

## Together They Are Strong?

### *Co-Regulatory Approaches for the Protection of Minors within the European Union*

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Regulation in general and regulation within the media sector in particular has to face the fact that new technologies and internationalization have led to widespread and fundamental changes. These developments, which are often described as a change of former industrial societies into so-called information societies, represent a challenge for the regulating states. Traditional regulation, though successful and efficient in the past, might be unsuitable under changed circumstances. The role of the state needs to be redefined. This is even true for fundamental objectives like the protection of minors. While in most countries, the state has responsibility for preventing children from having access to content that might be harmful to them, this does not mean that regulation in this field is completely in the hands of the state. In some countries, the state has included non-state regulation into its regulatory concept. “Co-regulation” has become a buzzword when it comes to new forms of regulation. Even the European Commission’s proposal for an audiovisual media services directive explicitly allows for co-regulation as a way to implement the directive’s provisions including those for the protection of minors.<sup>1</sup> According to article 3 of the proposed directive, the member states shall encourage co-regulatory regimes in the fields coordinated by the directive. However, the term “co-regulation” includes a variety of different approaches within different countries and different sectors. In a recently finished project, the Hans-Bredow-Institute and the Institute of European Media Law examined co-regulatory approaches in the media sector in the Member States of the European Union.<sup>2</sup> Most co-regulatory approaches that can be found in the media sector aim at the protection of minors or the protection of consumers (the latter mostly by regulating advertising). This article will give a brief overview on the theoretical background of co-regulation and will point to some examples of existing co-regulation in the field of the protection of minors in the media.

## Co-regulation: theoretical background and definition

When it comes to regulation, different concepts can be found. While command-and-control regulation and self-regulation can be seen as traditional forms of regulation, co-regulation seems to be a rather new approach that consists of more than just a combination of state regulation and self-regulation.

The growing interest in new regulatory concepts can be traced back to findings on failures of traditional regulation. Different studies have pinpointed the following main reasons for the failure of traditional “command-and-control” regulation.<sup>3</sup>

- Traditional regulation, such as ‘command-and-control’ regulation, ignores the interests of its objects, and as a result may engender resistance rather than co-operation; depending on their resources, the objects may be capable of asserting counter-strategies or evading regulation.<sup>4</sup>
- Furthermore, the regulating state tends to suffer increasingly from a knowledge gap.<sup>5</sup> The aim of the welfare state to improve the public good to the extent possible is doomed to failure in ever more complex and rapidly changing societies with fragmented knowledge.<sup>6</sup> Thus, an omniscient state cannot be envisaged as a model, but rather one that makes use of the knowledge of different actors. This means that cooperation with the objects of regulation, that possess the most complete knowledge of their own field, is essential.
- The above-mentioned knowledge gap appears even more dangerous for the regulatory state because information has become the most important ‘finite resource’ in modern societies and may become an important regulatory resource. However, in contrast to the resource ‘power’, information is not at the privileged disposal of the state.
- However, there are not only knowledge gaps but also gaps of understanding that cannot be overcome. According to systems theory, regulation is often an attempt to intervene in autonomous social systems, which follow their own internal operating codes. These autonomous systems include the economy, the legal system, education, the media, science and many others. It is impossible for the political system to control the operations of those systems directly.<sup>7</sup> Therefore, indirect forms of regulation have to be used (and have been used already).
- Moreover, traditional regulation does not seem to stimulate creative activities effectively. Initiative, innovation and commitment cannot be imposed by law.<sup>8</sup> Given that modern regulation has to rely on the cooperation of the objects of regulation to achieve its objectives, this aspect becomes significant as well.
- Traditional regulation tends to operate on an item-by-item basis only, not in a process-oriented manner such as would be desirable for complex regu-

latory tasks. If the state wants to influence the outcome of a process, it has to act before a trajectory has been laid out ('preventive state').<sup>9</sup>

- Finally, another obstacle to traditional regulation is globalisation. This facilitates international 'forum shopping' to evade national regulations (see the first point above). This trend is seen as a main reason for the failure of traditional state regulation. In addition, globalisation has created the further problem that, while the economic system now tends primarily toward multi-national or even global structures, legal regulation is still mainly the preserve of the nation state. Structures of non-governmental law now have to be taken into account by nation states.<sup>10</sup>

Against this background different lines of academic debate have highlighted the advantages of more indirect forms of regulation. While some academics refer to the above-mentioned system theory and doubt the ability of the state to directly intervene into autonomous operating social systems like the economy or the media,<sup>11</sup> others follow game theoretical findings and envisage regulation as a 'game' played between the regulatory body and the institution to be regulated.<sup>12</sup> The latter approach recognises that the objects of regulation – mainly regulated companies – have various strategies at their disposal, to which the regulator must respond or anticipate to ensure effective regulation. Including non-state regulation into the regulatory process can be done to avoid that the industry evades regulation or to mobilise 'countervailing power'.

The combination of state and non-state regulation can be considered as an indirect way to regulate the industry. As mentioned above different approaches of such combinations can be found. For the sake of examination and discussion of the advantages and disadvantages of co-regulation, it has to be defined which kinds of approaches can be seen as co-regulatory and which not. In the recently completed study on co-regulation<sup>13</sup> the following definition of co-regulation was developed:

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.

According to the above-mentioned study, the non-state component of the regulatory systems includes:

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

With regard to the link between a non-state regulatory system and state regulation, one can speak of co-regulation if the following criteria are met:

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

### Co-regulation and protection of minors in the media

Protection of minors in the media has been identified as a field of regulation where the cooperation of the state with non-state actors might be useful.<sup>14</sup> Regulation in this field has to deal with the two horns of the dilemma. On the one hand, the protection of minors against interference that might impair their development is generally accepted as an important value and protected on an international level as well as in many national constitutions (in Germany under art. 2 (1) in connection with art. 1 (2) and art. 6 GG (Grundgesetz = Basic Law, the German Constitution). On the other hand, protecting minors against improper media content means no less than controlling the access to media content, which is restricted for the state since the freedom of opinion protects this communication process (see on a European level art. 10 (1) European Convention on Human Rights, in Germany as a national example art. 5 (1) GG).

Apart from this legal context, interfering in media content directly means to cope with rapidly changing formats of programs, and when it comes to internet communication, there exists a high number of completely different types of services and service providers. Furthermore, the power of the media actors is, as a rule, relatively high thus they are able to effectively establish counter strategies against regulatory burdens. Finally, there are no clear cut and eternal criteria to measure whether content might be improper for children of a given age. Therefore, protection of minors is a regulatory process in which the yardstick is continually redefined within the cultural context.

Some of the above outlined problems with regulating media content to protect children can be more effectively dealt with if the state is not the sole regulator but co-regulatory arrangements exist as described above. However, fundamental problems are connected with such a step. State procedures are legitimized democratically and follow the rule of law. For new co-regulatory settings, this cannot be assumed as a given fact. Debates revolving around the term “governance” show the relevance of those issues.<sup>15</sup> Entrusting the industry with regulating itself has, notwithstanding several advantages, always the risk of setting the

fox to run the henhouse. The involvement of non-industry-actors like media watchdogs or associations for the protection of minors might not only be advisable to establish accountability and legitimacy but also to introduce the perspective of others than the industry into the process of defining what is harmful or disintegrating for minors.

However, several countries have already opted for co-regulatory settings to protect minors in the media.<sup>16</sup>

## Co-regulation approaches for the protection of minors within the European Union

When it comes to the protection of minors co-regulatory approaches can be found in different European countries. The fact that the term “co-regulation” includes quite different concepts can be illustrated by looking at the approaches in the Netherlands, Great Britain and Germany.

### The Netherlands

In the Netherlands, the classification of television programmes, movies, videos and DVDs can be seen as a co-regulatory system. While on the state side the Commissariaat voor de Media (CvdM, Dutch Media Authority) is responsible for regulating the media, non-state regulation is performed by the Nederlands Instituut voor de Classificatie van Audiovisueel Media (NICAM, the Dutch Institute for the Classification of Audiovisual Media), founded 1999 after the government had announced it would be willing to shoulder the costs of such an undertaking if all relevant media organisations were to participate.

The classification system, called “Kijkwijzer” (in the double meaning of “Watch wiser” or “Viewing guide”) was developed by independent experts and launched in 2001 by NICAM. It introduces a uniform classification system for film, TV, video and DVD.<sup>17</sup>

In this system, classification is done by the broadcasters, and film and video companies themselves. Specially trained employees use a coding form to describe the content. They do so by answering several questions regarding the appearance of violence, frightening elements, sexual acts, discrimination, drug abuse and bad/ coarse language (possible answers are “yes” or “no” and “never”, “once or a few times” or “often” respectively).

A Kijkwijzer computer programme then works out the classification of the given production.

By using special pictograms, broadcasters, film and video companies inform the viewers about the classification. In addition to an age recommendation (all

ages, 6 years, 12 years and 16 years), pictograms are used to display the reason for the recommendation: violence, fear, sex, discrimination, drug and/ or alcohol abuse and coarse language.

The pictograms can be found in television listing magazines, cinemas, film guides, film websites, advertisements, posters and on the packaging of DVDs and videos. The pictograms are also shown at the beginning of a television programme.

Television programmes classified with the classification “12 years” must not be broadcast before 8 pm. According to a second watershed, programmes with the classification “16 years” should not be broadcast before 10 pm.

As long as a provider is a member of NICAM, NICAM is responsible for supervisory compliance including the handling of complaints. It can impose the following sanctions: warnings; fines (the maximum has recently been raised to • 135.000), or revoking the NICAM-membership (only in the case of very severe or repeated violations).

As far as television is concerned, the Mediawet (Dutch Media Act<sup>18</sup>) contains specific requirements for the non-state regulatory system including NICAM: The Media Act states that programmes that may impair the physical, mental or moral development of persons under the age of sixteen can be broadcast only if the operators are members of an organisation accredited by the government on certain criteria laid down in the Media Act, and are subject to the rules and supervision of that accredited organisation.

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

- (a) Independent supervision by the organisation of compliance with the regulations is guaranteed,
- (b) provision has been made for adequate involvement of stakeholders, including in any event consumer representatives, establishments that have obtained broadcasting time, experts in the field of audiovisual media and producers of audiovisual media, and
- (c) the financial position of the organisation ensures proper implementation of the activities.

Following the provisions of the Media Act, NICAM was accredited by a decision of the government of 22 February 2001. NICAM is funded by both industry and state. If NICAM failed to meet the legal conditions stated in the Dutch Media Act, the government could decide to withdraw the accreditation.

Broadcasters who do not opt for membership of NICAM fall directly under the supervision of the CvdM. In addition, CvdM has to supervise the absolute prohibition on broadcasting content that can cause serious damage to minors.

Recently the CvdM has been entrusted with the task of performing so-called “meta supervision” of NICAM. Each year NICAM will have to report to the CvdM on how it will safeguard the quality of the classification. In addition, NICAM will have to demonstrate to the CvdM to what extent the classifications are reliable, valid, stable, consistent and precise.

## Great Britain

The Communications White Paper of December 2000 already recommended ‘co-regulation’ as a promising concept. Co-regulation was understood as a form of deregulation. Under the Communications Act of 2003,<sup>19</sup> the state regulator Office of Communications (Ofcom) is required to review its own activities to ensure that it does not impose unnecessary regulatory burdens on telecommunications operators and to consider whether self-regulation or co-regulation is appropriate.<sup>20</sup> Relative to premium rate services (mainly services that provide content transmitted by means of an electronic communications network, e.g. content that can be received via telephone), the Communications Act of 2003 envisions that there is an approved code of conduct and that there is an “enforcement authority”, this being a body that under the code has the responsibility for enforcement.<sup>21</sup> Ofcom has approved the code of the Independent Committee for the Supervision of Standards of the Telephone Information Services (ICSTIS). Compliance with the ICSTIS code is a specific condition imposed by Ofcom on premium rate operators.

ICSTIS, founded in 1986, is a non-commercial organisation financed by the industry. The members of its committee have to be independent of providers of premium rate services. A secretary assists the committee. ICSTIS deals with complaints by the public, supervises the premium rate services, recommends measures to ensure compliance with the codes and publishes information on its work.

The non-state organisation issues a code of practice for providers of premium rate services, the tenth edition of which came into force on 1 January 2004, after the Communications Act had made it necessary to review the code.<sup>22</sup> It was amended in July of 2005 to implement recommendations of the Ofcom review and to include specifically tailored provisions for new forms of premium rate services such as directory enquiry services, subscription services and SMS chat services.<sup>23</sup> Each provider of premium rate services is bound to comply with the provisions in the code. The service provider has to forward its address and the range of numbers to be used to ICSTIS before launching the service. Some service providers are not allowed to start their service (e.g. those offering “live conversation”) until written permission has been granted by the ICSTIS Committee.

The codes contain rules, which guarantee the ‘legality’, ‘decency’ and ‘honesty’ of the content. Thus, the objectives of the code are as follows: the protection of minors, the protection of human dignity, and protection of consumers as far as pricing information, etc. are concerned. The code also contains special rules for so-called live services, services for children, gambling services and online services.

Anyone can submit complaints to ICSTIS, which then initiates measures to enforce the requirements of the codes. The secretary also supervises the services and is authorized to submit complaints to the committee.

ICSTIS has three types of procedures at its disposal for dealing with complaints: an informal procedure for minor breaches of a code, a standard procedure and an emergency procedure for major breaches and in case of urgent calls for action. When using the informal procedure, ICSTIS informs the provider that there

has been a breach of code. If the provider accepts that the complaint is valid, it can take action to end the infringement. If it does not, ICSTIS moves on to the standard procedure. The provider is thereby requested to issue within a given period of time (normally five working days) the required information to ICSTIS. Based on this information, the secretary drafts a report and forwards it to a sub-committee of ICSTIS, the so-called complaints panel, which makes the final decision on whether there has indeed been a breach of the code. If immediate action is necessary, the secretary starts an investigation in respect of the complaint filed. It informs three members of the committee of the findings. If all three members agree that a major breach of code occurred, which must be dealt with immediately, the provider is ordered to discontinue the service. At the same time, a request is issued to the network provider to withhold all payments to the service provider. If ICSTIS does not succeed in informing the service provider, the network provider is requested to block access to the service in question.

Sanctions available to ICSTIS include formal reprimands, fines, an order to pay compensation, blocking of services and prohibiting companies or individuals from offering premium rate services.

As said above, the ICSTIS code was approved by Ofcom. The Communications Act contains criteria a code must meet to obtain Ofcom approval. One of these criteria is that there must be a person who, under the code, has the function of administering and enforcing it and who is sufficiently independent of the premium rate service providers. The provisions of the code must be objectively justifiable, must not discriminate unduly against particular persons, must be proportionate to what the provisions are intended to achieve and must be transparent in relation to what the provisions are intended to achieve.

If Ofcom later comes to the conclusion that the code is inappropriate to regulate premium rate services, it can withdraw approval.

The Communications Act gives Ofcom the power to set conditions for regulating the content and provisions of premium rate services. Such conditions are binding on premium rate service providers and may relate only to compliance with the premium rate services code approved by Ofcom or, in the absence of a code, an order made by Ofcom. As said above, compliance with the ICSTIS code is a condition imposed by Ofcom on premium rate operators. The Office has, as required by the Communications Act, drawn up guidelines on penalties. The guidelines state that Ofcom should bear in mind a number of factors when imposing any penalties, including the fact that the company in question has already been subject to sanctions in connexion with the same conduct by another regulatory body.

With regard to commercial content accessed via mobile phones, ICSTIS has established a subsidiary, the Independent Mobile Classification Body (IMCB). This development was at the request of the six mobile telephony operators in the UK, which together established a code of conduct in January 2004.

The IMCB has responsibility for still pictures; video and audiovisual material; and mobile games, including Java-based games. The main function of the IMCB

is to set a classification framework according to which content providers themselves may classify their content. IMCB does also have the function for the investigation of complaints about inappropriate classification. However, complaints in the first instance should be made to the mobile operator. Although a subsidiary of ICSTIS, IMCB is funded and run separately.

## Germany

### *Protection of minors in the movie and video games sector*

When it comes to the protection of minors in the film sector in Germany, non-state bodies have traditionally played an important role: they have been, and still are, responsible for age-classification. The federal Jugendschutzgesetz (JuSchG, Federal Act for the Protection of Minors) distinguishes between different levels of content: content that is harmful to children (jugendgefährdend) is classified by the federal Bundesprüfstelle für jugendgefährdende Medien<sup>24</sup> (BPjM, Federal Department for Media Harmful to Young Persons). Material that is classified as harmful to minors must not be shown in places where children have access and must not be provided to children. Content that is not harmful to children, but is capable of impairing children's development (entwicklungsbeeinträchtigend) is rated by the Oberste Landesjugendbehörden (State Authorities Responsible for the Protection of Minors). However, this age classification (suitable for all children and adolescents, 6 years and older, 12 years, 16 years, or not suitable for children and adolescents) has been handed over to non-state bodies: Freiwillige Selbstkontrolle Filmwirtschaft<sup>25</sup> (FSK, Film Classification Board) is responsible for the age-classification of films. Age classification of video games falls within the responsibility of the Unterhaltungssoftware Selbstkontrolle<sup>26</sup> (USK, Association for the Self-Monitoring of Entertainment Software).

Persons and organisations offering the respective content or granting access to it have to comply with classifications made by FSK and USK.

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

Although FSK and USK are non-state bodies, there is some state involvement: The majority of the members of the examination boards of FSK is nominated by state authorities. A permanent representative of the state authorities is the chairperson of the examination boards. Representatives of the state and the federal government are also members of the advisory board of USK. In addition, a per-

manent representative of the state authorities responsible for the protection of minors takes part in the examination of video games. This person is responsible for the official labelling of the video games subsequent to the decision of the USK.

According to the rules of FSK and USK, the state authorities that are responsible for the protection of minors may request a second examination of a film or a video game by FSK or USK. In this case, a so-called “Appellationsausschuss” consisting of seven members, decides on the rating of a film. The FSK committee consists of four representatives of the state authorities in addition to the chairman. At USK, all members of the committee are representatives of the state authorities. The rules of FSK and USK contain further provisions regarding a second examination: At FSK, the applicant or – in some cases – the overruled minority within the FSK may appeal a decision. In this case, a so-called “Hauptausschuss” decides on the case. When it comes to USK, the applicant and – in some cases – the permanent representative of the state authorities may appeal a decision. A special “Prüfgremium” decides on the appeal. The applicant and the permanent representative of the state authorities may appeal again (the so-called “Beiratsverfahren”).

Compliance with FSK and USK ratings is enforced by the state authorities responsible for the protection of minors. Besides this, there is a non-state procedure: If a film is shown that is not in compliance with FSK ratings, a so-called supervision procedure (Überwachungsverfahren) is conducted by the association FSK is part of. This procedure may lead to a contractual penalty.

#### *Protection of minors in the broadcasting and Internet sector*

The enactment of the Jugendmedienschutzstaatsvertrag (JMStV, Interstate Treaty on the Protection of Minors in the Media) in 2003 extended the responsibility of non-state bodies (“Einrichtungen der Freiwilligen Selbstkontrolle”) and their scope for decision-making. In order to secure compliance with the terms of the interstate treaty, it established a certification requirement for non-state bodies. In the television sector, Freiwillige Selbstkontrolle Fernsehen<sup>27</sup> (FSF, Organisation for the Voluntary Self-Regulation of Television) was certified under the new law. Freiwillige Selbstkontrolle Multimedia-Diensteanbieter<sup>28</sup> (FSM, Association for the Voluntary Self-Monitoring of Multimedia Service Providers) gained certification for the internet sector. On the state side, responsibility for the supervision of broadcasters and providers lies with the Landesmedienanstalten (State Media Authorities) and the Kommission für Jugendmedienschutz<sup>29</sup> (KJM, Commission for the Protection of Minors in Electronic Media). The KJM makes all decisions regarding the protection of minors to ensure the consistent application of the Jugendmedienschutzstaatsvertrag while the Landesmedienanstalten are responsible for executing these decisions.

For the broadcasting sector, it is the task of the certified “Einrichtung der Freiwilligen Selbstkontrolle” to classify content and to ensure the enforcement

of rules. Furthermore, it may make exemptions to the watershed regulation for the broadcasting of films, which had been given a rating by the non-state body for film (FSK, see above) under the Jugendschutzgesetz (Federal Act for the Protection of Minors) in the past.

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

Under the JMStV, instruments are in place to regulate non-state regulation, of which the most important is that “Einrichtungen der Freiwilligen Selbstkontrolle” need certification. Certification is only granted if:

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

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

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

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

The state media authorities and the KJM may not impose sanctions on broadcasters as long as the following requirements are met: The respective broadcasting content had been submitted to a certified “Einrichtung der Freiwilligen Selbstkontrolle” before this content was broadcast, the provider had followed

the decision of this non-state body and the “Einrichtung der Freiwilligen Selbstkontrolle” had not acted beyond the scope of its discretionary power. When the rules of the JMStV have been broken by the broadcast of content that could not be submitted to a “Einrichtung der Freiwilligen Selbstkontrolle” beforehand (e.g. live broadcasts) or by an internet service (Telemedien), certified “Einrichtungen der Freiwilligen Selbstkontrolle” have to deal with the matter. As long as a provider follows the decision of the non-state body and this body does not act beyond the scope of its discretionary power, the state media authorities and the KJM cannot impose sanctions on the provider. However, in the case of broadcasting this non-state regulatory “shield” only gives “protection” if the broadcaster is affiliated with the licensed “Einrichtung der Freiwilligen Selbstkontrolle” (such affiliation is not necessary, if the respective content is submitted to the “Einrichtung der Freiwilligen Selbstkontrolle” before the content is broadcast). Internet providers need not be affiliated to the “Einrichtung der Freiwilligen Selbstkontrolle” to be protected by the non-state shield. For them it is sufficient to follow the decisions of a licensed “Einrichtung der freiwilligen Selbstkontrolle” – irrespective of whether they are affiliated to this body or not.

When certified “Einrichtungen der Freiwilligen Selbstkontrolle” “deal with the matter” this includes imposing sanctions. “Einrichtungen der Freiwilligen Selbstkontrolle” will be certified only if they have issued procedural rules, including rules on possible sanctions.

Besides monitoring by the state media authorities, complaints help to find illegal content. “Einrichtung der Freiwilligen Selbstkontrolle” can be certified only if it is possible to file complaints with them.

### Other co-regulatory approaches within the European Union

Co-regulatory approaches for the protection of minors can also be found in Austria, Italy and Slovenia.<sup>30</sup> In Austria, the non-state Jugendmedienkommission (JMK, Commission for the Protection of Minors against Improper Media Contents), which was founded to advise the Federal Minister of Education, Science and Culture, makes recommendations on age classification of movies, DVDs and CD-ROMs. The state authorities of the Bundesländer (states) that are responsible for age classification regularly follow JMK’s recommendations. Some members of JMK are representatives of the federal government and of the states. All members of JMK are appointed by the Federal Minister of Education, Science and Culture. In addition, JMK is partly funded by the Federation (and partly by the film distributors).

In Italy, the Codice di Autoregolamentazione TV e Minori (Code for TV and Children) has been formally incorporated into a state law, resulting in its obligations being legally binding even for companies that are not signatories. Protection of minors in the internet is addressed by the non-state Code “Internet e Minori”. A non-state Comitato di Garanzia per l’attuazione del Codice di autoregola-

mentazione Internet e Minori (Guarantee Committee) is responsible for supervising and enforcement of the Code. This Committee was established by an inter-ministerial decree issued by the Minister for Communication and the Minister for Innovation and Technology. For mobile services, the principal Italian mobile phone operators have signed, under the auspices of the Ministry of Communications, the Codice di condotta per l'offerta dei servizi a sovrapprezzo e la tutela dei minori (Code of Conduct for the Provision of Premium Services and the Protection of Children). The Code mandates the establishment of a non-state Organo di Garanzia (Guarantee Committee), whose task is the coordination of the activities aimed at updating and revising the present provisions of the Code of Conduct. Some members of the Committee are representatives of the Ministry of Communications.

In Slovenia, Sveta za Radiodifuzijo (SRDF, Broadcasting Council) and the broadcasters of TV programmes signed an agreement regarding the television programmes not suitable for minors. The SRDF is an independent expert body in the field of broadcasting regulation and it assists state regulator Agencije za pošto in elektronske komunikacije Republike Slovenije (APEK, Agency for Post and Electronic Communication). The agreement has introduced two types of visual symbols for TV programmes that are broadcast between 5 am and midnight. One symbol shows that a programme is not suitable for children and minors under fifteen; the other symbol is used if a programme is suitable for children and minors only if they watch television in the company of parents or other adults.

## Co-regulation approaches beyond Europe: the Australian example

Co-regulation exists also beyond Europe. The Australian approach may even be seen as a role model for co-regulation:<sup>31</sup>

Co-operative regulatory systems in the broadcasting sector were first introduced in 1992 through the Broadcasting Services Act of 1992.<sup>32</sup> The new Act created a new state regulatory authority called the Australian Broadcasting Authority. On 1 July 2005, the Australian Broadcasting Authority and the Australian Communications Authority merged to become the Australian Communications and Media Authority<sup>33</sup> (ACMA).

Key aspects of content regulation are the development of industry codes of practice approved by the state regulatory authority and the administration of a system of complaints submitted by members of the public.

According to the law, groups representing providers of broadcasting services develop, in consultation with the state regulatory authority, codes of practice that are applicable to the broadcasting operations of a certain section of the industry.

Each sector of the broadcasting industry has developed a representative group for setting up codes: Free TV Australia<sup>34</sup> (FTA), Commercial Radio Australia<sup>35</sup> (CRA), Australian subscription television and radio association<sup>36</sup> (ASTRA), Community Broadcasting Association of Australia<sup>37</sup> (CBAA).

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

Once an industry group has developed a code of practice, the ACMA must include that code in its Register of Codes (and it becomes effective) if the ACMA is satisfied that:

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

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

The ACMA reserves the power to create industry standards at any time if the industry does not follow the request for a code. This power may be exercised even if an industry code fails to a certain degree.

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

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

Certain matters are still left regulated by stricter regulation, by way of standards made by the state regulatory authority itself and directly enforceable as licence conditions. The quota of Australian content and content specially made for children on television is regulated by standards.

## Conclusion

The examples show that the existing co-regulatory approaches differ when it comes to the task of involved non-state regulation as well as the link between state regulation and non-state regulation. For example, in Germany there is a pre-rating of movies and broadcasting programmes done by non-state bodies. Rating is done by the publishers themselves in the Netherlands. Great Britain's regulation of premium services as well as broadcasting regulation in Australia rely on non-state codes including provisions for the protection of minors.

With regard to the regulatory resources the state uses to influence the outcome of the regulatory process to guarantee the fulfilment of the regulatory goals, different approaches can be observed as well: In Germany's broadcasting and internet regulation the non-state bodies that are involved in the co-regulatory process are certified by a state body if they meet certain requirements. The same applies to the NICAM-approach in the Netherlands. In Great Britain's regulation of premium rate services and Australia's broadcasting regulation, the non-state code has to be registered. Other countries do not use the instrument of registration to regulate non-state regulation: Instead, the state influences the outcome of the non-state regulatory process by state representatives being members of the non-state bodies.

Are all these different approaches capable of preventing children from having access to content that might impair their development? Advantages of integrating non-state regulation into the regulatory concept can be seen in the division of work between state and industry (especially as applicable to huge volumes of content of different content providers as on the internet), greater acceptance of the regulatory regime within the industry and the fact that in some cases, non-state regulation might react more quickly to technological and social changes than state regulation is able to respond. On the other hand, there is the risk of non-state regulation being captured or being used as a smoke screen by the regulated industry that wants to avoid regulation. According to existing studies<sup>38</sup>, the success of such new regulatory approaches depends on a variety of different factors like the existence of effective and graduated sanctions, incentives for the industry to participate, the culture of the respective country and the respective sector, the severity of possible failures, the existence of a "safety net" in case of failures and the convergence of interests of the different participants of the industry with regard to the regulatory objectives.

The recently completed study on co-regulation shows that there is no reason to believe that co-regulatory approaches are not capable of fulfilling regulatory tasks like the protection of minors.<sup>39</sup> However, the effectiveness of the approach has to be examined in each case. It is not possible to refer to the results of this study in detail in this article. However, one insight is that evaluation requirements are necessary to ensure the permanent adjustment of the existing system.

Another result is that traditional process objectives like openness, transparency and participation (e.g. of interests groups) are not always guaranteed when non-state regulation has been integrated into state regulation.

Overall, co-regulation has the potential to lead to a high level of protection of minors against content that might impair their development. However, it depends on the concrete shaping of the regulatory system whether minors are effectively protected. The approaches in place and their evaluation are capable of helping to learn more about the different ways to achieve the regulatory objectives.

## Notes

1. See [http://europa.eu.int/comm/avpolicy/reg/twvf/modernisation/proposal\\_2005/index\\_en.htm](http://europa.eu.int/comm/avpolicy/reg/twvf/modernisation/proposal_2005/index_en.htm).
2. The draft final report Hans-Bredow-Institut/EMR, *Co-Regulation Measures in the Media Sector* is available at [www.hans-bredow-institut.de/forschung/recht/co-reg/Co-Reg-Draft\\_Final\\_Report.pdf](http://www.hans-bredow-institut.de/forschung/recht/co-reg/Co-Reg-Draft_Final_Report.pdf).
3. For a summary of these findings see Schulz/ Held, *Regulated Self-Regulation*, Eastleigh: 2004, pp 11+.
4. See Renate Mayntz, „Regulative Politik in der Krise?“, *Sozialer Wandel in Westeuropa. Verhandlungen des 19. Deutschen Soziologentages*, Joachim Matthes, (ed.), Berlin: 1979, pp. 55+.; Baldwin/ Cave, *Understanding Regulation*, Oxford: 1999, pp. 35+.
5. Jörg Ukrow, *Die Selbstkontrolle im Medienbereich in Europa*, München, Berlin: 2000, pp. 10+.
6. Karl-Heinz Ladeur, „Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental law“, *Environmental Law and Ecological Responsibility*, Gunther Teubner, Lindsay Farmer and Declan Murphy, eds., West Sussex: 1994, pp 301+.
7. See Mayntz and Scharpf, (eds.), *Gesellschaftliche Selbstregulierung und politische Steuerung*, Frankfurt am Main et al.: 1995.
8. Renate Mayntz, „Politische Steuerung: Anmerkungen zu einem theoretischen Paradigma“, *Jahrbuch zur Staats- und Verwaltungswissenschaft*, Vol. 1., Thomas Ellwein, Joachim Jens Hesse, Renate Mayntz and Fritz W. Scharpf, (eds.), Baden-Baden: 1987, p. 98.
9. Gunnar-Folke Schuppert, „Das Konzept der regulierten Selbstregulierung als Bestandteil einer als Regelungswissenschaft verstandenen Rechtswissenschaft“, *Die Verwaltung, special issue „Regulierte Selbstregulierung“* 2001, Beiheft 4: pp. 201+.
10. Gunther Teubner, „The King’s Many Bodies: The Self-Deconstruction of Law’s Hierarchy“, *Law and Society Review* 31, 1997: pp. 763+.
11. See, for example, Gunther Teubner, *Law as an Autopoietic System*, Oxford: 1993; Klaus Eder, „Prozedurale Rationalität“, *Zeitschrift für Rechtssoziologie (ZfRSoz)*, Vol. 7 (1986, pp. 1+; Helmut Willke, *Supervision des Staates*, Frankfurt am Main: 1997.
12. See, for example, Ian Ayres and John Braithwaite, *Responsive Regulation*, Oxford: 1992, p. 17.
13. Hans-Bredow-Institut/EMR, *Co-Regulation Measures in the Media Sector*. (see Fn. 2)
14. See the findings of Hans-Bredow-Institut/EMR, *Co-Regulation Measures in the Media Sector*. (see Fn. 2)
15. See Gunnar Folke Schuppert: „Governance-Leistungen der Zivilgesellschaft“, *Zivilgesellschaft – national und transnationale*, Dieter Gosewinkel, Dieter Rucht, Wolfgang van den Daele, Jürgen Kocka (eds.), Berlin: 2004, pp. 245+, 253 focusing on the theory of legal pluralism; Hans-Heinrich Trute, Doris Kühlers, „Governance in der Verwaltungsrechtswissenschaft“, *Die Verwaltung* 2004, pp. 451+; James N. Rosenau: „Governance, Order and Change in World Politics“, *Governance without government: order and change in world politics*, James N Rosenau, Ernst-Otto Czempiel (eds.), Cambridge: 2001, pp. 1+.
16. For examples, see below, but also the various country reports in our study Hans-Bredow-Institut/EMR, *Co-Regulation Measures in the Media Sector*. (see Fn. 2)
17. See <http://www.kijkwijzer.nl>.
18. See <http://www.cvdm.nl/documents/mediaact.pdf>.
19. See <http://www.communicationsact.gov.uk/>.

20. See Communications Act of 2003, Part 1, Section 6.
21. See Communications Act of 2003, Part 1, Section 121.
22. See ICSTIS Report No. 97 of May 2003 available at [www.icstis.org.uk/pdfs\\_news/IMR97.pdf](http://www.icstis.org.uk/pdfs_news/IMR97.pdf).
23. The code of practise is available at [www.icstis.org.uk](http://www.icstis.org.uk).
24. See <http://www.bundespruefstelle.de>.
25. See <http://www.fsk-online.de>.
26. See <http://www.usk.de>.
27. See <http://www.fsf.de>.
28. See <http://www.fsm.de>.
29. See <http://www.kjm-online.de>.
30. For a detailed description, see Hans-Bredow-Institut/EMR, *Co-Regulation Measures in the Media Sector*. (see Fn. 2)
31. See Schulz/Held, *Regulated Self-Regulation*, Eastleigh: 2004, pp. 22+.
32. The Broadcasting Services Act 1992 is available at <http://www.comlaw.gov.au> and <http://www.austlii.edu.au>.
33. See <http://www.acma.gov.au>.
34. See <http://www.freetvaust.com.au>.
35. See <http://www.commercialradio.com.au>.
36. See <http://www.astra.org.au>.
37. See <http://www.cbaa.org.au>.
38. See Ian Ayres and John Braithwaite, *Responsive Regulation*, Oxford: 1992, p. 81; Schulz/Held, *Regulated Self-Regulation*, Eastleigh: 2004, p. 61+.
39. See Hans-Bredow-Institut/EMR, *Co-Regulation Measures in the Media Sector*. (see Fn. 2)

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