case of continued violations).

As highlighted by the Panteia study, this is a criterion which should be assessed with refinement since the expectations and the appreciations of the public and of the industry might differ: *"on the one hand, if sanctions are not strict enough or do not carry enough impact they may not be effective tools for achieving compliance with a code. On the other hand, sanctions which are seen as too heavy or extreme can create resentment amongst industry, undermine the collaborative spirit of the self- or co-regulatory scheme, or excessively restrict the activities of the industry"*.

5.4. Articulation with statutory regulation

Traditionally, self-regulation is considered sa regime conceived and implemented by the media professionals or the industry, without any intervention from the State. The view advocated by the international organisations is that there should be as little State control of media content as possible. However, as a consequence of the British phone hacking scandal which revealed the limits of the model of media self-regulation, the voices demanding statutory recognition of self-regulation[8] are not isolated anymore.

Two visible and widely discussed relatively recent examples of proposals of statutory media self-regulation include the report of Judge Leveson in the United Kingdom[9] and a report commissioned by European Commissioner Neelie Kroes in 2013.

In reaction to the News of the World scandal in the United Kingdom, Lord Justice Leveson concluded in November 2012 that the former British press council (the Press Complaints Commission) had failed and that a new system of media self-regulation should be established (Leveson, 2012). "*Oscillating between co-regulation and self-regulation, his report recommended a system of media self-regulation underpinned by a statutory recognition body. This middle-way solution was brought in practice with a Royal Charter in 2013 regardless of the fact that a majority of the British press opposed it due to concerns of undue interference by public authorities in media freedom*" (Hulin 2014a, 1).

The same year the report of the group of experts on media freedom and pluralism, commissioned by EU Commissioner Neelie Kroes, suggested the establishment of press councils in all European countries to secure "*a free and pluralistic media to sustain European democracy*", on the basis of "*a set-up of European-wide standards*" and by being "*monitored by the Commission to ensure that they comply with European values*" (European Commission, 2013).

Hulin (2014a) draws a distinction between democratic countries and countries in democratic transition. She argues that statutory media self-regulation in non-democratic countries brings risks of transforming self-regulation into a compulsory system controlled by political interests. Hodžić (2015), on the other hand, demonstrates how a range of intractable problems (political, economic and structural) also hold back and limit self-regulation in the Western Balkans.

The News of the World case showed that the wealthier democratic countries are not immune to toothlessness of self-regulation. Nevertheless, as Hulin argues, in democratic countries, the "upgrade" of self-regulation to statutory media self-regulation can make this voluntary system more effective, for instance by limiting the number of media outlets that decide to abstain from it. However, there is still the risk of a two-speed protection of media professionals dividing them by their adherence to professional standards, which is not compatible with the universal nature of freedom of expression (Hulin 2014a).

[8] We use the term statutory self-regulation in the meaning suggested by Hulin (2014a, 1): an acknowledgement by law of a media self-regulatory body and its decisions.

[9] http://webarchive.nationalarchives.gov.uk/20140122144916/http://www.levesoninquiry.org.uk/about/

Statutory self-regulation does not equal with co-regulation, neither does it necessarily lead to co-regulation. It is also unlikely that self-regulation will fully replace statutory regulation in media in the foreseeable future.

Below we detail the dimensions where self-regulation, co-regulation and statutory self-regulation meet the statutory State regulation. Some of them (legal compliance, sanctions and financing) were already discussed above – at the levels of conception, implementation and enforcement, but from different perspectives.

5.4.1. What is the scope of territorial jurisdiction?

As the mandates of regulatory bodies are nationally focused, so are the mandates of the existing media self-/co-regulation systems. It remains to be seen what impact (if any) the new AVMSD will have and how the supra-national codes will function if put into practice.

5.4.2. What is the scope of material jurisdiction?

Even in systems with strong tradition of self-regulation "*some legal regulations are always needed to ensure that minimum standards regarding freedom of expression are respected*" (Hulin 2014a, 6), in particular the regulations safeguarding media freedom, protection of journalists' sources or ensuring access to information. According to the article 10 paragraph 2 of the European Convention of Human Rights, legitimate limitations of media freedom include also protection of the reputation and the protection of national security.

Due to different national contexts and policy choices there is no prevailing European model on what shall be within the remit of media self-regulation and what within the statutory media regulation. Sometimes their material scopes are partly overlapping and some areas might be covered by both systems. This can result on one hand in over-regulation and lack of legal certainty, or on the other hand in a more fortunate combination of the two systems complementing and supporting each other.

5.4.3. Is there a legal compliance of the self-/co-regulation schemes provided?

Legal compliance according to the definition as set in the Principles, is upheld in majority of the schemes examined by the Panteia study. In most cases, a country's regulatory approach in compliance with European and national legal frameworks consists of broad statutory regulation such as a law on broadcasting or on audiovisual media, which is then complemented with more specific rules in a self- or co-regulatory scheme, which are either based on or connected with a specific law.

5.4.4. Are there any enforcement measures with legal consequences?

The classic enforcement measures guaranteeing compliance with the rules and standards used by self- and co-regulatory bodies are faming, shaming and blaming, i.e. with no legal consequences. Nevertheless, self- and co-regulatory bodies can opt to inform a regulator or initiate Court procedure leading to judicial sanctions.

The Panteia study demonstrates that a combination of softer and harder sanctions (legislative backstop) can be a good approach to enforcing compliance with self- and co-regulatory schemes: "*Examples of such mixes of softer and harder sanctions were found, amongst others, in the National Ethics Rules for Advertising and Commercial Communication In Bulgaria, the Portuguese ICAP Code of Conduct, the Italian Code on TV and Minors, and the Slovenian Code of Advertising Practice*". In Italy, the Code on TV and Minors uses both faming, shaming and blaming, and public fines. The regulatory authority AGCOM is responsible for this part of the enforcement, based on national legislation.

5.4.5. Is there any formal recognition of the self- and co-regulation bodies by the State/public authorities required?

In Denmark, media self-regulation is recognized by law and is mandatory. In the United Kingdom, the signing of the Royal Charter does not make the system mandatory but formally recognizes the system of media self-regulation and endorses its way of functioning. This is also the case in Ireland (Hulin 2014a, 7).

5.4.6. Are there any incentives for participation in the self- and co-regulation scheme?

One of the techniques used by state authorities encouraging media to get involved in the system of self-regulation are incentives, such as rewarding or punitive measures for media who adhere to or ignore the model of self-regulation. "*In the United Kingdom, the Royal Charter foresees treating publishers differently depending on whether or not they are members of the media self-regulation system, with those outside the system facing the threat of exemplary damages and punitive costs should they be taken to court. On the contrary, in Belgium, media adhering to the system receive State subsidies. In Ireland, media belonging to the system of media self-regulation may benefit during defamation proceedings*" (Hulin 2014a, 7).

5.4.7. Is there any supervision of the self- and co-regulation implementation carried out by the State/public authorities?

Do the public authorities supervise the enforcement of rules adopted by media companies or professionals? Are the media or media professionals required or expected to report to the public authority regularly or upon request?

5.4.8. Are state or public funds involved in financing of self- and co-regulation?

According to the Panteia study, self- and co-regulatory schemes most commonly rely solely on membership fees as the source of financing. In some cases, the financing comes from membership fees as well as public funds. A source of financing can be also selling services (e. g. clearing of advertisements; classification of a programme according to a rating system…).

In cases where the State participates in self-regulation through financial incentives, either direct (government funding) or indirect (advertising practices of government institutions) an extra attention to the safeguards of independence of the self-regulatory body shall be paid. Alternatively, international funds can be considered, but bearing in mind that they cannot provide for long-term financial sustainability of the self-regulatory system. Ideally, the designers of the system shall give priority to independent sources, guaranteeing some stability and easy to combine with other sources.

6. Case studies

6.1. Protection of minors: Kijkjiwzer (Netherlands)

6.1.1. Policy context

In the Netherlands, the Dutch national regulatory authority Commissariaat voor de Media (CvdM) and the Nederlands Instituut voor de Classificatie van Audiovisuele Media (NICAM) share responsibility for protection of minors. According to the Media Act 2008, public service and private media that intend to broadcast linear audio-visual conten, are obliged to be affiliated to and comply with the regulations of NICAM. Should they not wish to participate in this system, they become subjected to direct supervision of the CvdM and may only broadcast content suitable for audiences of all ages.

6.1.2. Main features and best practices

Articulation with statutory regulation

The integrated age classification and labelling approach of NICAM's Kijkwijzer system, extending through all regulated audiovisual sectors (with certain specificities for each sector), has been a showcase for the co-regulation of audiovisual content across the media.

Kijkwijzers' co-regulatory design is tripartite. The actual classification and rating is conducted by the industry itself. System responsibility is installed with the NICAM. On the meta level, both the functioning and the output of NICAM is supervised by the CvdM.

The NICAM reports on the annual basis to the CvDM, which evaluates the Kijkwijzer's performance and reports on the findings to the Ministry of Culture. The results of these evaluations are included in the so-called letter to the government published on the CvDM website.

On the basis of the Media Act, the NICAM has the mandate by the Ministry of Education, Culture and Science to perform the remit of the institution for classification and acts as a private actor in the Dutch co-regulatory system. As such, NICAM is responsible for the supervision of its members (providers of audiovisual meda services). The CvdM, as noted above, is responsible for the supervision of non-members.

Rules on seriously harmful media content remain within the competence of the CvdM and are directly supervised by the regulator.

NICAM is also in charge of PEGI, the rating system for games.

Level of conception – rationale

The institute NICAM was established in 1999 and the Kijkwijzer introduced in 2001. NICAM is the owner of Kijkwijzer. The basic rationale behind this successful classification and labelling system is information, not imposition. Kijkwijzer does not assess the quality of programmes nor its suitability for children of different ages. Its creators acknowledged that standards and preferences of parents are too diverse, so they setup the system just pointing to potentially harmful elements and leaving the responsibility for determining the appropriateness of the content to parents and carers. The final responsibility for what their children watch rests with the parents.

Level of conception – compliance

Every year NICAM checks around 50 classifications for television on correctness. The CvdM includes this results in its annual evaluation of NICAM. The results of these evaluations become a part of a letter to the government.

Level of implementation – scope

The system is applied to all kind of audiovisual content in the Netherlands, from television programmes and cinema films to films on DVD and video. The only exemption are news and live programmes on television, as it is not possible to classify these programmes in advance. However, the providers are obliged to take the broadcast time into account and to warn viewers in advance in case of shocking images.

In the case of television (linear service), the Kijkwijzer age classifications are linked to broadcast time slots. Programmes with the labels 'All Ages', '6' and '9' years may be broadcast at any time of the day. Programmes with the classification '12' years may only be broadcast after 8 PM and those with the classification '16' years after 10 PM.

The age labels are presented together with pictograms describing the main features of the programme that may disturb children of a certain age. There are 6 of them (for violence, fear, sex, discrimination, drugs/alcohol abuse, and coarse language). They can be found in television listings magazines, cinemas, film guides, film websites, text pages, advertisements, posters and on the packaging of DVDs and videos. The pictograms are also broadcast at the beginning of a television programme.

Level of implementation – participation

There are more than 2200 companies currently affiliated to Kijkwijzer. Even the media service providers that are not legally obliged to join Kijkwijzer increasingly sign up as members of NICAM and voluntarily comply with the Kijkwijzer rules (e.g. Netflix). The reason lies in the wide public appreciation of the system, broad support of the audiovisual sector and its association with positive market effects.

Using a questionnaire developed by Kijkwijzer, broadcasters and film and video distributors classify their productions themselves. Specially trained employees, so-called coders, watch a

production in detail and answer sixty questions online about what they have seen. A computer programme developed by Kijkwijzer then calculates what classification a certain programme gets. On the basis of a number of questions, the coder assesses the television programme or film in terms of violence, fear, sex, discrimination, drug and/or alcohol abuse and coarse language. An age recommendation is associated with each of these subjects. The subject with the highest age score determines the final age recommendation that Kijkwijzer gives a production. If several categories score equally highly, these will also be included in the Kijkwijzer recommendation, with a maximum of three.

Kijkwijzer also enjoys a significant international success and has been quoted on a number of occasions as a referential practice. The countries that acquired the licence for the usage of the Kijkwijzer, together with its online tool (either in original or in the version adapted to the national specifics), range from countries as small as Island and Slovenia to the large audiovisual market of Turkey.

Level of implementation – iterative improvements

The questionnaire was developed by a group of renowned experts in the field of media and youth, and is being regularly updated on the basis of research findings. NICAM performs regular quality assessments of its compliance with the rules and tests consumer perception, as well as the use of the Kijkwijzer.

Level of implementation – financing

The foundation NICAM is an independent, non-profit organisation, which has set "*itself the general aim, without making a profit, to promote the provision of information as to the potential harmfulness of audiovisual products created by the audiovisual sector towards young people by means of classification.*" The half of the yearly budget of Kijkwijzer is financed by the government and the other half by the organisations of broadcasters. NICAM also earns a part of its budget also by selling its services.

Level of enforcement – complaint handling and sanctions

All organisations and companies affiliated to NICAM are obliged to classify their audio-visual productions in accordance to the Kijkwijzer rules and to display the Kijkwijzer classifications correctly. If the rules are not followed or infringed, a complaint to NICAM is possible within two weeks after the broadcast.

Complaints are always first processed at the NICAM's office. If the breach is confirmed, NICAM's office requests from the broadcaster, film or DVD distributor to correct the classification, or in case of television, to broadcast the production at a different airing time.

If the provider doesn't follow up the request within three working days, the complaint is forwarded to the independent NICAM Complaints Committee and a sanction may be imposed. Otherwise, the complainant is informed and the complaint is forwarded to the independent NICAM Complaints Committee, only if the complainant still wishes to do so. In that case a

hearing takes place. Both the complainant and the plaintiff are given an opportunity to make a verbal statement of their position. There are no costs involved. The complainant receives a written judgement from the Complaints Committee within approximately four weeks after the session.

The Committee may order that the classification is amended or may impose a fine of up to €135,000 per case. There is a possibility of appeal against the judgement of the Complaints Committee with the Appeals Committee. The appeal must be submitted to NICAM in writing within four weeks of the date of judgement by the Complaints Committee. Depending on the findings of the Appeals Committee, the judgement against which the appeal was launched will be confirmed, overturned or referred back to the Complaints Committee for reconsideration.

6.2. Protection of consumers: ASA (United Kingdom)

6.2.1. Policy context

The UK national converged regulator, responsible for media, Ofcom initiated the establishment of the Committee of Advertising Practice (CAP) Code together with the private self-regulator for advertising communication, the Advertising Standards Authority (ASA).

The objectives of the scheme are ultimately to make every advertisement shown in the UK responsible in order to protect consumers, notably children, and to improve the quality and trust in the advertising industry. The CAP is part of the ASA, which regularly revises its targets, and has quantitative and qualitative indicators in place to monitor the scheme's performance.

6.2.2. Main features and best practices

Articulation with statutory regulation

The regulation of commercial communication in the UK is under the direct responsibility of the ASA, which under the provisions of the Communications Act (2003), is given regulatory powers by the State regulator Ofcom.

Every quarter, the ASA reports on its performance indicators to Ofcom. In addition, the ASA and the CAP publish an annual statements regarding the progress made towards achieving its objectives and targets.

Level of implementation – monitoring

ASA and Ofcom have a shared responsibility to monitor the performance of the CAP Code. In order for Ofcom to monitor the system, ASA reports regularly on pre-agreed Key Performance

Indicators. Moreover, a major evaluation by Ofcom is conducted every 10 years. In addition, ASA also conducts its own reviews on the effectiveness of the scheme. Complaints are generally handled by ASA. It has produced a set of procedures governing the handling and resolution of complaints.

Level of enforcement – complaint handling and sanctions

Complaints are generally handled by the ASA (around 30,000 per year), which has created a set of specific procedures. The ASA Council is an independent jury that is solely responsible for deciding if the Advertising Codes have been breached. There are several sanctions which can be issued by the ASA for different types of breaches of the CAP Code. In 2016 the ASA resolved 28,521 complaints resulting in 4,824 ads being changed or withdrawn.

The ASA is a non-statutory body and as such, it cannot impose fines. Nevertheless, this does not appear to harm the effectiveness of the rules' enforcement. There are several sanctions, which can be employed in different circumstance: issue alerts to its members to withhold access to advertising, withdraw trading privileges and pre-vetting of marketing materials. If broadcasters are repeatedly found to be in breach of the Code, ASA can refer cases to Ofcom, which can impose fines and even withdraw the licence to broadcast.

Level of implementation – financing

Tha ASA is funded by a voluntary 0.1% levy on the cost of advertising space for their ads, meaning the amount of money advertisers pay media owners, such as billboard sites, newspapers, posters, online, and a 0.2% levy on some direct mail. It also receives a small income from charging for some services (seminars and premium industry advice). This arrangement guarantees its independence. It does not receive any public funding and the industry levy is an "arms-length levy" which is collected on the ASA's behalf by the Advertising Standards Board of Finance and the Broadcast Advertising Standards Board of Finance. The ASA doesn't know who is paying or how much they're paying. The levy is the only part of the system that is voluntary. Advertisers can choose to pay the levy, but they cannot choose to stick or not to the Advertising Codes or the ASA's rulings.

6.3. Journalism ethics: Conseil de déontologie journalistique (Belgium)

6.3.1. Policy context

The *Conseil de déontologie journalistique* (Council for ethical journalism, hereinafter CDJ) was created in 2009 as the self-regulatory body for the French speaking media of Belgium.

The creation process of the CDJ is of interest because it is the result of intense discussions and negotiations which implied the representatives of the media and the public bodies concerned (the Government of the French-speaking Community of Belgium and the audiovisual media regulatory authority of Belgium – *Conseil supérieur de l'audiovisuel*, hereinafter CSA).

The goals of these discussions were trying to solve the two main unsatisfactory aspects of regulation of journalism ethics, which were that, due to the lack of a self-regulatory body:

- complaints about breaches of journalism ethics by the press had no place to be dealt with, except of course within each individual media if they did so on their own initiative;
- complaints about breaches of journalism ethics by audiovisual media would naturally be driven towards the CSA, which could intervene:
    - either on the basis on the traditional content obligations derived from the transposition of the AVMS Directive (protection of minors, protection of consumers, ban of hate speech…);
    - or on the basis of a specific provision of the media law which states that audiovisual media service providers *"have to adopt internal regulations regarding objectivity in the treatment of information and commit to respect them"*.

Both situations were considered as unsatisfactory, giving a sense of impunity on one hand and a sense of public control on a matter which should be left to the profession on the other hand.

The discussions led to a unique agreement among all the stakeholders according to which a new self-regulatory body would be set up, would be given a legal status and financial support by the Parliament and would be granted, for audiovisual media, a shared responsibility with the CSA, whose former power would be partly transferred to the CDJ while keeping certain backstop powers in order to safeguard the public interest in contentious situations. All this is enshrined in the Law of 30 April 2009.[10]

This legal status and the public financing of the system raised of course concerns in terms of potential risks of political capture. The concerns have been solved by safeguarding the independence of the CDJ via a triple mechanism:

- only half of the financing is public, and it is not the CDJ which is directly financed, but rather the non-profit organisation which has legally set up the CDJ;
- the CDJ is fully autonomous in its decision-making process; no holder of a public mandate can be a member of the CDJ or the director of the non-profit organisation which created the CDJ;
- the legal status and the funding are enshrined in a Law adopted by the Parliament rather than in a simple ministerial decree, which gives the system a stronger guarantee of sustainability and broad public support.

[10] Available at http://www.csa.be/documents/1308

6.3.2. Main features and best practices

Articulation with statutory regulation

According to the law, the complaints which reach the CSA about audiovisual media are dealt with as follows:

- if the complaint is exclusively about a matter of journalism ethics, it is transferred to the CDJ, which becomes in charge of dealing with it;
- if the complaint is about a matter of journalism ethics but also about a matter of media law, it is handled by both parties, but first by the CDJ; once the opinion of the CDJ has been adopted, in case the CSA has the intention not to follow the opinion the CDJ, it has to launch a conciliation procedure with the CDJ and duly reason why it diverts from the opinion of the CDJ.

The law also leaves the possibility for the CSA to deal directly with a complaint in three exceptional circumstances:

- when the opinion of the CDJ concludes that there has been interference of the audiovisual media service provider in the editorial independence of its newsroom;
- when the CDJ concludes that there has been a repeated offence by the same audiovisual media service provider on the same issue within 12 months;
- a complaint is filed by at least three different political group represented in the Parliament.

Level of conception – participation

The composition of the CDJ has been structured in order to reflect the participation of as much as stakeholders as possible. The CDJ is currently structured as follows:

- 6 representatives of the journalists (+ 6 deputies);
- 6 representatives of the publishers (+ 6 deputies);
- 2 representatives of editors-in-chiefs (+ 2 deputies);
- 6 representatives of civil society (+ 6 deputies).

Level of conception – compliance

An annual report is published by the CDJ and is made publicly available. A specific joint report on complaints jointly handled by the CDJ and the CSA is also published yearly, and the two bodies have to meet twice a year to evaluate the correct functioning of their cooperation.[11]

Level of implementation – iterative improvements

Before the creation of the CDJ a Code for ethical journalism already existed, but the CDJ took the initiative to refresh it. The new code has been adopted in 2013.

Regularly, the CDJ also adopts oft law instruments on specific issues which have raised public concern via public debates or through a significant amount of complaints, such as:

[11] Reports available at http://lecdj.be/publications/les-rapports-annuels/

- a recommendation on information about foreigners or persons of foreign origin (2016);
- a recommendation on information in situations of emergency (2015);
- a directive on the distinction between advertising and journalism (2015);
- a directive on the identification of physical persons in the media (2014);
- a guide of good practices between journalists and their sources (2012);
- a recommendation on open discussion forums in the media (2011);
- a recommendation on election coverage by the media (2010).[12]

Level of enforcement

The CDJ has adopted internal regulations on complaints handling, which are made public.[13] These regulations detail the material of scope of the CDJ (i.e. all the media, no matter if they are on paper or digital, written or audiovisual), how to complain, how the complaint will be handled and how the final decision will be made available to the public and the complainant.

All the decisions have to be duly reasoned. The CDJ does not have the legal capacity to impose sanctions on the media. In case of breaches, the sanction is a moral one, consisting in the publication by the CDJ of its decision.

6.4. Non-linear audiovisual media services: United Kingdom

6.4.1. Policy context

The transformation of the EU regulatory framework for audiovisual media services in 2007 from the Television Without Frontier Directive (TWFD) to the Audiovisual Media Services Directive (AVMSD) led to the extension of the material scope of the Directive, which since then includes not only linear (broadcast – pushed to the consumer) services but also non-linear (on-demand – pulled by the consumer) services.

However, according to recital 94 of the AVMSD, *"in accordance with the duties imposed on Member States by the Treaty on the Functioning of the European Union, they are responsible for the effective implementation of this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently"*.

If the vast majority of the Member States have entrusted their existing regulatory authority to also regulate non-linear service, it has not been the case until recently in the United Kingdom (where until December 2015 the regulatory authority Ofcom entrusted the co-regulatory body

[12] All available at http://lecdj.be/la-deontologie/les-textes-belges/

[13] Regulations available at http://lecdj.be/comment-introduire-une-plainte-au-conseil-de-deontologie-journalistique/la-procedure-introduction/

ATVOD for this task)[14] and in Ireland (where this task is the hands of a self-regulatory body in charge of implementing the Code for On-Demand Audiovisual Services (ODAS).[15] The next section will focus on how Ofcom's delegation of powers to ATVOD has worked between 2010 and 2015.

6.4.2. Main features and best practices

Articulation with statutory regulation

As we have seen earlier in section 6.2 about protection of consumers, Ofcom has the possibility, under certain conditions, to designate another body to carry out part of its regulatory functions. It continues to do so for advertising standards with ASA and also used this opportunity in 2010 to entrust a body named the Association for Television On-Demand (ATVOD) with the mission to regulate non-linear services in all the aspects of regulation except advertising (already self-regulated by the ASA).

The decision to transfer its powers to this association, taken after having done a public consultation on the subject, was duly motivated and detailed the engagements taken by ATVOD in order to be designated as the co-regulatory body, which are:

(i) *"ATVOD is a fit and proper body to be so designated;*

(ii) *ATVOD will ensure, in performing any function to which this Designation relates, that it takes all appropriate steps to comply with the statutory and regulatory obligations that apply to Ofcom in performing its regulatory functions, including in particular:*

   a. *to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and to such of the matters in section 3(4) of the Act as appear to be relevant to it in the circumstances;*
   b. *to consult and carry out impact assessments in relation to the carrying out of the Designated Functions in circumstances where Ofcom would be required to do so to comply with section 7 of the Act;*
   c. *to comply and secure that its staff comply with section 393 of the Act (confidentiality);*

(iii) *ATVOD has access to financial resources that are adequate to ensure the effective performance of the designated functions;*

(iv) *ATVOD is sufficiently independent of providers of on-demand programme services; and*

(v) *ATVOD has consented to being so designated" (recital 5).*

This decision therefore legally transformed this association into an official co-regulatory body, as *"this Designation shall be legally binding and, as Ofcom's designee, ATVOD shall be liable to*

[14] All the documents about the period in which ATVOD was in charge are available at http://webarchive.nationalarchives.gov.uk/20160703010755/http://stakeholders.ofcom.org.uk/broadcasting/on-demand/atvod-archives/. All the documents about regulation of VOD since ATVOD's designation ended are available at http://webarchive.nationalarchives.gov.uk/20160702164814/http://stakeholders.ofcom.org.uk/broadcasting/on-demand/

[15] http://www.bai.ie/en/codes-standards/#al-block-8

Ofcom for any failure to carry out the Designated Functions in accordance with the terms of this Designation" (article 3).

Level of conception – objectives of the system

The objectives of the system were clearly set out in the Designation, which stated in its article 5 that *"Ofcom designates ATVOD to carry out the following functions:*

> *(i) to administer procedures for receiving, and to receive, advance notifications under section 368BA of the Act from every person who intends to provider an on-demand programme service (or, in the case of any person already providing an on-demand programme service on the date that the 2010 Regulations come into force, a notice stating that they are already providing the service);*
>
> *(ii) to determine whether Service Providers have complied with section 368BA and the relevant requirements of the Act in accordance with Paragraph 6(ii) of this Designation;*
>
> *(iii) to require Service Providers to pay a fee in accordance with section 368NA of the Act; such fees to be sufficient to enable ATVOD to meet, but not exceed, their costs estimated under section 368NA(5)(a) of the Act and to be subject to Ofcom's prior written approval;*
>
> *(iv) in accordance with section 368C(1) of the Act, to take such steps as appear to them best calculated to secure that the relevant requirements of the Act are complied with by Service Providers;*
>
> *(v) to encourage Service Providers to ensure that their services are progressively made more accessible to people with disabilities affecting their sight or hearing or both (section 368C(2) of the Act); and*
>
> *(vi) to ensure that Service Providers promote, where practicable and by appropriate means, production of and access to European works".*

Level of conception – legal compliance

The designation also clearly set out in detailed manner in its article 7 the legal obligations imposed on ATVOD, which were:

> *"(i) to act in accordance with s368B(9)(e) of the Act;*
>
> *(ii) to ensure, in performing any function to which this Designation relates, that it takes all appropriate steps to comply with the statutory and regulatory duties and obligations that apply to Ofcom in performing its regulatory functions, including in particular:*
>
> > *(a) to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in*

which action is needed, and to such of the matters in section 3(4) of the Act as appear to be relevant to it in the circumstances;

(b) to consult and carry out impact assessments in relation to the carrying out of the Designated Functions in circumstances where Ofcom would be required to do so to comply with section 7 of the Act; and

(c) to comply and secure that its staff comply with section 393 of the Act (confidentiality);

(iii) following referral or appeal to Ofcom in accordance, to accept any decision of Ofcom on scope or as to whether a programme is included in an on-demand programme service;

(iv) to ensure, that in carrying out its function under Paragraph 5(iii) of this Designation, it satisfies the requirements under section 368NA of the Act (Fees) and in particular:

(a) in each financial year to consult in such manner as Ofcom considers appropriate, whether alone or jointly with Ofcom, the Service Providers likely to be required to pay them a fee; and

(b) to publish, in such manner as Ofcom considers appropriate, the amount of the fee Service Providers will be required to pay;

(v) to consult with Ofcom in preparing any Rules it proposes to issue for the purpose of securing that Service Providers comply with the relevant requirements of the Act and to obtain Ofcom's prior written approval of theRules before publishing them;

(vi) to ensure that such Rules are expressed as the relevant requirements of the Act and are expressed without further material additions or omissions;

(vii) to consult with Ofcom in preparing non-binding interpretative guidance to the Rules (and any subsequent material changes to that guidance), and to obtain Ofcom's prior written approval of such guidance before publishing it or any changes to it;

(viii) to ensure that in drawing up any guidance referred to in this Designation, such guidance reflects the following:

(a) that it is provided as non-binding guidance only in order to aid interpretation of the Rules;

(b) that it will be the Rules themselves, rather than the guidance, which determine whether a contravention of the Rules has taken place;

(c) that compliance with the guidance does not itself confer a presumption of conformity with the Rules; and

(d) that non-compliance with the Rules will be taken to be non-compliance with the relevant requirements in the Act;

(ix) to have in place and publish appropriate and robust complaints handling processes in order to carry out the Designated Functions, such processes to be formulated in consultation with Ofcom;

(x) to handle complaints received by it in accordance with its obligations in this Designation;

(xi) to comply with the Key Performance Indicators ('KPIs') set out in the Schedule to this Designation for its complaints handling arrangements;

(xii) to consult Ofcom before issuing any enforcement notification it is empowered to issue under this Designation in accordance with sections 368BB and 368I of the Act;

(xiii) to comply with the reporting obligations set out in the Schedule to this Designation;

(xiv) to inform Ofcom forthwith of all cases where a Service Provider to whom ATVOD has given an enforcement notification does not comply with it within the period fixed by ATVOD in the enforcement notification and, if requested by Ofcom, provide copies of all relevant evidence and submissions, in order that Ofcom can decide whether to exercise its powers to impose a sanction on that Service Provider in accordance with sections 368J, 368K or 368L, or take other such steps that Ofcom considers appropriate to secure compliance;

(xv) to refer to Ofcom immediately (together with copies of all the relevant evidence and submissions) all cases where ATVOD considers that a service provider may be in contravention of sections 368E to 368H of the Act due to the inclusion in the service of material likely to encourage or to incite the commission of crime, or to lead to disorder; and where the contravention may be such as to justify the need for Ofcom to take urgent action under section 368L of the Act (suspension or restriction of service for inciting crime or disorder);

(xvi) not to make a determination referred to in sections 368BB and 368I unless it has reasonable grounds for believing that a contravention of section 368D is occurring or has occurred and it has allowed the provider an opportunity to make representations about that apparent contravention;

(xvii) where ATVOD makes a determination:

(a) that a person is providing an on-demand programme service; or

(b) following complaint or otherwise concerning compliance with the relevant requirements of the Act, that a particular programme is or is not 'a programme included in an on-demand programme service' in accordance with section 368R(2) of the Act, ATVOD, when notifying the Service Provider or the parties to the complaint, as the case may be, of its determination, shall inform the Service Provider and, where appropriate, the parties, that they may request an appeal by Ofcom of that determination in accordance with Ofcom's relevant procedures;

(xviii) not to enforce any requirements of section 368D of the Act other than those in respect of which it has Designated Functions;

(xix) to cooperate fully with Ofcom at all times, including:

(a) to consult Ofcom, as appropriate, in cases where there is any doubt in connection with any of the Designated Functions and/or ATVOD's Powers, Obligations and Conditions under this Designation or any other provision of this Designation; and

(b) to supply Ofcom forthwith on request with any information it reasonably requires in connection with the carrying out of its functions;

(xx) as part of fulfilling the duty to encourage Service Providers to ensure that their services are progressively made more accessible to people with disabilities affecting their sight or hearing or both, to:

(a) provide to Ofcom by no later than 30 June 2010 a detailed plan in writing setting out how ATVOD will fulfil this duty and including proposed guidance to Service Providers, such guidance not to be issued without Ofcom's prior approval; and

(b) comply with the reporting obligations in the Schedule to this Designation;

(xxi) as part of fulfilling the duty to ensure that Service Providers promote, where practicable and by appropriate means, production of and access to European works (section 368C(3) of the Act) to:

(a) provide to Ofcom by no later than 30 June 2010 a detailed plan in writing setting out how ATVOD will fulfil this duty and including proposed guidance to providers of on-demand programme services, such guidance not to be issued without Ofcom's prior approval; and

(b) comply with the reporting obligations in the Schedule to this Designation;

(xxii) to notify Ofcom immediately if it has reason to believe it may no longer be able to carry out the Designated Functions for any reason and/or may no longer be able to satisfy the requirements of section 368B(9) to be the appropriate regulatory authority in relation to the Designated Functions and in each case to use its best endeavours to resolve any such issues promptly; and

(xxiii) in the event that ATVOD no longer wishes to be designated as the appropriate regulatory authority for the purpose of carrying out the Designated Functions and intends to withdraw its consent, it shall notify Ofcom in writing at least six months before ceasing to carry out the Designated Functions, setting out its reasons".

Level of implementation – evaluation of the system

Article 13 provided that *"This Designation shall be subject to a formal review by Ofcom at the expiry of two years from the date of this Designation taking effect"*. Ofcom also had the power to revoke the Designation at any time (article 15) and even had the obligation to do so *"if it is no longer satisfied that ATVOD is able to satisfy the requirements for being the appropriate regulatory*

authority set out in section 368B(9) of the Act" (article 16). Moreover, the annex of the designation provided detailed provisions and calendar in terms of reporting obligations and key performance indicators.

The Designation made in 2010 has indeed been reviewed and confirmed in 2012 and 2014 before being revoked starting January 1st 2016 on the motive that *"following the review, Ofcom has decided that acting as sole regulator for video-on-demand programmes is a more effective model for the future than having two separate bodies carrying out this work. This will create operational efficiencies and allow editorial content on video-on-demand to sit alongside Ofcom's existing regulation of broadcasting"*[16].

Level of implementation – adequate and transparent financing

ATVOD was financed by a £2.900 levy imposed on the services regulated, with a possibility for small scale services providers to pay a reduced fee if they provided appropriate evidence to support their case.

The yearly reports of ATVOD contained all the detailed data about the levies collected and about how these revenues had been spent to fulfil its mission.

Level of enforcement

The Designation of ATVOD did not imply sanctioning powers. ATVOD's powers included the power to determine if a service provider had contravened to one of its obligations and to issue *"enforcement notifications"*, but sanctioning powers remained in the hands of OFCOM. Those are the imposition of a financial penalty (with maximum of 250.00 £ or 5% of the revenues of the service provider, whichever is greater) and the issuing of a direction to suspend or restrict the entitlement to provide the service.

OFCOM was also acting as the appeal body regarding the decisions made by ATVOD on whether or not a service was an on-demand programme service (ODPS) as defined by the Communication Act (*"scope appeals"*).

[16] https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2015/1520333

7. Recommendations for the implementation of a co-regulatory system in Serbia

7.1. General observations

Co-regulation is a relatively unfamiliar concept in Serbia. Similar is true for self-regulation. The first and so far the only self-regulatory body in the media sphere, i.e. the Press Council, was established by journalists in 2009. While self-regulation has a longer tradition and is a common part of media systems in the EU, at least in areas related to protection of media consumers and journalism ethics, co-regulation is relatively new and not widely spread. Despite its trending in the media policy discussions on the supra-national level, co-regulation still represents an exception rather than a rule. However, as indicated in the study, this may change.

The following table shows how much the situation differs between the EU countries in terms of existence of a self- or co-regulatory system in the three areas in which they are the most often implemented, i.e. protection of minors, protection of consumers and journalism ethics:

Table 1: Existing self-/co-regulatory systems in the EU Member States

Country	AT	BE	BG	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK
Protection of minors[17] 8/28																												
Protection of consumers[18] 26/28																												
Journalism ethics[19] 19/28																												
Total 53/84	2	2	2	2	1	3	2	2	3	2	1	2	1	2	2	2	3	1	2	0	1	3	2	2	2	2	3	1

Source: Panteia / AIPCE / partly updated by authors

In their influential work, Hallin and Mancini identified stable connections between media systems and political systems, showing that politico-cultural traditions have a major influence

[17] Data based on the Panteia study and information collected by the authors (updated data indicating situation in Slovenia).
[18] Data based on the Panteia study.
[19] Data based on the information provided by the Alliance of Independent Press Councils of Europe (AIPCE): http://www.aipce.net/ and information collected by the authors (updated data indicating situation in Slovenia).

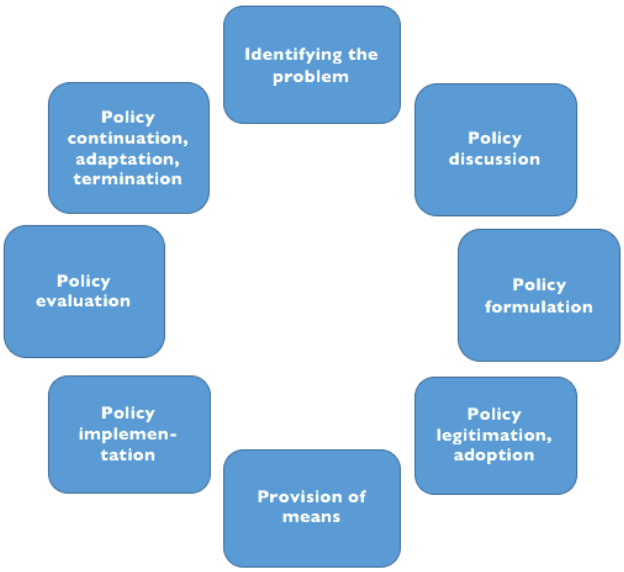
on the way media develop and function, and how their role is viewed and regulated in society (Hallin and Mancini 2004; 2012).

The cases discussed in this comparative study come from countries with different traditions. Two of them, i.e. Belgium and the Netherlands, appertain to a group of countries from the North/Central Europe with democratic corporatist media system according to Hallin and Mancini (2004). The other two, Ireland and UK, are a part of the North-Atlantic world or liberal media system (ibid.). There's no case from the Mediterranean or polarized pluralist media system (ibid.) and neither is there any from the Eastern European or post-communist media system (Hallin and Mancini 2012).

The development of a self- or co-regulatory system (or the lack thereof) is the result of each national context, in which several contextual elements play a role. Just like there is no "European" model of co-regulation, so there is no existing model that could be simply transposed to Serbia. Even if some models can be used as a reference, the policymakers shall bear in mind that – as highlighted by the study prepared by Hulin (2014a) on behalf of European University Institute, Florence – there are differences in impacts of different political contexts (democratic and less democratic) on applicability and potential successfulness of the regulatory schemes.

When considering the idea of introduction of a co-regulatory scheme, the policymakers should first identify the problem or the area where co-regulation could represent a solution to the existing challenges.

Figure 3: Policy formulation cycle



Source: Adapted from Nachmias and Felbinger (1982, 30)

Once the area or the problem is selected, the policymakers should consider the following contextual elements[20] in framing out the policy:

- the legal and institutional framework:
  - are there incentives to the development of alternative modes of regulation?
  - are there any obstacles for the development of alternative modes of regulation?
- the political and social will:
  - is there political and social will to solve a public policy issue?
  - if yes, can it be solved with an alternative mode of regulation?
- cultural norms:
  - how important the values such as protection of minors, protection of consumers and journalism ethics are?
  - how are they balanced with other potentially conflicting values such as freedom of information and freedom to conduct business?
- economic considerations:
  - what would be the cost or the gain of a certain mode of regulation?
  - how would it affect the competitiveness of the media service providers?
  - how would the new form of regulation be funded?
- technological developments:
  - how much is the traditional regulation of media jostled by the emergence of new entrants, new modes of distribution and new consumption patterns in a convergent media landscape?

7.2. Key recommendations

1. In redesigning the regulatory system and introducing alternative methods such as co-regulation (or statutory) self-regulation, the Serbian policymakers should strive towards risk-based approaches, supported by a strong evidentiary basis and with clearly specified, realistic and measurable (auditable) objectives, targets and indicators.

2. The area where Serbia could benefit most from co-regulation – if introduced thoughtfully and well managed – is protection of minors from harmful content. Based on the information accessible to the authors of the study, there seems to be a lot of effort of the regulator but no real progress or any significant effect in this area. Here, the Dutch Kijkwijzer, largely recognised as an example of best practice, and discussed as a case study in Chapter 6, can serve as a model, also because it was already transposed to different countries, including to two countries in the broader neighbourhood of Serbia (Slovenia and Turkey).

[20] Contextual elements based on the Panteia study.

3. Another area worth considering is journalism ethics, where however we advise against a large remit of the regulatory authority. Despite recognising some benefits of a statutory self-regulation as a legally acknowledged media self-regulation, turning the existing media self-regulation into a compulsory system should be avoided. An incentive-based system with a clear delineation between the self- and statutory regulation, such as the one of Belgium, seems to be a better option with fewer potential negative effects. The delineation of the remit and power of the self-regulatory and the regulatory body should be clear and strong. The professional standards should be within the remit of the self-regulation of the media professionals and the room for a regulatory intervention that could be potentially detrimental to the freedom of expression clearly limited.

4. The factors that could hinder the implementation of the co-regulatory system in Serbia are connected with the characteristics of the media market and the current effectiveness of the existing regulatory system which should be improved. As long as there are no effective enforcement measures (e.g. financial sanctions) and true safeguards of the independence of the regulatory authority, there are slight chances of successful introduction of a co-regulatory system in any sphere of media activity.

5. The area where we see the room for improvement is also the awareness of the public. As long as there is no strong and articulated public pressure towards effective regulation, the interest of both the industry and policymakers for creation of operational co-regulation system may remain weak.

6. There is a clear need for a reshaped triangle regulator-public-industry and a change of perspective from protection with limited effectiveness to critical awareness and negotiated, participatory regulation. To this end, the investment in the knowledge is essential – for all the stakeholders, including the regulator.

7. Given the numerous cross-border issues, the cooperation between the self- and co-regulatory bodies on the regional and European scale shall be further nourished via the existing or new forms of cooperation.

8.Toolkit: Assessment tool for design and performance of self- or co-regulatory body

Conception

1. Is the conception process multi-stakeholder? Is the initiative widely publicised and easily accessible? Is there open exchange?

2. Is the involvement in the system driven by good faith? Are participants committed and are they providing real effort? Are their actions outside the self-/co-regulation scheme coherent with the aim of the scheme?

3. Are the objectives of the system clearly set out? Do they include targets and indicators allowing evaluation of the impact?

4. Is legal compliance ensured?

Implementation

5. Is there room for iterative improvements of the system? Is there a systematic process (e.g. annual progress checks) in place for identifying areas for improvement to achieve objectives?

6. Is there a transparent and autonomous monitoring of the system against the targets and indicators?

7. Is there an evaluation of the system assessing performance, impact and room for improvement?

8. Is there a procedure (adjudicating body) for resolving disagreements of participants in the self-/co-regulatory scheme?

9. Is there an adequate and transparent financing of the system?

Enforcement

10. How is the complaint resolution mechanism functioning? Is the public aware of its existence? Is it providing timely responses to complaints?

11. What is the outcome of the decision? Does it contribute to the overall compliance with the system and better understanding of its functioning?

12. Can there be sanctions and if yes are they enforced? Are they effective?

Articulation with statutory regulation

13. What is the scope of territorial jurisdiction?

14. What is the scope of material jurisdiction?

15. Is there a legal compliance of the self- or co-regulation schemes provided?

16. Are there any enforcement measures with legal consequences?

17. Is there any formal recognition of the self- or co-regulation bodies by the state/public authorities required?

18. Are there any incentives for participation in the self- or co-regulation scheme?

19. Is there any supervision of the self- or co-regulation implementation carried out by the state/public authorities?

20. Are state or public funds involved in financing of self- or co-regulation?

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