**Self-Regulation of Digital Media
Converging on the Internet:
Industry Codes of Conduct in
Sectoral Analysis**

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Section 1: Introduction

This report examines the regulation of harmful or otherwise inappropriate content, particularly minors' access to such content, and the regulation of content by self-regulatory means by the media industry.[1] The primary case studies concern the providers of connectivity and content hosting on the Internet, and of their Codes of Conduct (CoCs). Further case studies consider the models for self-regulation from other media, notably: press self-regulation; film and video classification; computer games ratings schemes; broadcasting self-regulatory schemes; mobile telephony content regulation. Special attention is given to the effect of the Internet and regulatory trends on demand for self-regulation across the traditional and new media industry sectors. Commissioner Liikanen noted in a speech on 15 April 2004[2]:

> "Good governance is about fairness, transparency and accountability. It is also about making the right decisions in the interests of those being governed. The role of governments is to:
>
> - ensure that public policy interests are protected in any governance structures for the Internet. And to:
>
> - make sure that the private sector is allowed to innovate and develop the Internet further. And this without any undue hindrance from inappropriate regulation.
>
> We also need to keep the bigger picture in mind. A lot of attention is paid to the problems that occur on the Internet, particularly regarding content. This can distract us from the Internet's key impact on society. It is an amazing technology. Its main impact by far has been overwhelmingly positive. Its contribution to productivity, rates of innovation, communication and learning is unprecedented. Its potential to contribute even more to economic and social development is abundantly clear."

Internet users are increasingly using the Internet for electronic commerce, information and entertainment, education, forming friendships and virtual communities. However, trust in the medium is affected negatively by software viruses, unsolicited mail (spam), inappropriate or harmful contact and content, threat of prosecution for copyright and even criminal activity online. Liikanen explains that:

> "the Internet's architecture does not lend itself easily to hierarchical control…. governments do clearly have legitimate concerns about the Internet:
>
> - Spam is an increasing problem for example…
>
> - Other concerns of governments include harmful and illegal content, respect for Intellectual Property Rights and privacy."

The European Commission expresses the pitfalls of Internet surfing compared with television viewing:

> Whereas in traditional broadcasting (analogue or digital) the individual broadcaster is easily identifiable, it is difficult and sometimes impossible to identify the source of content on the Internet. Access to harmful and illegal content is easy and can even occur without intent. In addition, the volume of information in the Internet is massive in comparison to broadcasting.[3]

It has long been maintained that Internet service is not analogous to broadcasting, but print publishing. In this view, the lack of control of the network by any one company, relatively low entry and distribution costs to publishers and authors, and pluralism of supply means that there is competition for users. In this case, the only 'control' is on the distribution of the material to the final user, as in a newsagent's kiosk, and the editorial choice of the end-user. In the tangible case of print, newsagents might refuse to sell pornography to minors, but in the case of the Internet, that choice is more difficult due to the technology. End-user tools

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[1] It does not examine criminally illegal content, covered in the Council of Europe Cybercrime Convention which came into force on March 18 2004. Council of Europe Convention on Cybercrime, CETS No.185, opened for signature Budapest 23 November 2001, see http://press.coe.int/cp/2004/135a(2004).htm

[2] See Liikanen, Erkki (2004) "Internet governance the way ahead" SIDN event Hague, http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/04/191|0|RAPID&lg=EN

[3] See Second Evaluation Report From The Commission To The Council And The European Parliament on the application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity COM(2003) 776 final of 12 December at http://europa.eu.int/comm/avpolicy/legis/reports/com2003_776final_en.pdf at p6.

such as filtering, imposing rules on children's use of the Internet, and reporting inappropriate or illegal content to hotlines established by Internet companies have h ad only limited success.

Trust in the medium of the Internet appears to be weak, and knowledge of 'trust marks' – logos that indicate that a site has been certified by a self-regulatory body such as the Internet Content Rating Association (ICRA) – is very poor in Europe. Only 10% of EU citizens in 2003 were aware of trustmarks, including only 8% of Swedes and 15% of Germans[4]. This lack of trust is also hampering Internet use for e-commerce transactions in Europe, with only 16% of EU citizens having made an online purchase, compared to an estimated 40% of US consumers, who spent $17.2billion in Q4 2003[5]. EU citizens' ignorance about to whom to report potentially harmful content is particularly profound: 57% do not know whom to contact, and only 13% are aware of a self-regulatory solution of ISP or hotline (with Netherlands highest at 26%).

Figure 1: Eurobarometer figures for 2003 from sample of 17,000 citizens
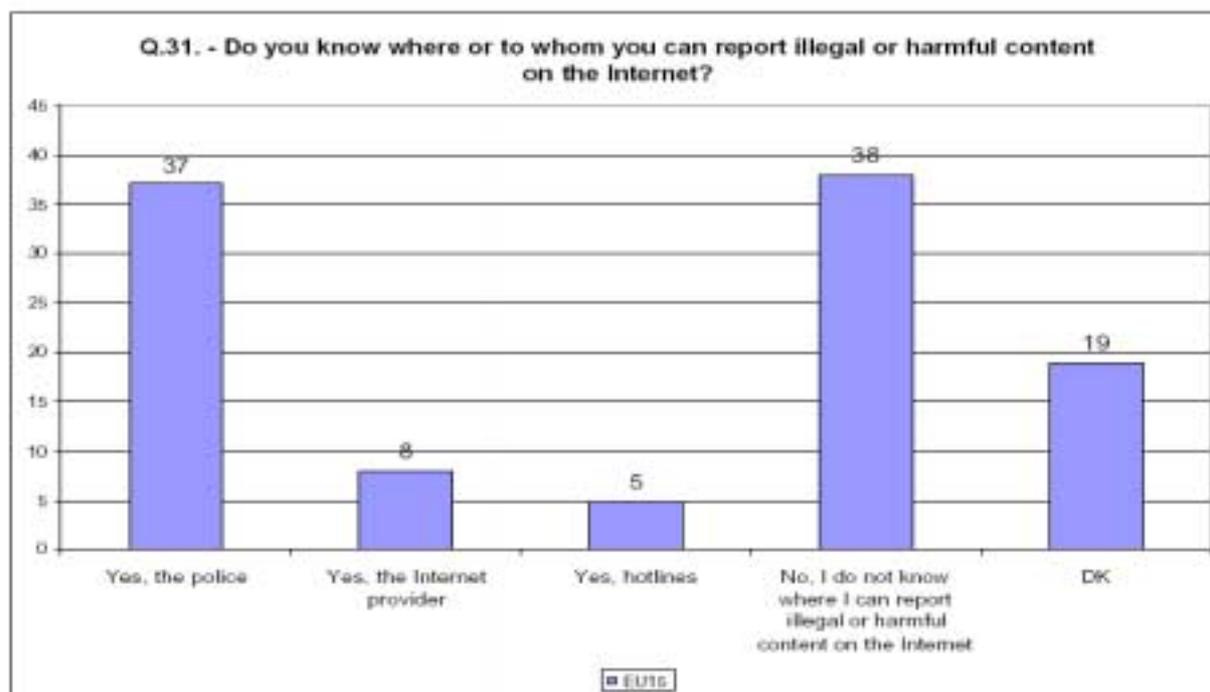
Concerns regarding inappropriate and potentially harmful content on the Internet are as old as the public Internet itself, but began to surface in public policy debate in about 1994, when Vint Cerf[6] classified three types of regulation: technical constraints, legal constraints and moral constraints. He stated that: 'In reality, all of these tools are commonly applied to channel behavioural choices.' He explains that it was public service Internet Service Providers' (ISPs) - university and research institute - conditions of use, including CoCs, that regulated online behaviour from the Internet's invention. After the privatisation of the Internet in 1989-90, CoCs, inherited from the public service past, continued to be the default approach. Legacy inheritance thus conditioned private Internet use. Cerf emphasises the need for motivated self-regulation: 'guidelines for conduct have to be constructed and motivated in part on the basis of self-interest'. In a 1995 response to the threat of legislation against illegal and harmful material on the Internet,[7] the World Wide Web Consortium began to develop the Platform for Internet Content Selection (PICS)[8], the basis of filtering

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[4] Eurobarometer (2004).

[5] Electric News reporting on Jupiter survey November 10 2003. See also www.theregister.co.uk

[6] Cerf, Vint (14 Aug 94) Guidelines For Conduct On And Use Of Internet Draft v0.1 at http://www.isoc.org/internet/conduct/cerf-Aug-draft.shtml Though an incomplete draft it is fascinating as an example of very early public policy making on Internet content.

[7] The *Communications Decency Act*, Title 47 U.S.C.A., 223(a) and (d), 1996 was introduced on 30 January 1995, passed by Congress in December 1995 and signed into law by President Clinton in January 1996, before being substantially but not wholly declared unconstitutional by the Supreme Court in *ACLU v. Reno* Supreme Court Case No. 96-511, 1997.

[8] Paul Resnick and James Miller (1996) PICS: Internet Access Controls Without Censorship, Association for Computing Machinery vol. 39(10), pp. 87-93 at http://www.w3.org.PICS.iacwcv2.htm

that was immediately incorporated into browser software and used to classify web pages by the major ISP-portals in the United States – and by default worldwide. The idea was to engineer websites and user software to enable control of content at the device – the end of the network – rather than by ISP or another intermediary.

Content unsuitable for, and potentially harmful to, minors has proved a target for regulation in all media. Adult content distributors and users are regular early adopters of new technologies, from printed press and colour photography to cinema to video recording to satellite television. The difference with the Internet is that government regulation has only taken place in special circumstances, with regulated self-regulation – or co-regulation as it is increasingly known – the norm. Price and Verhulst assert the limits of both government and private action in this sphere, and assert the interdependence of both – there is little purity in self-regulation without at least a lurking government threat to intervene where market actors prove unable to agree. They draw on regulatory theory and empirical studies of advertising and newspaper regulation, demonstrating that in areas of speech, the Internet included, government preference in liberal democracies is for self-regulation[9].

In European debate[10], the overall regulatory response was considered in a 1996 Green Paper and the July 1997 Declaration at the Bonn Ministerial Conference made plain the Council of Ministers' desire to see end-user filtering rather than intermediary liability[11]:

Responsibility of the actors

41. Ministers underline the importance of clearly defining the relevant legal rules on responsibility for content of the various actors in the chain between creation and use. They recognise the need to make a clear distinction between the responsibility of those who produce and place content in circulation and that of intermediaries.

42. Ministers stress that the rules on responsibility for content should be based on a set of common principles so as to ensure a level playing field. Therefore, intermediaries like network operators and access providers should, in general, not be responsible for content. This principle should be applied in such a way that intermediaries like network operators and access providers are not subject to unreasonable, disproportionate or discriminatory rules. In any case, third-party content hosting services (i.e those provided by neither user nor uploader of content) should not be expected to exercise prior control on content which they have no reason to believe is illegal. Due account should be taken of whether such intermediaries had reasonable grounds to know and reasonable possibility to control content.

43. Ministers consider that rules on responsibility should give effect to the principle of freedom of speech, respect public and private interests and not impose disproportionate burdens on actors.

Facilitating users' choice

53. Ministers urge the software industry to provide the necessary tools to enable users to select categories of content which they do or do not wish to receive so as to deal with information overload and undesired or harmful content.

54. Ministers therefore welcome the development of powerful services and software tools which enable information search and retrieval, and delivery directly to the user of specifically requested information.

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[9] Price, Monroe and Verhulst, Stefaan (2000) 'In search of the self: charting the course of self-regulation on the Internet in a global environment', Chapter 3 in Marsden, C. (ed). Though one must acknowledge the strength of the democratic principle enunciated: see Viktor Mayer-Schonberger and Teree E. Foster (1997) A *Regulatory Web: Free Speech and the Global Information Infrastructure* in Kahin and Nesson (eds) Borders in Cyberspace; Ingrid Volkmer (1997) *Universalism and Particularism: The Problem of Cultural Sovereignty and Global Information Flow* in Kahin and Nesson (eds); Price, M. (1995) *Television, The Public Sphere and National Identity* Oxford: Oxford University Press

[10] See: European Commission (1996) Green Paper on the protection of minors and human dignity in audiovisual and information services on 16 October 1996; Council resolution on illegal and harmful content on the Internet of 17 February 1997 OJ C 70, 6. 3. 1997; Economic and Social Committee Opinion OJ C 214, 10. 7. 1998; European Parliament Opinion OJ C 339, 10. 11. 1997; Economic and Social Committee Opinion OJ C 287, 22. 9. 1997; Committee of the Regions Opinion OJ C 215, 16. 7. 1997.

[11] Bonn Ministerial Declaration 8 July 1997 at http://europa.eu.int/ISPO/bonn/Min_declaration/i_finalen.html

55. Ministers stress the importance of the availability of filtering mechanisms and rating systems which allow users to decide on categories of content which they wish themselves, or minors for whom they are responsible, to access.

A co-regulatory Recommendation in 1998 continues to serve as the Commission's policy towards content regulation[12]. Further Commission legal instruments including the E-Commerce Directive of 2000 has maintained the co-regulatory approach to Internet regulation laid out in the 1998 Recommendation[13]. The Safer Internet Action Plan funded action against harmful content on the Internet within the EU from 1999-2004, see further the proposal for Safer Internet Plus[14]. The Committee of Communications Ministers meeting in Dundalk on 22 April 2004 reaffirmed their commitment to including spam in the Safer Internet plus plan[15].

ISPs, evolving into much more complex content, service and access providers, are the key link in control of the end-user's Internet experience, and the focus of this study. Code surveys have been conducted by several projects in the past two years, notably the Markle Foundation[16] and the Institute for Information Law (IvIR) at the University of Amsterdam in conjunction with the European Audiovisual Observatory and Institute of European Media Law[17]. The difference that the 2 ½ year IAPCODE survey has brought to the study of Codes of Conduct is the contextual benefit of extended field interviews, to supplement the legal and administrative analysis of self-regulatory codes. This socio-legal fieldwork has been of unique benefit in analyzing the actual operation of self-regulatory schema. In the following section, we explain why the Internet's distribution method – creation of perfect digital copies of information – creates such enormous potential liabilities for ISPs, and how self-regulation tries to limit these liabilities.

1.1 Explaining The Legal Basis for Liability for Illegal or Harmful Material on the Internet

Internet operation requires ISPs to automatically reproduce and distribute material to subscriber requests. Content creators upload to web pages by instructing the ISP's computer to store a copy of the uploaded material. The ISP's computer also makes copies of the material every time a computer asks to view the subscriber's web page and sends those copies through the Internet. That file does not travel directly to the user. Instead, it generally goes through other computers hooked up to the Internet. Each of these computers makes at least a partial copy of the relevant file. As Yen has described, "a practically unlimited scope of liability soon follows."[18] In order that these nodes on the network between content provider and end-user are not all held strictly liable[19] for the billions of web files they continually copy in the act of transmission,

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[12] Council Recommendation 98/560/EC on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity OJ L 270, 7.10.1998.

[13] See further Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications OJ L 201, 31.7.2002; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market OJ L 178, 17.7.2000; Decision No 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a Multiannual Community Action Plan on promoting safer use of the Internet and new online technologies by combating illegal and harmful content primarily in the area of the protection of children and minors OJ L 33, 6.2.1999, p.1 as amended by Decision No 1151/2003/EC of the European Parliament and of the Council of 16 June 2003 OJ L 162, 1.7.2003.

[14] See pp15-17 of SEC (2004) 148 Commission Staff Working Paper – ex ante evaluation Safer Internet plus at http://europa.eu.int/information_society/programmes/iap/docs/pdf/si_plus/exante.pdf

[15] 'EU Communications Ministers today agreed to step up efforts to make the Internet safer for children' at http://www.eu2004.ie/templates/news.asp?sNavlocator=66&language_id=1&list_id=597

[16] Price, M., Verhulst, S. (2004) Self-Regulation and the Internet, Netherlands: Kluwer. See also PCMLP (undated, 1999) Parental Control of Television Broadcasting, A Report for the European Commission DG Culture, PCMLP, Oxford.

[17] See special issues of IRIS in 2002-3, notably IRIS Special (2003) Co-Regulation of the Media in Europe, Strasbourg, Council of Europe at http://www.obs.coe.int/oea_publ/iris_special/2003.html.en See also IRIS plus 2002-6. See further http://www.ivir.nl/publications/medialaw.html

[18] President Clinton's 1995 Copyright Taskforce supported such liability: Working Group On Intellectual Property Rights, Information Infrastructure Task Force, Intellectual Property And The National Information Infrastructure 1-6, 114-24 (1995).

[19] Some legal commentators forcefully argued that strict liability should apply. See Trotter Hardy, The Proper Legal Regime for "Cyberspace", 55 U. PITT. L. REV. 993, 1042-46 (1994) (advocating strict ISP liability); Kelly Tickle,

legislators in the US and European Union have held that only a limited liability holds for these intermediaries, typically ISPs[20]. In the US, liability regimes have differed according to speech-based and copyright-based liabilities. The Communications Decency Act of 1996 provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider[21]. Yen states: "the general philosophy motivating these decisions— namely, that the liability against ISPs for subscriber libel would result in undesirable censorship on the Internet—remains vitally important in assessing the desirability of ISP liability." Holznagel has indicated that US courts have applied these 'safe harbour' provisions to widely protect ISPs, even where [a] it was aware of unlawful hosted content; [b] if it had been notified of this by a third party; [c] if it had paid for the data[22]. Frydman and Rorive observe that courts "in line with the legislative intent…applied the immunity provision in an extensive manner"[23].

In Europe, 'safe harbour' protection of ISPs from liability was implemented on 17 January 2002, when the E-Commerce Directive came into force. Article 12 protects the ISP where it provides 'mere conduit' with no knowledge of, nor editorial control over, content or receiver ("does not initiate [or] select the receiver"). Benoit and Frydman establish that it was based on the 1997 German Teleservices Act, though with "slightly more burden on the ISPs in comparison with the former German statute"[24]. Where ISPs provide hosting services, under Article 14 they are protected from liability, in two ways:

> [a] the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity is apparent; or

> [b] the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disrupt access of the information.

Like the proverbial three wise monkeys, ISPs and web hosting services should 'hear no evil, see no evil, speak no evil'. As mere ciphers for content, they are protected; should they engage in any filtering of content files (as opposed to classes of content types, such as spam) they become liable. Thus masterly inactivity except when prompted by law enforcement is the only – and economically most advantageous - policy open to them. PCMLP research conducted by Frydman and Rorive, found that "undoubtedly the Directive seeks to stimulate coregulation". It does this by formally permitting national courts to over-ride the safe harbour in the case of actual or suspected breach, of national law, including copyright law and certain types of illegal content, such as hate speech or paedophilia.

Whereas in the US, the absolute speech protection of the First Amendment and procedural concerns mean that Notice and Take Down (NTD) is counter-balanced by 'put back' procedures, in Europe no such protection of free speech exists, where speech freedom is qualified by state rights. In both jurisdictions, Notice and Take Down regimes cause Frydman and Rorive state that "this may lead to politically correct or even economically correct unofficial standards that may constitute an informal but quite efficient mechanism for content-based private censorship"[25]. It is clear that the economic incentive for ISPs is simply to remove any content notified, otherwise do nothing to monitor content, and let end-users, the police and courts, and ultimately the ethics of the content providers decide what is stored and sent over their access networks. Frydman and Rorive state that:

Comment, The Vicarious Liability of Electronic Bulletin Board Operators for the Copyright Infringement Occurring on Their Bulletin Boards, 80 IOWA L. REV. 391, 416 (1995) (favoring limited ISP liability).

[20] See, for example, Niva Elkin-Koren, Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators, 13 CARDOZO ARTS & ENT. L.J. 345, 399-410 (1995), who argues opposing liability.

[21] Communications Decency Act Section 30, 47 U.S.C. § 230(c)(1) (Supp. II 1996). This language might shield ISPs from liability for subscriber copyright infringement as well. However, Section 230(e)(2) specifically states, "Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property."

[22] Holznagel, B. (2000) Responsibility for Harmful and Illegal Content as Well as Free Speech on the Internet in the United States of America and Germany, in C.Engel and H. Keller (eds) Governance of Global Networks in Light of Differing Local Values, Nomos, Baden Baden.

[23] Frydman, B. and Rorive, I. (2002) Regulating Internet Content Through Intermediaries in Europe and the USA, Zeitschrift fur Rechtssoziologie Bd.23/H1, July 2002, Lucius et Lucius.

[24] Ibid at 54.

[25] Ibid at 56.

> Business operators should never be entrusted with … guidelines defining the limits of the right to free speech and offering procedural guarantees against censorship… which belong to the very core of the human rights of a democratic people[26].

That is nevertheless the situation which ISP CoCs seek to self-regulate.

The following section considers the development of co-regulation as a technique for regulating the digital media of broadcasting, newspaper production, video gaming, film viewing, all of which are seen to be converging on the Internet.

Section 2: Media Converging on the Internet: Typologies of Self-Regulation

The international and multimedia impact of the Internet creates serious coordination problems, which the Commission addresses (emphasis in original)[27]:

> The Recommendation on the protection of minors has a **cross-media approach** and emphasises the **cross-border exchange of best practices** and the development of **coregulatory and self-regulatory mechanisms**.

It explains how best to achieve the regulatory goals:

> A coregulatory approach may be more flexible, adaptable and effective than straight forward regulation and legislation. With regard to the protection of minors, where many sensibilities have to be taken into account, coregulation can often better achieve the given aims. Co-regulation implies however, from the Commission's point of view, an appropriate level of involvement by the public authorities. It should consist of cooperation between the public authorities, industry and the other interested parties, such as consumers. This is the approach laid out in the Recommendation. In order to promote national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity, the Recommendation enumerates different objectives to be fulfilled by (i) the Member States, (ii) the industries and parties concerned and (iii) the Commission.

Co-regulation is based on an on-going dialogue between stakeholders, which results in a form of regulation which is neither state command-and-control regulation in its bureaucratic central or IRA specialised functions, but is also not 'pure' self-regulation as can be observed in some parts of Internet infrastructure regulation[28]. The state, and stakeholder groups including consumers, are stated to explicitly form part of the institutional setting for regulation. Coregulation constitutes multiple stakeholders, and this inclusiveness results in greater legitimacy claims. However, direct government involvement including sanctioning powers may result in the gains of reflexive regulation – speed of response, dynamism, international cooperation between ISPs and others – being lost. It is clearly a finely balanced concept, a middle way between state regulation and 'pure' industry self-regulation.

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[26] Ibid at 59.
[27] European Commission (2004) Second Evaluation Report, ibid.
[28] See Liikanen (2004) op cit on ICANN and IANA.

Table: European Union Policy Statement Regarding Co-Regulation[29]

Conditions for the use of co-regulation

Co-regulation implies that a framework of overall objectives, basic rights, enforcement and appeal mechanisms, and conditions for monitoring compliance is set in the legislation.

It should only be used where it clearly adds value and serves the general interest. It is only suited to cases where fundamental rights or major political choices are not called into question. It should not be used in situations where rules need to apply in a uniform way in every Member State. Equally, the organisations participating must be representative, accountable and capable of following open procedures in formulating and applying agreed rules. This will be a key factor in deciding the added value of a co-regulatory approach in a given case.

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

The 1998 European Council Recommendation which initiated the Safer Internet Action Plan contained an important annex on self-regulation. This outlines guidelines for the consultation on codes, for the content and coverage of the code of conduct, and therefore also constitutes a useful point of comparison (see extract at the end of this section). To what extent do existing codes conform to standards outlined in this recommendation? In this section, the Council recommendation forms a backdrop to a general overview of best practice in Code-based media self-regulation, in the co-regulatory context.

2.1   Conditions of successful self-regulation

There have been numerous attempts in the literature on self-regulation to isolate the conditions for success of self-regulatory schemes.[30] The UK's National Consumer Council has offered a succinct yet comprehensive set of 'ingredients' for a successful self-regulatory scheme:

- Objectives: These must be clear and intelligible and set out clear standards.

- Content: the following elements must be clearly set out in the code of conduct: rules, monitoring, enforcement, sanctions, consultation on codes and a redress mechanism.

- Structures and Governance: The structure for implementing the above should be legitimate and sustainable.

A code administered by a trade organisation may face legitimacy deficit and impartiality/independence of adjudication must be defended. Therefore a dedicated structure is needed, including independent representation, external monitoring of compliance, public accountability and adequate publicity functions. Resources must be sufficient to support these structures. Finally performance indicators for redress (including time taken to deal with complaints and surveys of complainants) should be identified, enabling regular review of self-regulatory bodies.

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[29] Com (2001) 428 Final, European Governance – A White Paper, at p21, see http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf
Also see Rec (2001) 8 of the Council of Europe Committee of Ministers, Self-Regulation Concerning Cyber Content, at http://com.coe.int/ta/rec/2001/2001r8.htm

[30] See Price and Verhulst (2000), and the classic study of advertising self-regulation (Boddewyn 1988). See also Richard Thomas's report to the National Consumer Council (UK) "Better business practice: how to make self-regulation work for consumers and business" at http://www.ncc.org.uk/pubs/pdf/self-regulation_gpg.pdf

This outline is accompanied by some clear guidelines on crucial details that are often neglected in general discussions. For example:

> "In schemes that separate the redress and monitoring/ enforcement functions. Lay members should always be in the majority on the body responsible for running the redress system; and, where possible, on the body for code monitoring and enforcement. In practice, a lay majority is most often missing when rules are made. The challenge is to achieve the right balance between insiders and outsiders"[31]

In addition to this quite comprehensive list, the academic literature on self-regulation suggests that we must also discuss the structure of the industry and its relationship to government if we are to fully understand the potential for successful self-regulation.

2.1.1 Industry Structure and Interest

Self-regulation works best where there is a degree of coincidence between the self-interest of the industry and the wider public interest. i.e. Industry self-regulation is more likely in those situations where self-policing can increase the overall demand for the industry's product. It is necessary also to look at the level of the specific harms that are associated with the industry and relationship of harm to profit. (e.g. gambling). The existence of an industry-wide decision-making system (e.g industry association) increases the probability of effective industry self-regulation.[32] The strength and effectiveness of an industry self-regulatory system is a function of its essentiality and non-substitutability. Industry self-regulation is more likely in those situations where the externally imposed costs from not undertaking self-regulation would be greater than the cost of undertaking self-regulation, and where there is a consensus regarding these costs.

2.1.2 Relationship to Government

The generation of self-regulation often has its foundation in the possibility or fear of government regulation.[33] Therefore where industry representatives are able to point to a credible threat, they are most likely to sustain self-regulatory institutions. It is a commonplace to assert that there is therefore in practice no clear division between state and private self-regulation, though there has been little research on the legal consequences of this in communications. Hyuyse and Parmentier[34] distinguish between the following state/self-regulatory relationships:

- **Subcontracting**, where the state limits its involvement to setting formal conditions for rule making, but leaving it up to parties to shape the content)

- **Concerted action.** Where the state not only sets the formal, but also the substantive conditions for rule making by one or more parties.

- **Incorporation.** Where existing but non-official norms become part of the legislative order by insertion into statutes.

To this we could add a fourth: "pure" self-regulation, whereby industry sets standards and polices them merely to increase product trust with consumers. We could call this enlightened self-interest. Market research shows that product X is not trusted by public and they are reluctant to buy. Industry groups realise that their market is shrunk by a few rogues who reduce trust in product in general. They act collectively to exclude the rogues, as in the example in solving collective action problems.

Clearly, the negotiation between state and industry is complex and sensitive and there are no pure forms. It may not be necessary for "the state" to "do" anything. If part of the calculation of industry bodies involves awareness that the state might do something or be compelled to do something should they fail to take responsibility for self-regulation, then we can say that there is at least co-regulatory oversight. Previous analyses of self-regulation have tended to focus on the codified aspects of co-regulatory oversight and audit and neglected the analyses of these less formal- but no less important- calculations on the part of self-regulating organisations.

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[31] NCC op.cit p 2.
[32] See Boddewyn 1988, 30-33
[33] See Gibbons 1998, 275-285.
[34] Hyuyse and Parmentier (1990) at 260; see also Gunningham and Rees (1997) at 365.

2.1.3   Media Self-Regulation and the Public Interest in Fundamental Rights

Media content is an established field of self-regulation in which all the issues identified above play a central role. It is also an area where controversial issues of free speech regularly come into play along with other fundamental rights such as privacy. This is of course true of other areas but it is long accepted in the general regulatory regime (with respect for example to competition and state aids and international trade) that the media sector has special features and should be treated differently to others. In particular, high standards with regard to transparency, accountability, and clarity and proportionality of objectives for example need to be maintained. That would in turn suggest that the National Consumer Council benchmarks and criteria for successful self-regulation, whilst setting the standards high, should not be compromised in the media and communications sector. If self-regulation is to inspire trust and confidence it is crucial that it should not be seen to undermine fundamental rights in any way. Co-regulation may be appropriate in this sphere, given sufficient media law training and transparency of adjudication. It is for this reason that we insist that IRAs play an active role in certifying self-regulatory schema for the media, above and beyond any self-regulatory design requirements.

2.2   Regulated Self-Regulation and European Concepts of Self-Regulation

Schulz and Held have investigated co-regulation in the German context, specifically in the case of protection of minors[35]. In their view, self-regulation in Anglo-American debate is concerned with "reconciliation of private interests" whereas their formulation – regulated self-regulation[36] – is indirect state regulation based on constitutional principles. The German concept of regulated self-regulation gives the state a role when basic constitutional rights need to be upheld: "The extent of possible delegation [to self-regulation] depends … on the relevance … in terms of basic rights".[37] It is the combination of "intentional self-regulation" – the actions of market actors, whether in social or economic settings – with the state sanction in reserve which results in self-regulation which is 'regulated' by the possibility of state intervention. At the Birmingham 'Assises de l'Audiovisuel' in 1998, the formulation used was: "Self-regulation that fits in with a legal framework or has a basis laid down in law".[38]

The French term 'co-regulation' also gives a sense of the joint responsibilities of market actors and state, short of outright command-and-control, in the activity under investigation. It has been used by the UK's telecom regulator to suggest a state role in setting objectives which market actors must then organize to achieve – with the threat of statutory powers invoked in the absence of market self-regulation[39]. However, co-regulation is used in such a wide variety of circumstances that its specific meaning must be seen in the national, sectoral and temporal context in which it is used[40].

Schulz and Held suggest that 'regulated self-regulation' can be any of these categories: co-regulation, intentional self-regulation, or a third category - 'audited self-regulation'. Independent audit of self-regulation is a U.S. concept of using an independent standard or professional body to audit a self-regulatory organisation or individual company according to pre-set standards. In the case of ISPs, audited self-regulation might involve at least a standard being set that an audit firm could certify organisations against (or at least that organisations could self-certify with reporting requirements), but could involve the setting of an international standard, as increasingly occurs in accountancy, for instance. At a minimum, dedicated budgetary and personnel resources, with activity reports, would be required to demonstrate regulatory commitment.

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[35] Schulz and Held (2001) Regulated Self-Regulation as a Form of Modern Government, Hamburg, Verlag Hans Bredow Institut.

[36] See Hoffman Reim, Wolfgang (1996) Regulating Media.

[37] Sculz and Held (2001) at 8.

[38] See typologies and quotation at p7 in Schulz and Held op cit.

[39] See further OfCom consultation on self-regulatory body 'certification' and the development of the telecoms ombudsmen in the UK, under Oftel 'patronage' and reinforced by the Universal Service Directive (2002) Article 34: Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services ("*Universal Service Directive*"), OJ L 108, at:http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/index_en.htm

40 See Le Forum des droits sur l'Internet (2004) Children of the Internet 1: Exposure of Minors to Harmful Content. Schulz and Held detail different meanings used in the UK, Australia and France, at pp7,14.

2.2.1   A Typology of Co-Regulation

Self-regulation in the European context must also be proportional to the aims of the legal instrument, as well as conforming to the competition law of the European Union. Enforcement is the ultimate responsibility ('the safety net') of the state. In Schulz and Held's case study, Australia, practical self-regulation is illustrated in the application of the 1997 Telecoms Act and 1992 Broadcasting Services Act, where four types of regulatory scheme can be identified:

Regulatory Type	State Role
1. Intentional or 'Pure' Self-regulation	No state IRA involvement
2. Industry Codes	Registered with the state IRA
3. Industry standards	Mandatory codes set in the absence of pan-industry code agreement
4. Command-and-control	Set by state IRA pre-empting attempts at self-regulatory action

However, there are clearly nuanced approaches that industry can take, in choosing the menu of 'regulated self-regulation' to adopt. Multinational actors can choose to engage in game-playing with the regulator and other actors in order to secure their preferred environment for regulation, and it is here that national 'regulated self-regulation' according to national constitutional standards are arbitraged by multinational actors seeking a more co-ordinated international regulatory framework. That is not to suggest the extreme and celebrated case in which Yahoo! attempted to substitute U.S. First Amendment speech standards over French government controls on illegal Nazi memorabilia auctions (clearly a Type 4 regulatory discussion)[41], but to suggest that Types 1-3 above afford substantial latitude for rational multinational actors to seek to arbitrage regulators in favour of their 'home state' standards for speech and commercial freedom (which in the U.S. coalesce more frequently than in Europe, which does not protect commercial speech to the same extent).

The main body of the report is structured as follows. Having introduced the typologies of self-regulatory types, we now investigate in Section 3 the methodology used to assess the efficiency, effectiveness, and sustainability of media self-regulation. In Sections 4-9 we investigate the individual sectors for which we have conducted pan-European research. In Sections 10-11 we further cross-analyze by sector, and then by nation, to identify the common themes, successes and problems of pan-European and pan-sectoral coordination of self-regulation and assess the value of co-regulation and regulatory audit. Finally in Section 12 we reassess our introductory classifications to provide an auditory and technical research toolkit for future digital media co-regulation.

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41 See Reidenberg, J. (2004) States and Law Enforcement, 1 Uni.Ottawa L.& Tech.J. summarising Reidenberg, J. (2002) Yahoo and democracy on the Internet, 42 Jurimetrics 261.

COUNCIL RECOMMENDATION (98/560/EC) Annex: Indicative Guidelines For The Implementation, At National Level, Of A Self-Regulation Framework For The Protection Of Minors And Human Dignity In On-Line Audiovisual And Information Services

Objective - The purpose of these guidelines is to foster a climate of confidence in the on-line audiovisual and information services industry by ensuring broad consistency, at Community level, in the development, by the businesses and other parties concerned, of national self-regulation frameworks for the protection of minors and human dignity. The services covered by these guidelines are those provided at a distance, by electronic means. They do not include broadcasting services covered by Council Directive 89/552/EEC or radio broadcasting. The contents concerned are those which are made available to the public, rather than private correspondence. This consistency will enhance the effectiveness of the self-regulation process and provide a basis for the necessary transnational cooperation between the parties concerned.

While taking into account the voluntary nature of the self-regulation process (the primary purpose of which is to supplement existing legislation) and respecting the differences in approach and varying sensitivities in the Member States of the Community, these guidelines relate to four key components of a national self-regulation framework:

– consultation and representativeness of the parties concerned,

– code(s) of conduct,

– national bodies facilitating cooperation at Community level,

– national evaluation of self-regulation frameworks.

1. Consultation And Representativeness Of The Parties Concerned

The objective is to ensure that the definition, implementation and evaluation of a national self regulation framework benefits from the full participation of the parties concerned, such as the public authorities, the users, consumers and the businesses which are directly or indirectly involved in the audiovisual and on-line information services industries. The respective responsibilities and functions of the parties concerned, both public and private, should be set out clearly.

The voluntary nature of self-regulation means that the acceptance and effectiveness of a national self-regulation framework depends on the extent to which the parties concerned actively cooperate in its definition, application and evaluation.

All the parties concerned should also help with longer-term tasks such as the development of common tools or concepts (for example, on labelling of content) or the planning of ancillary measures (for example, on information, awareness and education).

2. Code(S) Of Conduct

2.1. General

The objective is the production, within the national self-regulation framework, of basic rules which are strictly proportionate to the aims pursued; these rules should be incorporated into a code (or codes) of conduct covering at least the categories set out at 2.2, to be adopted and implemented voluntarily by the operators (i.e. primarily the businesses) concerned.

In drawing up these rules, the following should be taken into account:

– the diversity of services and functions performed by the various categories of operator (providers of network, access, service, content, etc.) and their respective responsibilities,

– the diversity of environments and applications in on-line services (open and closed networks, applications of varying levels of interactivity).

In view of the above, operators may need one or more codes of conduct. Given such diversity, the proportionality of the rules drawn up should be assessed in the light of:

– the principles of freedom of expression, protection of privacy and free movement of services,

– the principle of technical and economic feasibility, given that the overall objective is to develop the information society in Europe.

2.2. The content of the code(s) of conduct - The code (or codes) of conduct should cover the following:

2.2.1. Protection of minors

Objective: to enable minors to make responsible use of on-line services and to avoid them gaining access, without the consent of their parents or teachers, to legal content which may impair their physical, mental or moral development.

Besides coordinated measures to educate minors and to improve their awareness, this should cover the establishment of certain standards in the following fields:

(a) Information to users

Objective: within the framework of encouraging responsible use of networks, on-line service providers should inform users, where possible, of any risks from the content of certain on-line services and of such appropriate means of protection as are available. The codes of conduct should address, for example, the issue of basic rules on the nature of the information to be made available to users, its timing and the form in which it is communicated. The most appropriate occasions should be chosen to communicate the information (sale of technical equipment, conclusion of contracts with user, web sites, etc.).

(b) Presentation of legal contents which may harm minors

Objective: where possible, legal content which may harm minors or affect their physical, mental or moral development should be presented in such a way as to provide users with basic information on its potentially harmful effect on minors.

The codes of conduct should therefore address, for example, the issue of basic rules for the businesses providing on-line services concerned and for users and suppliers of content; the rules should set out the conditions under which the supply and distribution of content likely to harm minors should be subject, where possible, to protection measures such as:

– a warning page, visual signal or sound signal,

– descriptive labelling and/or classification of contents,

– systems to check the age of users.

Priority should be given, in this regard, to protection systems applied at the presentation stage to legal content which is clearly likely to be harmful to minors, such as pornography or violence.

(c) Support for parental control

Objective: where possible, parents, teachers and others exercising control in this area should be assisted by easy-to-use and flexible tools in order to enable, without the former's educational choices being compromised, minors under their charge to have access to services, even when unsupervised. The codes of conduct should address, for example, the issue of basic rules on the conditions under which, wherever possible, additional tools or services are supplied to users to facilitate parental control, including:

– filter software installed and activated by the user,

– filter options activated, at the end-user's request, by service operators at a higher level (for

example, limiting access to predefined sites or offering general access to services).

(d) Handling of complaints (`hotlines©)

Objective: to promote the effective management of complaints about content which does not comply with the rules on the protection of minors and/or violates the code of conduct.

The codes of conduct should address, for example, the issue of basic rules on the management of complaints and encourage operators to provide the management tools and structures needed so that complaints can be sent and received without difficulties (telephone, e-mail, fax) and to introduce procedures for dealing with complaints (informing content providers, exchanging information between operators, responding to complaints, etc.).

2.2.2. Protection of human dignity

Objective: to support effective measures in the fight against illegal content offensive to human dignity.

(a) Information for users

Objective: where possible, users should be clearly informed of the risks inherent in the use of on-line services as content providers so as to encourage legal and responsible use of networks. Codes of conduct should address, for example, the issue of basic rules on the nature of information to be made available, its timing and the form in which it is to be communicated.

(b) Handling of complaints (`hotlines©)

Objective: to promote the effective handling of complaints about illegal content offensive to human dignity circulating in audiovisual and on-line services, in accordance with the respective responsibilities and functions of the parties concerned, so as to reduce illegal content and misuse of the networks.

The codes of conduct should address, for example, the issue of basic rules on the management of complaints and encourage operators to provide the management tools and structures needed so that complaints can be sent and received without difficulties (telephone, e-mail, fax) and to introduce procedures for dealing with complaints (informing content providers, exchanging information between operators, responding to complaints, etc.).

(c) Cooperation of operators with judicial and police authorities

Objective: to ensure, in accordance with the responsibilities and functions of the parties concerned effective cooperation between operators and the judicial and police authorities within Member States in combating the production and circulation of illegal content offensive to human dignity in audiovisual and on-line information services.

The codes of conduct should address, for example, the issue of basic rules on cooperation procedures between operators and the competent public authorities, while respecting the principles of proportionality and freedom of expression as well as relevant national legal provisions.

2.2.3. Violations of the codes of conduct

Objective: to strengthen the credibility of the code (or codes) of conduct, taking account of its voluntary nature, by providing for dissuasive measures which are proportionate to the nature of the violations. In this connection, provision should be made, where appropriate, for appeal and mediation procedures. Appropriate rules to govern this area should be included in the code of conduct.

Section 3: Comparative Analysis Framework - The 5C Approach

Much of the research in this project has focused on the analysis of media self-regulatory codes themselves. Study of codes of conduct is a good way of revealing to what rules code subjects want to publicly commit and for breach of which to be held accountable. This of course assumes that the drafters of codes are also the subjects of codes and that there are procedures and sanctions involved in the self-regulatory mechanism that amount to effective accountability. Study of codes alone however is not enough. It should be accompanied by contextualising research on the empirical process of drafting, adopting and revising codes and the process of their application. That is why we also draw upon background research, expert interviews, workshops, technical assistance to groups in the process of developing codes, historical and archive material and secondary analysis conducted by other researchers.

Code analysis can identify those cases in which a code is not in fact justiciable and therefore not likely to be effective. However, trust, mutual observation and a sense of obligation can be key mechanisms in the process of self-regulation alongside the code itself. In our research, we recognized that a methodologically-rigorous and systematic analysis of codes is only the start of a broader contextual analysis of the sustainability of self-regulatory mechanisms. Sustainability, as we argue elsewhere in this report, is a product of a combination of industry structure, cost of the regulatory structure and the standards of transparency and due process that are maintained. To investigate the context in which codes of conduct develop and are implemented, we conducted interviews, organized workshops and used our technical assistance project to gain a deeper understanding of the practical issues involved in implementing sustainable and effective codes. However, it is the analysis of codes that offers one of the most reliable objective indicators of some basic patterns in development of self-regulation and has proved invaluable to the selfregulation.info project.

Our aims in this comparison are two fold. On one level we simply want to map the basic parameters of development of codes of media conduct in European countries. Our findings will be of interest both to policymakers and researchers monitoring the development of industry rule making. On another level we wish to push the comparison a little further, asking what evidence can be brought to bear on questions of quality of self-regulation. Does self-regulation conform to expected levels of accountability, transparency and public involvement? Are there patterns of development that would impact on the ability of self-regulatory organisations to collaborate and cost-save across countries or across sectors? This will lead us to the discussions in further sections of questions such as what explains international differences (law or political culture), and the broader question of 'exportability' of self-regulation from Western European Countries where it is well established, to other regimes such as the New Member States.

The various media sectors required different methodologies and in certain areas different focus points, technologies, and respect for cultural diversity We make distinctions between principles, codes, guidelines and recommendations. We examined emerging issues, including enforcement, procedures, content issues, evolvement, preventing government legislation, avoidance of liability, child/consumer protection.

Codes are adopted for one or more of the following reasons, which are by no means exhaustive or mutually exclusive (in fact, several are mutually reinforcing):

- As an alternative to direct statutory regulation;

- To prevent direct statutory regulation by the state;

- To build public trust, consumer confidence;

- To avoid legal or user-perceived liability;

- To protect children and other consumers;

- To exert moral pressure on those who otherwise behave in an "unprofessional" or "social irresponsible" way;

- To reinforcecompetitive advantage of a group of industry players, while potentially restricting market access for others;

- As a mark of professional status;

- To develop a set of common standards for services and products;

- To raise the public image of their industry.

Code drafting and revising can include outside participation and consultation, with interest organizations such as consumer associations, trade unions, and non-governmental organizations:

1. members of the public that are independent from any special interest or organization (also called "independents");

2. consumer representatives;

3. experts solicited for their opinion in the process; and

4. professionals within the regulated area.

Under evolving processes, issues to be addressed include:

- the convergence of national, regulatory and corporate cultures;

- the changing nature of the relationship between government and industry;

- the evolving technological architecture that underwrites self-regulation;

- the further development of standards, Codes, and rules;

- the growth and change of cultural norms and of public understanding surrounding self-regulation; and

- revision through third party consultation or audit.

The variables identified and used to compare and classify the selected Codes are covered in the following five broad analytical areas (Depending on the media branch these may have different subsections and questions)[42]:

CONSTITUTION

COVERAGE

CONTENT

COMMUNICATION

COMPLIANCE

3.1. Data Collection Methods

In-depth comparative analysis of codes with analysis is modelled on the "5C plus" approach. The project team assembled and translated codes from ISP's, broadcasters, games and film regulators and providers of mobile communications. Once the codes were received they were initially reviewed under what we have labelled the 5C approach. They were supplemented by in-depth interviews with self-regulatory bodies, a series of workshops, and technical assistance projects used to gain a further understanding of the practicalities of code drafting and implementation..

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[42] Details about this methodology, are available on http://www.selfregulation.info/iapcoda/iapcode-meth-grid-020530.htm This IAPCODE tool of analysis is a development of methodology used by PCMLP in previous work carried out by Monroe E. Price and Stefaan G. Verhulst.

This analysis is helpful, but only addresses a portion of the research questions being asked. It addresses whether and how particular issues are coded for, but it does not address "Why" questions involved in attempting to understand "why" the organization does/does not include particular issues in their code. The "plus" mentioned in the title "5C plus" is in-depth interviews with the individuals responsible for drafting, revising and enforcing the particular code.

3.2.   Project Methodology

The 5C's represent the research team's interpretation of the core questions that have surfaced in coming to grips with how to analyze self-regulatory codes of conduct.

At the broadest levels of abstraction, the questions are:

- How should a code be drafted, meaning, coming to an understanding of the internal procedural processes involved in making a code.

- Who is subject to the code? Whose actions are governed by the code and also whose actions should be governed by the code?

- What is the objective of the code? For example, are we regulating content, privacy, protecting minors, dealing with illegal content? More often than not, codes deal with a range of these issues and concerns.

And finally:

- How should the code be enforced? Is there an enforcement mechanism? If so, what are the sanctions, how often has the enforcement mechanism been applied and what have been the results?

We now briefly explain each of the five C's along with some sample questions that were asked in the research.

3.2.1   1st C: Constitution

The project team defined constitution as the organizational structure and governance of the code drafting and enforcing body, who is it composed of and what are the roles and responsibilities of its various members in drafting, revising and enforcing the code? Coverage also includes issues of whether the code includes provisions for review and amendment.

Obviously analysis of the code alone does not address all of these issues. It is the in-depth interviews that concern how the code was drafted, how many times it has been revised and the reasons why it has been revised.

Constitution also refers to the regulator which is entrusted with the application of the code or codes. In the case of the print media, "constitution" also refers to the organisation and character of the press council as a mechanism of code implementation, focusing on its governance and its relationships with the government, the industry and society. In this area we will highlight, in the stories of the creation of the press councils in Europe, a recurrent theme, which is that due to a situation of crisis of some sort (e.g. discontent with intrusions by the press, dissatisfaction with low standards of journalism, etc.), there are calls for legislation or there is a threat of legislation, and as a reaction the industry offers to improve its performance by raising its standards. In the case of the print media, the standards mean standards of journalism ethics. In the case of the broadcast media, the research tool had to be adapted: we searched for available self-regulation in an area which has traditionally been highly regulated.

3.2.2   2nd C: Coverage

Coverage issues are issues of scope, both geographical scope and actual scope of the code. Geographical scope issues are dealt with by questions concerning whether the organizations are country specific or pan-European. Questions addressed under "coverage" are, for example, whether there is industry membership in the self-regulatory body, and provisions for amending the code. Some examples of coverage of scope of code:

- In the ISP review coverage issues are addressed with questions dealing with whether the code applies to only ISPs or also ICPs.

- In the Games review, the distinctions being made are those between producers of the games and suppliers.

- In the print media review, the focus is on the code, and it refers to the scope of the journalistic standards of ethics set out in the code used as a yardstick by the council. Additional questions include whether the code (and hence, the mechanism of the regulator if any) is also applicable to the Internet (e.g. online news services).

These questions were supplemented by interview questions of why the above decisions to include or exclude groups from coverage of the code were made.

3.2.3   3rd C: Content

Content refers to the panoply of issues that are often identified as core areas of concern. For example, the ISP analysis content issues covers questions concerning whether the code regulates:

- Illegal content

- Limiting access to material that is harmful to minors

- Provisions regarding racist and xenophobic speech

- Information regarding best practices in business

- Provisions regarding bulk email and

- Provisions regarding data protection and privacy

In the games review, because content issues are so intimately tied to a rating, the types of content instead of falling under the umbrella of "harmful to minors" are much more delineated and deal individually with the levels of:

- Violence

- Sex and Nudity

- Offensive Language

- Racist/Xenophobic Speech

- Controlled Substances

In the print media review, content refers specifically to the ethical standards of the journalistic profession and the accountability of the media in relation to readers/audiences:

- Provisions regarding accuracy

- Provisions regarding appearance as well as reality of objectivity

- Prohibition of members of the press from receiving gifts

- Provisions concerning Privacy

- Duty to distinguish between fact and opinion

- Racist/Xenophobic Speech

- Rules on protection for vulnerable people (e.g. minors)

- Rules on payments to criminals and witnesses, etc.

Again, as in previous examples, this information was supplemented with interviews to understand why certain areas were or were not coded for.

3.2.4   4th C: Compliance

Compliance is defined as those significant aspects of the code that determine how violations of the code are resolved, as well as whether there are sanctions for violation of the code. Cooperation with law enforcement and third-parties is also addressed.

In the both the ISP review and games study compliance is addressed by inquiry into: presence of a complaint mechanism; sanctions for violation of the code; cooperation with third parties such as IWF and law enforcement. Interview questions concern the frequency of enforcement actions, common violations and common sanctions, as well as the reasons behind the choice of sanctions.

In the case of the print media study, compliance refers to actual application of the code and consequences for breaches of its rules. The area of study focuses on mechanisms for appeals, resolution of disputes, and sanctions at the council's disposal (e.g. duty to publish the rulings of the press council).

3.2.5   5th C: Communications

The final C in the 5C approach is communications. By "Communication" the research team hopes to identify the areas of coding that concern the relationship between the industry and users. These include: consumer and user group interaction at the level of code formulation; privacy concerns; consumer and consumer group consultation in code amendment and enforcement.

Note some exceptions:

- In the ISP review and games study, Communications is in part concerned with the presence of privacy provisions or guidelines within the code.

- In the games study in particular, issues of how the ratings are communicated to the end user are addressed by questions concerning packaging and display.

- In the print media study, communication refers to mechanisms by which the standards contained in the Code are communicated to readers and/or audience.

Finally, another area of inquiry within the ISP review are questions concerning rating and filtering and whether these options are presented to end-users. Interview questions cover why the provisions mentioned were or were not coded for as well as detailed inquiry into the role of consultation with end users and consumer groups in the formulation, enforcement and amendment of the code.

3.3   Research Findings

Research reports on individual media industries are presented on the projects website. COCON is the code of conduct library and contains original codes, translations where appropriate, and analysis under the 5C approach. This area continued to grow as more analysis of codes were completed. In conclusion, taking the data collected and supplementing it with interviews the project team analyzed further both how and why coding decisions are made. The basic outline of the 5C+ approach is meant to be illustrative, not exhaustive, of the types of questions the project asked during the course of the research. The 5C approach identifies the core issues at a significant level of abstraction and then permits inquiry by carefully selected questions, which vary from media to media.

Complementing this initial research with questions aimed at the "why", the "plus" aspect of the approach offers a deeper understanding into the complex nature of codes at the level of those who are drafting, revising and enforcing self-regulatory codes of conduct in the media environment.

The Codes of Conduct in sectors examined in depth are summarised in the following sections: print, broadcast, ISP, film, computer games, and mobile Internet. Full coverage of each sector is provided in the relevant Annex. We provide the Annex to the Council Recommendation which forms the basis for ISP Codes of Conduct, as a preliminary framework.

Section 4: Press councils: codes and analysis of codes in the EU

The print media are subject to a variety of codes of conduct that set out standards of journalistic ethics. Some of those codes are internal to a media outlet, or specific to a publication, or adopted by professional associations of journalists. Some publications, for example, have an in-house ombudsman, which applies a code (e.g. the newspapers such as *The Guardian*, *The Observer* and *The Independent on Sunday* in the UK; *El País* and *La Vanguardia* in Spain; *Politiken* in Denmark). There is a plethora of codes of ethics available for application to the print media in the countries of the EU.[43] The field of research in this paper is confined to the codes of the 9 EU countries that have a press council. For present purposes press councils are defined as independent bodies which deal with complaints from the public about the content of the print media. Although there is no single model for a press council, the 9 press councils in this study administer a code of journalistic ethics. In all cases proprietors of media outlets fund - or help to fund - the running of the press council. Representatives of proprietors, journalists and in some cases members of the public sit as members of the council.[44]

The list of countries in this study includes: Austria, Denmark, Finland, Germany, Luxembourg, The Netherlands, Spain (but only Catalonia has a press council), Sweden and the United Kingdom. At the end of 2002, a press council was created in the Flemish speaking part of Belgium, but the council has so far decided very few complaints, and is not included in the survey.

France is conspicuous by its absence from this list, as there never was a press council. Claude-Jean Bertrand explains that the late establishment of press freedom - and the (at least formal) stricture of the 1881 Press Law – may have fuelled the distrust of journalists for any kind of further limitation and imitation law court. There is also the scattering of the profession among many unions, and the lack of dialogue with. publishers (themselves hostile to any limitations on their right). Perhaps the old (although now fading) fierce Left-Right dichotomy in French politics is responsible for these developments: any criticism of a Right-wing or Left-wing newspaper would have been considered a partisan attack.[45]

As this report is to be placed in the context of the analysis of self-regulation codes and mechanisms of implementation across other media industries in the territory of the EU, the general methodology of analysis used for the enquiry into other sectors, with a few necessary adjustments, is applied to the press sector to facilitate comparisons. Finally, we should mention that by print media regulation we refer to newspapers. Books, and periodicals not concerned directly with topical journalism are excluded from consideration.

4.1. Key Indicators – What Statistical Evidence Is There Of Usage Of The Self-Regulatory Code?

UK: Press Complaints Commission deals with the highest volume of complaints in the group of councils surveyed. The Commission received 2,630 complaints in 2002, a significantly higher number than the average of the previous three years. 56% of complaints concerned accuracy, while approx. 25 % of complaints dealt with privacy.[46]

Germany: Press Council receives between 500 and 600 complaints per year. Approximately two thirds of all complaints can be dealt with at an early stage without a formal decision by the complaints commission. Following its meetings the Council issues Press statements, including public reprimands where necessary. A newspaper or magazine that has been censured must print the reprimand in its next issue--about 90% of the German publishing companies have signed a voluntary agreement committing themselves to do so.

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[43] Among the many compilations available see: Hugo Aznar, Etica y Periodismo: Códigos, estatutos y otros documentos de autorregulación, Barcelona: Paidós (1999), and the following websites: Codes of ethics of various media organizations collected by the American Society of Newspaper Editors www.asne.org/ideas/codes/codes.htm and more codes http://jcomm.uoregon.edu/about/ethics/index.html

[44] For a a general definition applicable worldwide, see http://www.presscouncils.org/html/frameset.php?page=index

[45] Claude-Jean Bertrand, Arsenal of Democracy: Media Accountability Systems, chapter "M*A*S in France", Hampton Press (2002).

[46] UK PCC websiste: http://www.pcc.org.uk/2002/statistics_review.html

Sweden: Press Council, which can apply fines of up to approx. Euro 2,500, deals with 350-400 complaints per year. About 30% of the complaints have been reviewed by the Press Council either on the Ombudsman's request or if the Ombudsman has written off the case, on appeal by the complainant. 10-15% of all complaints have resulted in formal criticism of the newspaper in question by the Press Council.

Netherlands: The Dutch Press Council hears a much lower number of complaints: 71 judgments were delivered in 2000, 53 judgments were delivered in 2001, 66 judgments were delivered in 2002 and 70 judgments were delivered in 2003.[47]

4.2   Best practice examples

If we look at the historical background to the creation of press councils in Europe we see that there is, in most cases, a crisis of some sort (e.g. discontent with intrusions by the press, dissatisfaction with low standards of journalism, etc.) that prompts calls for legislation, or there is a threat of legislation; and as a reaction the industry offers to improve its performance by raising its standards. Some press councils are entirely industry created.

Germany: The German Press Council was founded in 1956 in the context of discussions on a project for a federal press law. In 1952 the Federal Ministry of the Interior submitted a draft, which provided for the establishment of a self-monitoring body under public law. The project met with tremendous opposition from the journalist and publisher associations and following the example of the British Press Council of 1953, the journalist and publisher associations formed the German Press Council on 20 November 1956.[48] We can see clearly the corporatist traditions of Germany in the composition of the council. There is no lay membership.[49]

UK: Similarly an industry initiative, a Press Council was originally established in 1953, and a revised Press Complaints Commission (PCC) was established in 1991. The UK Press Council's apparent inability to deal with privacy issues led to its demise: "The main reason for the abolition of the Council was the increasing intrusion by the press, especially the tabloids, into private lives of people and the inability of the Council to curb it. The main difference between the old Press Council and the Press Complaints Commission[50] is while the Council was also responsible for preservation of the freedom of the press, the latter only ensures a decent standard of conduct by newspapers."[51]

Sweden: Similar dynamics between the industry and the threat of legislation led to the creation, reforms and re-launches of the oldest press council in Europe, the one in Sweden. The Swedish Press Council was established in 1916.[52] It was the result of an initiative of three press organizations, The Publisher's Club, The Swedish Union of Journalists, and The Swedish Newspaper Publisher's Association. It had a slow start and World War II interrupted its work. In the 1960s a deep reform was carried out when the Swedish Parliament contemplated legislation to curb sensationalism in the press. The industry responded by setting up in 1969 the first Press Ombudsman, which is part of the system of the Press Council, and the code of ethics was strengthened. The Swedish system of self-regulation is therefore entirely organised by the industry, and it consists of three pillars: the code of ethics, the Office of the Press Ombudsman and the Press Council.[53]

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[47] A.G. Scherphuis, Jaarverslag Raad voor de Journalistiek 2002, http://www.rvdj.nl/jaarv.html

[48] Website of the German Press Council http://www.presserat.de/site/service/lang_english/aufgabe/enghist.html   See also: Lutz Tillmanns Media accountability in Germany: the German press council in "Organising Media Accountability" http://www.ejc.nl/hp/mas/tillmanns.html

[49] Peter J. Humphreys, op. cit., p. 61.

[50] The UK PCC's website www.pcc.org.uk

[51]S. Shivakumar, *Press Council of India*, background paper for the workshop on Press, Ethics and Law jointly organized by Indian Society of Interdisciplinary Studies and Press Club, Thiruvananthapuram on 23rd & 24th of March, 1998 in Thiruvananthapuram, Kerala, India.

[52] See the website of the Department of Journalism and Ethics at Stockholm Univeristy http://www.jmk.su.se/global03/project/ethics/sweden/swe2a.htm

[53] Pär-Arne Jigenius Media accountability in Sweden: the Swedish press ombudsman and press council, in Organising Media Accountability http://www.ejc.nl/hp/mas/jigenius.html

In complete contrast with the countries surveyed up to this point, the press councils in Luxembourg and in Denmark are statutory creations.[54]

Catalonia: In Spain the press council is a regional body, that applies to the press in Catalonia. An important method of self-regulation in Spain is the ombudsman based at newspapers.[55] The practice was initiated by the newspaper "El País" in 1986, and others followed. The Catalonian self-regulatory initiative that led to the creation of the Catalonian Council of Information was grass roots, initiated by the Union of Journalists of Catalonia, but later the initiative was widened to include members of civil society in all stages of its creation and in its functioning. The launching of the project involved signing a document that stressed the voluntary and consensual character of the council and code, which was highlighted by the formal signature of a document of creation, and the fact that the council was established for a limited period of time, which is renewable. The protocol[56] in question was signed in 1996 during the 3rd. Congress of Catalan Journalists. The Protocol was signed by representatives of the Journalist Union, the Association of Journalists, the Faculties of Journalism, journalists and a total of 48 media companies (press, radio and television). The agreement involves the provision of support, cooperation and financial support to the Council, a promise to accept its moral authority and its decisions. Its experience can be regarded as successful.[57]

4.3 Trends

The main similarities across the different countries are as follows:

o Press councils are set up as independent organisations;

o Press councils and media self-regulation are a result of a struggle between the industry and the authorities, and the history behind the creation and the reform of press councils reveals that the struggle re-surfaces from time to time, which could lead to a new settlement (for example, the incorporation of lay membership in the Swedish Council in the 1960s, or the metamorphosis of the UK Press Council into the UK Press Complaints Commission in the early 1990s).

o There is a strong corporatist aspect in the composition of the councils (owners, editors, journalists) with participation in most cases of lay members in addition to industry representation;

o Critics point out the closeness that exists between industry and councils;

o The industry funds all or part of the running of the Council, with some cases in which the state authorities co-fund the council;

o Councils generally have an internal procedure for evaluating their standards and making changes to the code;

o Councils offer a formal complaint and appeal procedure for settling disputes, usually laid out in documents outside the Code;

o The Codes applied by the Council address editorial and news content of the print media, advertising is not contemplated as it is addressed by separate mechanisms and codes not under study in this report;

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[54] The Calcutt report recommended a statutory tribunal for the UK if self-regulation were to fail. The Press Complaints Tribunal envisaged would be able to award compensation (within statutory limitations unless complainant can show financial loss), and in privacy cases it would be able to restrain publication by injunction. The Chairman would be a judge or senior lawyer appointed by the Lord Chancellor. See: Review of Press Self-Regulation (Chairman Sir D. Calcutt QC), Department of National Heritage, London: HMSO, Cm 2135, 1990. A summary of the report is available in the Entertainment Law Review: Ent. L. R. 1990, 1 (5), E 84-86, full text on Westlaw.

[55] Roger Jimenez, Media accountability in Spain: the Spanish press ombudsman, in "Organising Media Accountability", http://www.ejc.nl/hp/mas/jimenez.html

[56] http://periodistes.org/cic/cat/Protocol.htm (in Catalan) and http://www.periodistes.org/cic/esp/Protocol.htm (in Spanish)

[57] Hugo Aznar, Comunicación Responsable: Deontología y autorregulación de los medios, Editorial Ariel: Barcelona, 1999, at p. 215.

- There is similarity in the standards of ethics laid out in the Codes, and most Codes are written at high level of generality (which could facilitate the impression of similarity),

The main differences between the nine Codes and Councils emerge in the areas of:

- formal relationship to government:
    - some of the councils are entirely funded by the industry and arguably put a high priority on protecting industry interests;
    - others (Finland) receive a grant from the government but "no strings attached"
- some of the councils (Denmark) have statutory origin, while others do not have this origin (UK, Germany);
- corporatism is strongly present in Austria and Germany, the two councils which are not yet open to lay membership.
- the Codes in use by some of the councils (Denmark) are statutory, while others are industry codes (UK, Germany); and in the case of the Dutch Press Council, it exists as a mechanism for dispute resolution with no code of its own.
- some councils go beyond the print media industry to address ethical standards of journalism in the broadcast media (Catalonia, Sweden, Finland) notwithstanding the existence of statutory regulators for broadcasting.
- The degree of information disclosure varies in different councils: it is abundant in the case of the UK PCC (searchable database of adjudications, annual reports available on line) and it is very low in the case of the Luxembourg Press Council.

The two issues in which there is coincidence in all codes under study are the provisions regarding accuracy and provisions regarding discrimination and hate speech. Most codes contain provisions concerning the duty to distinguish between fact and opinion, and a majority of the codes contain clauses to protect privacy. We can observe this in the following issue penetrationmatrix:

Issue Penetration Matrix

y/n	A	D	F	G	L	N (No code)	Sp	Sw	UK	
Issue 1	Y	Y	Y	Y	Y	-	Y	Y	Y	Provisions regarding accuracy
Issue 2	Y	Y	Y		Y	-		Y	Y	Provisions regarding appearance as well as reality of objectivity
Issue 3			Y	Y		-	Y			Prohibition of members of the press from receiving gifts
Issue 4		Y	Y	Y		-	Y	Y	Y	Provisions concerning Privacy
Issue 5		Y	Y	Y	Y	-	Y	Y	Y	Duty to distinguish between fact and opinion
Issue 6	Y	Y	Y	Y	Y	-	Y	Y	Y	Provisions regarding Hate Speech/ discrimination
Issue 7	Y			Y		-	Y	Y	Y	Rules on protection for vulnerable people (e.g. minors)
Issue 8						-			Y	Rules on payments to criminals and witnesses
Issue 9			Y			-				Rules on depiction of violence
Issue 10			Y	Y	Y	-			Y	Rules on manner in which information is gathered
Issue 11			Y	Y	Y	-				Rules on protection of confidential sources
Issue 12		Y	Y			-	Y	Y		Rule not to prejudge the guilt of an accused
Issue 13			Y			-				Other content area not covered above
Issue 14						-				Complaint Mechanism?
Issue 15				Y	Y	-				Provisions that Regulate Cooperation with Law Enforcement, and Third Parties or informatiom embargoes?
Issue 16						-		Y		Sanctions, duty to publish rulings of press council

A. Austria
D. Denmark
F. Finland
G. Germany
L. Luxembourg
N. The Netherlands (no code, the press council offers mediation services)
Sp. Spain
Sw. Sweden
UK United Kingdom

4.4 Dilemmas and challenges: hot topics developing

Can the Codes be applied to the Internet? An important use of the Internet is for access to news. The revolution in digital media meant that publishers acquired the ability to put their publications online, and the new medium introduced changes, for example, the fact a

publication is updated several times a day. It is not only the print media who made newspapers available on line. Broadcasters also offered online news services. There are news services as well, raging from those who collect the news (e.g. Associated Press and Reuters) to those who aggregate the sources for online presentation (e.g Yahoo!). The challenge for the press councils was to respond to complaints made on the basis of alleged breaches of their codes by online news services, and the need to place limits on the potential workload. The German Press Council adopted a decision in 1996 by which it extends its jurisdiction and its code to complaints which "relate to published material containing journalistic or editorial contributions which is circulated by newspaper or magazine publishers or by press services solely in digital form or also in digital form."[58] The Swedish Code (applied by both the Ombudsman and the Council) applies to the printed versions of newspapers, and to Internet publication if the company who publishes the web edition is a member of The Swedish Newspaper Publishers' Association or The Swedish Magazine Publishers Association.[59] Similarly, the UK PCC extended its code to cover online publications.[60] The Catalan Code, in its Annex 3, also extends the code to online publications. We see, therefore, that some elements of the press tradition are coming into the Internet via the press councils by the way of extending application of their code to online publications of their members.

Another challenge, in particular, is to achieve transparency and disclosure. This is important to ensure legitimacy. While, on the one hand, annual reports, a searchable adjudications database and other materials are easily available on the UK PCC's website, the Luxembourg Press Council is on the other extreme, in which very little information is available via website. We take decisions not published on the website as unreported, which makes may make more difficult to undertake future research into stringency of codes (as they are interpreted and applied in adjudications).

4.5 Conclusions

There has been a move in translating thinking from the traditional media to the online news services of broadcasters and the traditional print media. In this sense an already developed self-regulatory mechanism was translated into the new medium. We have seen that the UK PCC, the German Press Council and others are now accepting complaints against Internet publications of their members. This trend is reflected outside Europe in Australia, for example. This presents challenges, as potentially there could be a very high number of complaints due to the rapid growth and variety of online publications, and there is uncertainty as to where the growth of Internet publishing will lead. Not to mention also the wider issue of Internet regulation and who should play the role of regulator.

For the Press Council as a mechanism the key to achieving independence lies in the membership of the board and the sources of financial support. It is important to achieve a good balance between the self-interest of the industry and other considerations, such as fostering public confidence and the participation of lay members. If the argument in favour of print media self-regulation is enlightened self interest, then sources of legitimacy such as

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[58] German Press Council http://www.presserat.de/index.shtml

[59] See http://www.jmk.su.se/global03/project/ethics/sweden/swe2e.htm The Swedish Press Editorial Advertising Committee. The rules against editorial advertising are the third and last part of the Swedish code of ethics for press, radio and television. It resembles the second part, professional rules, in terms of integrity. But here it's about credibility not for the single journalist, but for the entire media. Material that is published on editorial pages should not have any commercial influence and the news organization should not accept any gifts or free trips, according to the rules. These issues are monitored by the Swedish Press Editorial Advertising Committee. Six members and three substitutes are appointed by The Publisher's Club, The Swedish Union of Journalists and The Swedish Newspaper Publishers' Association. The committee meets about five times a year and every meeting ends up in a report compiling the cases. The report is sent to the Swedish Press Cooperation Council, consisting of the mentioned press organizations. It is also distributed to Journalisten, the union paper, and Pressens Tidning, the magazine of the Swedish Newspaper Publishers' Association, where it can be published.

[60] The PCC will take complaints about the on-line versions of newspaper and magazines provided that the publication subscribes to the Code of Practice and the material is something that is covered by the terms of the Code. However, readers should note that the Commission is not equipped to deal with complaints about all the services - such as interactive chat rooms - that a newspaper or magazine website may offer. See http://www.pcc.org.uk/complaint/faq.asp

credibility and transparency are of great relevance. Legitimacy earned over a period of time could help with the problem of ensuring compliance, in view of the weak enforcement powers of press councils.

As regards the interplay between ordinary law and self-regulation, we have seen that the ethical standards being applied here operate in a region where there tends to be no statutory regulation. Political culture is, of course, another very important backdrop. In the cases of the Scandinavian examples there seems to be more partnership between the state authorities and the self-regulatory mechanisms in place, than in the case of the UK or Germany, for example, where the industry seems more fearful of any interference, even in areas such as privacy where self-regulation may need statutory reinforcement.

The press councils offer a means of alternative dispute resolution, with the possibility of achieving redress via a complaints mechanism faster and less onerous than courts. But perhaps with less protection for rights than the protection offered by the law. And compensation may not be available to successful complainants. Speedy redress is no doubt advantageous. Provided that there is adequate protection for rights of complainants and transparency, the code and the mechanism for its implementation may have the effect of making the media more accountable to its audience. This, in turn, may lead to a virtuous circle in which the enlightened self-interest of the industry can help the media be willing to fund the mechanism of code implementation, and abide by the decisions of the council. Over and above these considerations, print media self-regulation does not operate in a vacuum and ordinary law provides a backdrop. The experiences reviewed in this report suggest that the effectiveness and sustainability of self-regulatory bodies depends on how the line between statutory control and self-regulation is drawn (and kept under review).

Section 5: Mechanisms for self-regulation in the broadcasting sector in the EU

Broadcasting is a heavily regulated sector in which there is, on the one hand, self-regulation or self-monitoring by means of internal bodies at public service broadcasters (PSBs), as a way of implementing independence by keeping distance from the government of the day, and on the other, findings point to self-regulation islands in the commercial sector of broadcasting. Complexity in terms of more services brought about first by cable and satellite, and then digital technologies, forced changes in the regulatory environment and the authorities felt the need to delegate more and more tasks of supervision to be carried out at lower levels[61]. Therefore, we are witnessing a shift to self-regulation within a general context of a complex, co-regulatory environment. On the other hand, self-regulation could be resorted to instead of government regulation to avoid constitutional free speech issues when regulating more stringently than the requirements of statutory regulators. For example, by performing pre-publication control as carried out for the protection of minors by the FSF in Germany and similar bodies in other countries.

The trend is towards continued delegation. The regulatory environment thus created is one that permits the tasks of supervision of content to be discharged by increasingly autonomous mechanisms. The authorities retain supervision at a higher level (broad guidelines, judicial review, etc.).

5.1   Introduction: Areas open for self-regulation in the broadcasting sector

In analysing broadcasting codes of conduct, the purpose was to review areas in which changes in the regulatory framework of broadcasting allow for self-regulation in an area which has traditionally been highly regulated.[62] We review available mechanisms in both the public service broadcasting sector and in commercial broadcasting. In all the countries of the EU there are special authorities responsible for licensing and supervising broadcasting. Most of the 15 countries surveyed have a long tradition of public service broadcasting (PSB), and the tendency across the countries of the EU is to have separate regulators for commercial and PSB. In the case of France and Italy, however, the (statutory) regulator for commercial channels has some limited competences over public service broadcasting. The regulatory bodies responsible for general supervision and licensing may be separate or combined in one regulator. These bodies enjoy an important degree of autonomy from the government regarding the formulation and enforcement of programme standards.

PSB is financed by taxation in most European Union Member States, and provided by a public service broadcaster – normally a statutory corporation. We here use the term PSB to refer to the corporation responsible for such programming. Where we refer to terrestrial free to air (FTA) broadcasters who receive no public financing, but whose licenses nevertheless contain public service obligations, we do not refer to 'PSB'. The European Commission has conducted extensive investigations into the legal definition of a PSB under the competition rules of the Treaty of Rome, as redefined in part by Protocol 32 to the Treaty of Amsterdam 1997.[63]

The convergence produced by digital technologies has made broadcasting, telecommunications and Internet come closer because it has become possible for any given medium to deliver any type of content. Consequently, and although full convergence is still

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[61] See Marsden, C. (1999) Pluralism In The Multi-Channel Market: Suggestions For Regulatory Scrutiny, Council of Europe Human Rights Commission, Mass Media Directorate, MM-S-PL [99] 12 Def 2.

[62] The reasoning behind the justification for the special regulation of broadcasting, see for example, Eric Barendt, Broadcasting Law: A Comparative Study, pages 5 to 9. For views on the matter in the United States, see: Bollinger, Lee C. (1976) "Freedom of the Press and Public Access: Toward a Theory of Partial Regulation", 75 Michigan Law Review 1.

[63] Larouche, Pierre, 1998, 'EC competition law and the convergence of the telecommunications and broadcasting sectors', Telecommunications Policy, vol. 22, no. 3, pp. 219-242. Also, Larouche, Pierre, 2001, 'Communications convergence and public service broadcasting', at http://infolab.kub.nl/uvtweb/bin.php3?id=00011353&mime=application/pdf&file=/tilec/publications/larouche2.pdf (accessed 15.03.03).

ahead in the future, there is a tendency to combine the diverse functions of several regulators in one (e.g. OFCOM in the UK).

Sometimes regulators are assigned the enforcement of anti-trust rules in the interest of media pluralism (e.g. in the UK the former ITC was required to ensure fair and effective competition in the provision of private broadcasting services, but the Director-General of Fair Trading and the Monopolies and Mergers Commission must determine whether networking arrangements meet the requirements of competition law.)   The focus of this report is, however, on content regulation.

A general principle observed in all countries surveyed is that if a regulated commercial broadcasting sector is to be independent from the state the regulatory authority(ies) must be autonomous from government. Similarly, PSBs are also organised in ways to be independent from the government of the day. Hoffman-Riem[64] points out that legal forms offer little indication of the influence exerted in fact by the authorities. The independence of broadcasters could be entrenched in law, as it is the case in some of the German states. Or, in the case of the UK, even though independence may not be written in the law as such, the political culture points in the direction that government does not exercise powers that it may enjoy. Governments exercise important supervisory functions over regulators by, for example, selecting the main personnel and making financial decisions in some cases. But the experience in the countries studied in this report is that the individual regulatory body's independence rests in fact with rules concerning the composition and appointment of its members.

5.2   Self-regulation in the public service sector

Independence of the PSBs in most European countries is safeguarded by allowing public service broadcasters in the Member States to monitor themselves. PSBs are created by statute and are public law entities whose self-regulation aims at creating space between the broadcaster and the government. The monitoring takes place via internal bodies that control the public service broadcaster(s). In addition, independence may be fostered by the funding arrangements in place, such as the BBC's licence fees charged to UK viewers.

The composition of the bodies in charge of controlling the PSBs vary across the Member States of the EU. In some countries those bodies include representatives of social groups. Consider a few examples in which we see the different approaches of different societies to the general idea stated above.

Austria: the Austrian Broadcasting Company (ORF) self-regulates via 4 controlling bodies: the Board of Trustees, the General Intendent, the Committee of Viewers and Listeners and the Board of Inspection.   In performing their duties the members of these boards are not subject to directives or orders from the government. The appointments, however, are made by the government following rules to ensure representation of different sectors. The 35 members of the Board of Trustees are appointed by the federal government in proportion to the political parties' fractions in the National Council and taking into consideration the candidates proposed by the parties. Nine members are appointed by the states that make up Austria, and a further nine are appointed by the federal government. Of the remaining eleven, six are appointed by the Committee of Viewers and Listeners, five are appointed by the Central Workers' Council. There is a requirement that other than the trustees representing political parties none of the other members should be a member or in employment at a political party.

The controlling function performed by the Board of Trustees is performed by approval of programme guidelines, production guidelines, etc. which the Director General prepares. The Director General, in turn, is appointed by the Board of Trustees, and is not bound to orders from the government. The role of the Director General is to manage the broadcaster and represent it.

To represent the interests of the audience, the Committee of Viewers and Listeners of 35 members has appointees chosen by the following organisations: the Federal Chamber of

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[64] Wolfgang Hoffmann-Riem: Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries, page 288.

Commerce, the Conference of Presidents of the Agricultural Chambers of Austria, the Austrian Workers Congress, the Austrian Trade Unions Congress, the professional chambers of self-employed people, the Roman Catholic and the Protestant churches, etc. This Committee makes recommendations on programming and approves the level of licence fees paid by Austrian viewers and listeners.

Denmark: The Danish Broadcasting Law establishes that Danmark Radio is managed by a board of 11 members which although they are appointed by the government, have full decision making powers over the broadcaster. The board formulates the general guidelines for activities of the broadcaster, it appoints the General Director as well as senior management. The Director General has responsibility for programming.

The public service broadcaster in Denmark operates in the regulatory environment created by the amended Broadcasting Law[65] which entered into force on 1st. January 2003. This law gives a right to provide programme services as follows: (1) by the law itself in the case of the public service broadcasters, which are two, one is Danmark Radio and the other is TV 2[66]; (2) by a system of licensing commercial services supervised by the Radio and Television Board (a regulator set up by the Minister of Culture); and (3) by commercial services registered with the Radio and Television Board[67] (cable-network distribution of programmes does not require a licence or even registration with the Radio and Television Board.)[68]

Germany: In the German system, federalism requires that the states of the federation have all responsibility for culture and media and there is no centralised regulatory authority at a federal level.[69] The two PSBs (ARD and ZDF) have managing councils independent from government. The federalism as brought into the broadcasting system of Germany means, in the case of the control of ZDF that a broadcasting council is set up in which all the federal states that make up Germany are represented on an equal footing. On the other hand, the individual broadcasters of the ARD network are supervised by separate Broadcasting Councils, each with a membership between 19 and 77. Members are appointed for a term of four to nine years. As in the case of Austria and Denmark, various civil society groups have representation, such as churches, journalistic and cultural organisations, universities and unions. Other members are elected by the state legislatures, but the number of the nominees of the political parties do not exceed one-third of all members. The broadcasting councils have controlling powers such as (1) the approval of programming principles and monitoring compliance, (2) the nomination of top management, and (3) financing.[70]

UK: The BBC is a public corporation set up by Royal Charter[71] which regulates aims, competences, duties, constitution, sources of income and use of that income. In order to self-regulate the BBC relies on a variety of instruments and codes, such as the Royal Charter and a

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[65] There is a translation into English of The Danish Broadcasting Act (*Lov om radio-og TV-virksomhed*) which is available on http://www.fs.dk/uk/acts/a_tvuk.htm

[66] The PSBs are Danmarks Radio (DR) – Danish Broadcasting Corporation http://www.dr.dk/ and TV2: http://tv2.dk/

[67] Soren Sandfeld Jakobsen, "New Radio and Television Broadcasting Act", Iris 2003/2.

[68] Distribution in this sense is understood as the case when national or foreign programmes are distributed via cable systems unchanged and simultaneously. Owners of these cable networks, however, are under a "must-carry" obligation as regards radio and television programmes of the public service broadcasters. If there is, on the other hand, subtitling or delayed transmission then the service requires a licence. Other broadcasters can be licenced by the Satellite and Cable Board to broadcast to an area exceeding one local area, and companies, associations and local authorities can be licenced to broadcast in one local area. Licensing of broadcasting by cable is under the responsibility of the Minister of Culture. The website of the Kulturministeriet (Danish Ministry of Culture): http://www.kum.dk/

[69] Legal Basis: Art. 5 GG (German Constitution): http://www.iuscomp.org/gla (available via the German Law archive in English language), and Interstate Broadcasting Agreement http://www.alm.de/bibliothek/download/RSTV_JMStV.pdf (German).

[70] Hoffman-Riem, op. cit., pages 148-149.

[71] The Royal Charter of the BBC http://access.adobe.com/perl/convertPDF.pl?url=http://www.bbc.co.uk/info/policies/charter/pdf/charter.pdf

complementary Licence and Agreement[72] signed between the BBC and the Secretary of State for Culture, Media and Sport gives more detail on how the BBC is to fulfil its duties. The BBC is controlled by a Board of Governors with 12 members appointed by the government. Among those members there is a chairman, a vice chairman and the national governors for Scotland, Wales and Northern Ireland.

The Board has two duties in regulation of the BBC: it defines corporate strategy and acts as trustees of the public interest. They approve targets of BBC services and monitor its performance, and are responsible for ensuring that the public funding received through the licence fee is spent correctly. They appoint the BBC's senior staff.

Self-regulation of the BBC takes place via the direct accountability to the public of the Board of Governors. The Board each year publishes a statement of goals, standards and services which viewers and listeners may expect, and once a year the Board reports on how well the BBC has kept its promises. The BBC is also under parliamentary scrutiny, as it is required to present every year an annual report and accounts, must obtain Parliament's approval for the licence fee, etc.[73] (Since the Hutton Inquiry these governance arrangements have come under increasing scrutiny. The previous chairman has published a discussion paper on changes to the arrangements and an internal review is being conducted alongside the review of the Charter and Agreement.)

The Welsh Fourth Channel Authority (S4C) is a corporation under public law, whose purpose and functions are laid out in the Broadcasting Acts 1990 and 1996. S4C is controlled by a Board appointed by the Secretary of State for Culture, Media and Sport, which is responsible for defining the strategy of S4C and ensuring that the legal requirements are met. S4C is accountable to the public via the Board, which is also subject to parliamentary scrutiny.

In Ireland, the PSB also self-regulates,[74] and a applies a number of codes for this purpose.[75]

5.3 Self-regulation in the commercial sector

Across the EU countries commercial broadcasting is a relatively new phenomenon, as broadcasting, unlike print media (understood as newspapers, not books), started as a state monopoly (with the sole exception of Luxembourg were there was never public sector broadcasting, although there have always been public service obligations imposed on RTL, the broadcaster, which has always been a commercial organisation.)

The current regulatory "geography" reveals an atmosphere of "mixed" public service and commercial systems in Europe in which broadcasters are subject to a variety of more or less demanding regimes.[76] Statutory regulatory bodies find it increasingly difficult to cope with the sheer volume of material that they are responsible for regulating. Where regulators have a responsibility for detailed monitoring and reporting on media content, the trend has been towards a "lighter touch regulation", i.e. more of the regulatory responsibilities are taken on by the producers and users of content rather than law or regulatory bodies of statutory creation. On the other hand not only are the means of regulation under challenge, but the justifications of regulation are undermined, as many argue that in an "ecology" of more media, it becomes increasingly less justifiable to have central regulatory supervision of content. In this context, self-regulatory codes of practice are becoming the preferred solution in certain areas, as we see in the survey of the 15 member countries of the EU.

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[72] Licence and Agreement of the BBC
http://access.adobe.com/perl/convertPDF.pl?url=http://www.bbc.co.uk/info/policies/charter/pdf/agreement.pdf
[73] The criticism of PSB self-regulation and the system of governance of the BBC was renewed after the Hutton Inquiry in 2004:
[74] The RTÉ Authority: http://www.rte.ie/about/organisation/corporate_structure.html#authority   See also: Statements of Commitments 2003: http://www.rte.ie/about/organisation/statements.html
[75] RTÉ Programme-Makers' Guidelines: http://www.rte.ie/about/organisation/ProgrammeMakersGuidelines.pdf; and the Irish Code of Fair Trading Practice: http://www.rte.ie/about/organisation/fairtrading.html
[76] Rachel Craufurd Smith, Broadcasting Law and Fundamental Rights, (1997), Clarendon Press: Oxford.

5.3.1 Self-regulatory bodies operating in the commercial sector

<u>Germany</u>: the *Freiwillige Selbstkontrolle Fernsehen e.V.*, FSF (Voluntary Television Review Body) is an organisation whose main concern is the protection of minors in relation to the representation of violence and sex on television and its effects on the recipients. The FSF was founded in 1993 by the largest German commercial broadcasters, as a response to a public outcry about the depiction of violence and sex on television.[77] It started its activities in 1994. The activities of the FSF are mainly the examination of programmes for their content of violence and sex, to produce guidelines on the content of daytime talkshows[78], as well as fostering media education[79] aimed at the protection of minors.

The FSF exists to ensure that there is child protection over and above the limits set out in ordinary law.[80] It performs this task by means of pre-publication review. Under German law, a statutory regulator could not operate along the lines of the FSF. A regional LMA, for example, cannot control content before publication because of the constitutional protection of freedom of speech and the ban on censorship.[81] In the restricted area of its jurisdiction, the pre-publication review of the FSF represents a more stringent content control than otherwise permissible in the environment of statutory regulation of commercial broadcasting.

The FSF has approximately one hundred examiners, and films are examined by boards of 5 to 7 people. Films are submitted to the FSF by the broadcasters indicating how they propose to broadcast (time, cuts if any, etc.). Decisions by that first board can be re-examined by a second board in case of appeal (by broadcasters, LMAs, the board of trustees of the FSF or those who sell programme licences to a broadcaster member of the system)[82]. The decisions are made available to the LMAs. Assessment procedures in use at FSF are monitored by a committee of independent experts. In 2003 the FSF was approved by the KJM (an interstate regulatory commission for the implementation of the 2003 Interstate Treaty on the Protection of Minors and Human Dignity in the Media)for a period of four years.[83]

The decisions of the FSF are compulsory and can take various shapes: establish a time after which broadcast can proceed, order cuts or not to broadcast at all. In its decade of operation the FSF has examined 56,569 titles. In 2,168 cases the examining board did not agree with the channel's request. In 981 cases, cuts were required to be made. 906 titles were approved for broadcasting, however, only at a later time than applied for. 114 films were approved on condition of a later broadcasting time and further cuts. 167 titles were not allowed to be broadcast.[84]

The FSF operates in the legal environment for commercial broadcasting in which the fundamental rights of freedom of information and freedom of broadcasting as interpreted by the German Constitutional Court underpin the system.[85] Private broadcasters are bound by certain minimum standards with regard to balance and the expression of pluralism of views. These are controlled, however, after publication. Each German state has created a public agency entrusted with the task of licensing and supervising commercial broadcasting (LMA – Landesmedienanstalten). Private broadcasters intending to broadcast nationally, or to a limited geographic area (state, region or local) must be licensed by the LMAs having jurisdiction over the area(s) for which the licence is sought. Licensing requirements are set out in the Interstate Treaty on Broadcasting and in the 15 state media statutes for private broadcasting passed by

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[77] Andrea Schneider, "Child Protection on German Television – The Voluntary Television Review Body (FSF)", IRIS 1995-3:7/13.

[78] Tobias Niehl, "Daytime Talkshows on TV – Voluntary Code", IRIS 1998-9:13/25.

[79] German FSF, English summary: http://www.fsf.de/su mmary.htm

[80] Andrea Schneider, "Child Protection on German Television – The Voluntary Television Review Body (FSF)", IRIS 1995-3:7/13.

[81] Andrea Schneider, op. cit., IRIS 1995-3:7/13.

[82] Andrea Schneider, "New regulations governing the right to apply for review by the Voluntary Television Review Body (FSF)", IRIS 1995-5:9/13.

[83] Peter Strothman, "Approval for FSF", IRIS 2003-7:8/13.

[84] German FSF, English summary: http://www.fsf.de/su mmary.htm

[85] For a brief review of the constitutional cases that shape German broadcasting law see: Barendt, <u>Broadcasting Law: …</u>, pages 21-25.

each individual state (as regards PSB, there are also 15 statutes). The State treaty sets out requirements of protection of pluralism and a balance of views and limits the number of channels each private broadcaster can control. The treaty also limits the interest a company may hold in a private broadcaster of national reach.[86]

Italy: In 2002 public and private broadcasters agreed to a "Self-regulatory Code of conduct on television and minors" to protect minors from harmful content. In January 2003 a Supervisory Committee was set up. This system works within the statutory control in place, and to ensure compliance, the Supervisory Committee can refer non-compliance cases to AGCOM, the statutory regulator.[87]

Finland: in order to fulfil the requirements of protection of minors set out in the regulatory regime for television, broadcasters have agreed on a framework for the classification of programmes regarding their suitability for children as regards the depiction of violence and sex on television.[88]

Sweden: the *Våldsskildrings rådet* (The Council on Media Violence) supports and stimulates the industry's efforts regarding self-regulation[89]. As in the example mentioned above, this organisation operates within the regulated environment of commercial broadcasting. The Swedish Ministry of Culture is responsible for the technical aspects of broadcasting and the Radio and Television Authority is in charge of awarding licences.[90] As is the case of all of the countries surveyed, award of a licence leads to demands on programme content, impartiality and diversity, which are requirements placed on the PSB and the only commercial television broadcaster already active on analogue terrestrial television.[91]

Netherlands: NICAM – *Nederlands Instituut voor de Classificatie van de Audiovisuele Media* (Netherlands Institute for the Classification of audio-visual Media)[92] is discussed in other parts of this report. Commercial broadcasting was first introduced in the Netherlands in 1992, however, Dutch commercial broadcasters had been operating from Luxembourg long before that date.[93] There is one regulator: *Commissariaat voor de Media*[94], which is a statutory regulator.

UK: Self-regulation takes the shape of two industry bodies which carry out clearance activities for advertising submissions before commercials are broadcast: the BACC (Broadcast Advertising Clearing Centre for television and the Radio Advertising Clearing Centre.)[95]. Complaints against broadcasted commercials are handled by the statutory regulator.

Accession countries: Poland: the National Broadcasting Council and the broadcasters prepared a "Catalogue of Rules Underlying the Rating of TV Programmes Intended for Various Age

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[86] Jorg Kirchner, "The Search for New Markets: Multimedia and Digital Television under German Broadcasting and Copyright Law", E.I.P.R, 1995, 17 (6), 269-276, at pp. 269 to 271.

[87] Marina Benassi, "New Self-Regulatory Code of Conduct on Television and Minors", IRIS 2003-4:10/21.

[88] Marina Österlund-Karinkanta, "Only Films for Minors to be Censored as of 1 January 2001", IRIS 2000-8:9/19.

[89] http://www.sou.gov.se/valdsskildring/council.htm (English version)

[90] Radio- och TV-verket (Swedish authority for radio and television, the state licensing and supervisory authority): http://www.rtvv.se (Swedish) or in English version http://www.rtvv.se/english/index.htm

[91] Jan Rosén, "Digital Terrestrial Broadcasting", IRIS 1999-5:15/18.

[92] http://www.kijkwijzer.nl/engels/ekijkwijzer.html

[93] http://www.netherlands-embassy.org/article.asp?articleref=AR00000429EN Dutch-language commercial companies include RTL 4 and 5 (which broadcast in Dutch from Luxembourg), Veronica, SBS6, TV10 and the Music Factory. It should be mentioned that RTL was in operation from Luxembourg before the time Dutch law authorised the licensing of private broadcasters based in the Netherlands.

[94] Commissariaat voor de Media : http://www.cvdm.nl/pages/home.asp?flash=5

[95] Torin Douglas, "Self-regulation: they way ahead for advertising?", 17 Oct. 2003, Marketing Week, page 17. With regard to experiences in the field of advertising self-regulation used for pre-vetting in the United States, see, for example: Avery M. Abernethy and Jan LeBlanc Wicks, "Self-regulation and Television Advertising: A Replication and Extension", May-June 2001, Journal of Advertising Research, page 31, and Herbert J. Rotfeld, Avery M. Abernethy and Patrick R. Parsons, "Self-Regulation and Television Advertising", (2001) 19 Journal of Advertising, page 18.

Groups of Children and Adolescents" and the signatories established a standing Commission to control implementation.[96]

5.3.2 Self-regulation of journalistic ethics in the commercial sector

As regards journalistic ethics we have seen in the print media section, that a few press councils extend their code of conduct (which addresses issues of journalistic ethics) to television and radio journalism. The Finnish Code (and the mechanism of the CMM) as well as the Catalan media Council and its code of ethics can be resorted to in cases of breaches of professional standards in the print or the broadcast media.

In December 2002 the council of ethics of the Association of Journalists was replaced by a press council in the Flemish speaking part of Belgium. As is the case of its Finnish and the Catalan counterparts, this council can hear complaints on alleged breaches of rules of ethics by journalists in the print and the broadcast media. On its board journalists, print media broadcasters and broadcasters are represented. Its decisions are published but the council has no disciplinary powers.[97]

Although the code of ethics applied by the Swedish Press Council and the Press Ombudsman cover journalistic ethics in other media, these two bodies however do not deal with possible breaches of the rules in radio or television. Those breaches will be dealt with by the broadcasting regulator.

5.3.3 Areas in the commercial sector in which the (self) regulatory burden is taken on by the producers and users of content

Self-regulatory codes of practice in which more of the regulatory burden is taken on by the producers and users of content rather than statute or regulatory bodies of statutory creation, is becoming the preferred solution. In the UK, the Communications Act[98] contemplates broadcasters preparing statements of programme policy and monitoring their own performance. Already in 2001 the popularly known "Contracts with Viewers" [99] or statements of programming commitment[100] were being published on behalf of broadcasters, when the UK government envisaged in the White Paper "A New Future for Communications" a move towards greater self-regulation.

Advertising[101] is an area in which there is scope for self-regulation in the broadcast media.[102] There are precedents in other European countries (e.g. Italy[103]), and in the UK the area of print media where the ASA –(Advertising Standards Association) has been in operation for many years. Currently in the UK commercials for radio and television are pre-vetted by the Broadcasting Advertising Clearance Centre (for television) and the Radio Advertising Clearance Centre. Clearance is carried out by self-regulation. Complaints for published

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[96] Katarzyna Mastowska, "Television Self-Regulation", IRIS 1999-5:13/16.

[97] Dirk Voorhoof, "First Decision of Council for Journalism – No Infringement of Journalistic Ethics by Commercial Television", IRIS 2003-6:7/11.

[98] UK Communications Act 2003, the relevant section is available on http://www.legislation.hmso.gov.uk/cgi-bin/htm_hl.pl?DB=hmso-new&STEMMER=en&WORDS=statement+program+commun+act+2003+&COLOUR=Red&STYLE=s&URL=http://www.hmso.gov.uk/acts/acts2003/30021--i.htm#muscat_highlighter_first_match

[99] David Goldberg, "'Contracts with Viewers' Published", IRIS 2001-5:6/10.

[100] Tony Prosser, "ITC Moves Towards Partial Self-Regulation and Lighter Regulation of Content", IRIS 2001-3:12/16.

[101] Nick Higham, "The challenge of media regulation", 21 Jan. 2003, BBC News http://news.bbc.co.uk/1/hi/entertainment/tv_and_radio/2679593.stm ; Colin Grimshaw, "OFCOM moots ASA broadcast role", 30 Oct. 2003, Marketing UK, page 4.

[102] Tim Douglas, "Code war breaks out as Ofcom tries to force pace", 29 Jan. 2004, Marketing Week, page 19.

[103] The Italian Code of Advertising and Sales Promotion. See: Maja Capello, "Comparative Advertising Allowed by the Self-regulatory Advertising Code", IRIS 1999-6: 13/25, in which she discusses implementation of the European rules on misleading comparative advertising. (Those rules were incorporated in the codes used by the statutory regulators in the UK, for example, see: David Goldberg, "Radio Authority Publishes Revised Advertising and Sponsorship Code", IRIS 2001-2:9/20.)

material are handled by the statutory regulator, OFCOM, previously the ITC (for television) and the Radio Authority. Statutory regulators can impose fines. Advertising self-regulation of published material in broadcasting can be fully evaluated once a code and a mechanism for implementation are put in place. OFCOM is currently consulting on the possibility of delegating more powers for advertising regulation to self-regulatory bodies.

5.4   Conclusions

Broadcasting is a digital media sector in which technological progress brought increased levels of complexity to a relatively stable licensing scheme, and policy changes have been in part responding to those changes. The European monopolistic model in which broadcasting developed with radio in the early 20th century, and which was maintained with the advent of television, was first challenged by the opening of commercial services. Complexity in terms of more services brought about first by cable and satellite, and then digital technologies, forced changes in the regulatory environment and the authorities felt the need to delegate more and more tasks of supervision to be carried out at lower levels: i.e. more self-regulation. The trend is towards continued delegation. The regulatory environment thus created is one that permits the tasks of supervision of content to be discharged by increasingly autonomous mechanisms. The authorities retain supervision at a higher level (broad guidelines, judicial review, etc.) while the mechanisms of implementation are the ones entrusted with the day to day task of implementing codes of conduct.

The findings point to a heavily regulated sector in there is, on the one hand, self-regulation or self-monitoring by means of internal bodies at PSBs, as a way of implementing independence from the government of the day, and on the other, a commercial sector supervised by statutory regulators that apply a variety of codes which are imposed on licensees directly through a license condition on the use of electromagnetic spectrum. Breach of these codes of conduct will result in direct and heavy sanctions such as: fines; the removal of the license to broadcast, the obligation to broadcast of apologies, and in some cases provision of a right to reply.

A few examples of self-regulatory bodies were identified as regards the commercial sector, particularly with the aim of protecting minors. However, although their role is expanding, it is at present concentrated on areas located in the periphery of regulation, as they are also covered by the codes attached to the license conditions, or in areas in which the authorities delegate and decision making is made at a lower level (for example, broadcasters self-police their programming duties). Self-regulation could be used instead of government regulation to avoid constitutional free speech issues when regulating more stringently.   For example, by performing pre-publication control as carried out for the protection of minors by the FSF in Germany and similar bodies in other countries.

Convergence, the great number and variety of channels and services available, seem to be opening up the field for more reliance on self-regulation - the environment makes supervision more difficult for statutory regulators as it is becomes increasingly onerous to supervise all those new additional channels and services. Areas such as advertising, where there are precedents in self-regulation in other media, may come to broadcasting in the near future.

While in the past, the detailed objectives of regulation are set out in legislation (and/or the licensing agreements signed with commercial broadcasters), in the future it is likely that more countries will move to a system that gives more autonomy to the industry for developing detailed objectives, within broad guidelines defined in statutory form. Whilst broadcasting remains a distinct service however, these self-regulatory codes evoke within an existing spectrum licensing scheme in all cases. They provide self-regulatory "islands" within a complex co-regulatory framework therefore, with backstop powers remaining in the hands of the regulator.

Section 6: Internet Content and Self-Regulation

The development of Internet content self-regulation over the past decade has been a rapid, disorganised and creative process. It has drawn on previous traditions and tools of regulation in related sectors such as telephony, press and broadcasting, but has developed wholly new and peculiar paradigms th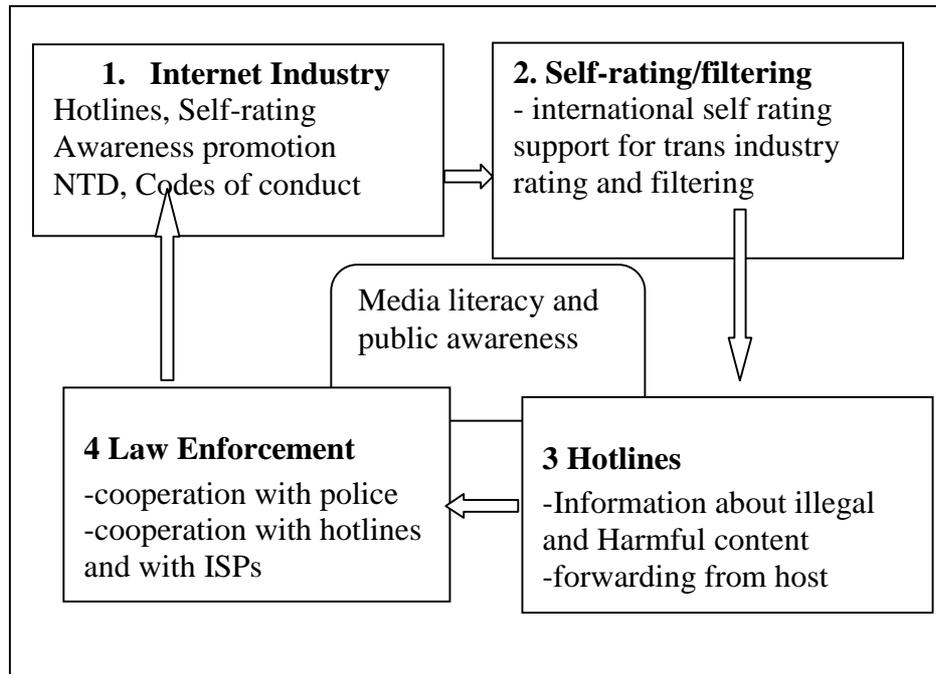at have raised fundamental constitutional issues relating to key rights such as freedom of expression, privacy, and other rights, as well as fundamental problems of enforcement and some completely new harms. Whilst an overall family resemblance of regulatory approaches has emerged on a global level, with some key regional variations, there is little indication that this system of Internet content self-regulation is stabilising as a paradigm, and no indication that the key problem of jurisdiction in a global medium has found resolution. The rate of change in the sector remains too fast to permit stabilisation of a regulatory scheme with broadband rollout leading to convergence with broadcasting services and the rollout of the wireless Internet leading to wholly new forms of service and regulatory dilemma. There remain tensions with fundamental constitutional rights and uncertainties about effectiveness and about the range of new harms that emerge in the process of innovation.

In this section we outline the main structures and paradigms of self-regulation of Internet content, and introduce some of the main tensions and dilemmas that are emerging in the sector. In what follows we refer mainly to Western Europe and to the key regions of the more open societies in the Asia Pacific region such as Japan and Australia, and North America. We outline the general level of activity of self-regulation and then pose some rather difficult questions about the overall effectiveness of these forms of regulation.

Self-Regulation Codes in the Internet Value Chain:

| Internet Content producers -content standards codes -privacy codes | *ISP* -ISP code of conduct -privacy codes | *ISP-User* Terms of service | Public access (schools, libraries) Computer Misuse codes | *User-level* -filtering -awareness -literacy -age-verification |
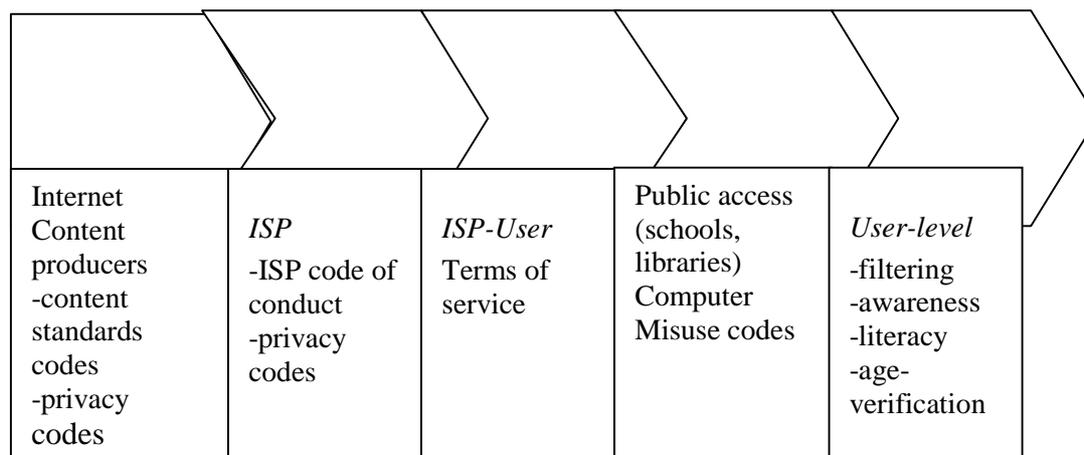
Internet self-regulation of content: the early settlement.

The first stable paradigm of Internet regulation was summarised by Marcel Machill in a paper in 2001[104][1]. Clearly this paradigm envisages a virtuous circle between the various forms of increased literacy and awareness, notice and takedown, cooperation with law enforcement and other self-regulatory initiatives. The key here is that the process is driven by complaints and monitoring by users themselves, and is self-perpetuating as long as it is supported by increasing levels of public awareness and media literacy.

This first settlement of Internet content regulation has become somewhat institutionalised both sides of the Atlantic and marked a compromise between a rapidly developing but fragmented ISP industry keen to avoid regulation, but under pressure from rights holders and civil society. Governments competing with one another for investment were cautious about placing burdens of regulation on a key strategic industry. This model of Internet content regulation, which is embedded in a co-regulatory framework outlined in the E-Commerce Directive in Europe and the Digital Millenium Copyright Act in the US, attempted to assuage concern amongst parents, whilst addressing potential objections regarding both freedom of speech and regulatory burden. It also reflects the growing alarm of copyright holders that the internet was bypassing traditional businesses based on publishing.

There are some signs that this framework, along with the structural underpinning that supported it, is already being questioned. For one thing, the Internet as an infrastructure crucial for economic growth is less of a priority to many governments than it was in the 1990s. Governments may be less cautious about imposing regulatory burdens on it. Second, there are some signs that the first paradigm of Internet content self-regulation may be failing to deliver: significant indicators of continuing harm remain, both in terms of the level of trust in internet transactions and in terms of the levels of exposure to harmful content. (See Selfregultion.info Global Report 2002). Third, some of the key jurisdictional issues may be easier to resolve than they once were in the light for example of the blocking and filtering solutions administered following the Yahoo case in France.

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[104][1] Structural Development of Internet Self-Regulation: Case study of the Internet Content Rating Association (ICRA). Marcel Machill, Thomas Hart and Bettina Kalten Hauser.

6.1   Development of Codes of Conduct

In 2002, selfregulation.info conducted some in depth interviews and questionnaires with those responsible in ISPs for the administration of codes of conduct. Although the number of respondents was small, the findings are indicative of more general trends in the sector.

6.1.1   Summary of Findings

The IAPCODE survey yielded 12 responses from 7 countries and 5 different media industry segments. From the responses, valuable information can be extracted regarding the prevalence of codes of conduct, reasons and mechanisms of their adoption and revision, use of content labels, and legal challenges to established codes. Limited information is available on enforcement and sanctions, and little or no information is available on violations of codes of conduct and the organizations' methods for dealing with violations. In several categories of questions, detailed answers (in addition to short answers) were collected to provide qualitative information about the codes.

Although the results are worthy of interpretation and improve our picture of the state of self-regulatory codes of conduct in the EU media industries, more responses need to be collected in order to improve the legitimacy of the findings as well as to provide information on major EU markets that were not represented in the survey (Germany, France, Italy, and the Scandinavian countries).

6.1.2   Introduction

The IAPCODE project team mailed, both by post and by email, information about the IAPCODE survey, directing potential respondents to the www.selfregualtion.info website. In the period of several moths in 2002, 12 responses were recorded from various media organizations. Of those, 7 identified themselves as Internet organizations, one as a mobile communications organization, two as film organizations, one as a video game organization, and one as a digital television organization. Country-wise, the respondents were from Finland (1), Hungary (1), Spain (2), Portugal (3), Denmark (1), the United Kingdom (3), and the Netherlands (1).

6.1.3   Results: Answers to individual questions

Does an organization have
offices/affiliates in other EU states?
(N=12)

yes	41.7 %
no	58.3 %
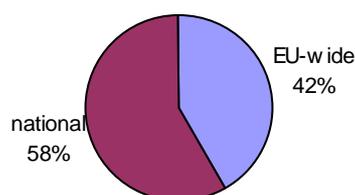
Does an organization have a code of
conduct/guidelines? (N=12)

yes	91.7 %
no	8.3 %
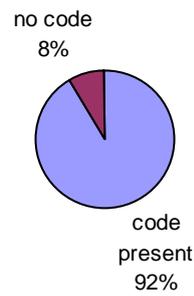
Year of code adoption (N=11)

before 1990	27.3 %
1990-2000	36.4 %
after 2000	36.4 %
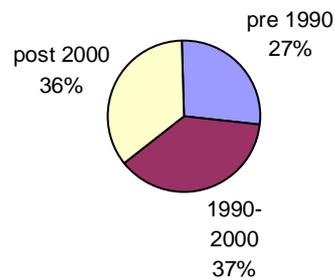
Reasons for adopting the code (N=11)

ordinary industry practice	45.5 %
fear of external regulation	27.3 %
consumer complaints	18.2 %
legal advice	36.4 %
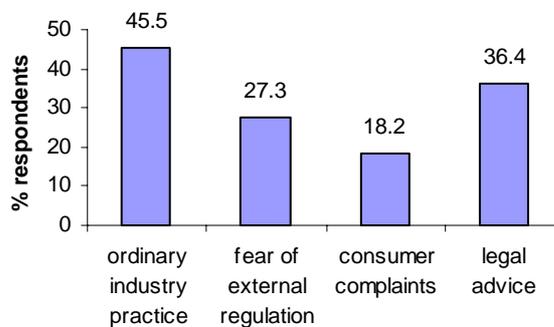
Methods of drafting the code (N=11)

in-house	100.0 %
external consultation	27.3 %
consumer groups	27.3 %
focus group	9.1 %
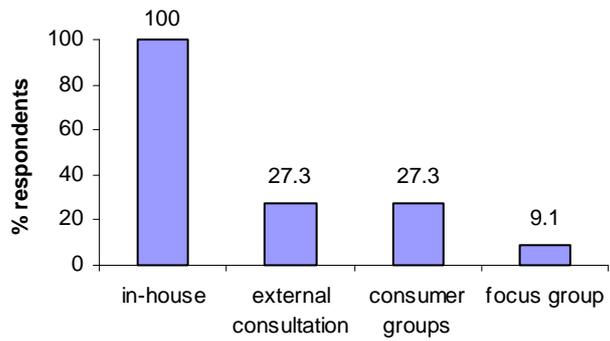
Number of code revisions (N=11)

none	27.3 %
1 to 3	36.4 %
more than 3	36.4 %
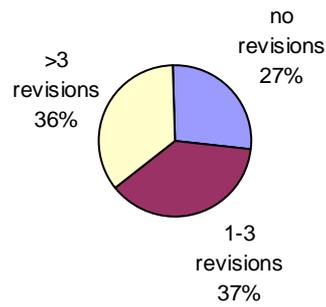
Reasons for code revisions (N=8)

changes in the business model	62.5 %
customer conduct	25.0 %
changes in law	25.0 %
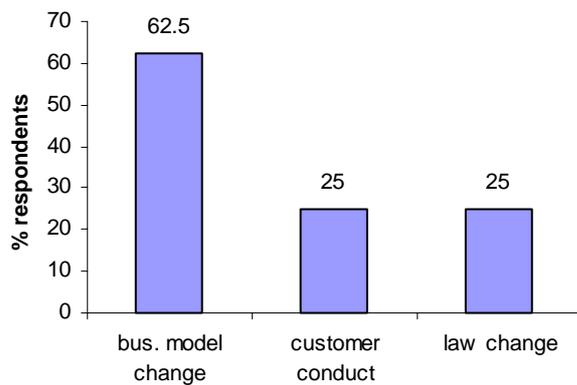
Does an organization use quality labels or other icons to identify content? (N=12)

yes	66.7 %
no	33.3 %

no labels
33%

uses content
labels
67%
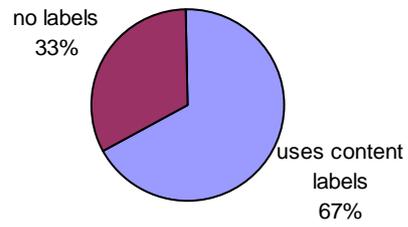
Sanctions and enforcement mechanisms
(N=12)

fines	16.7 %
removal of rating/termination of privileges	33.3 %
none specified	50.0 %
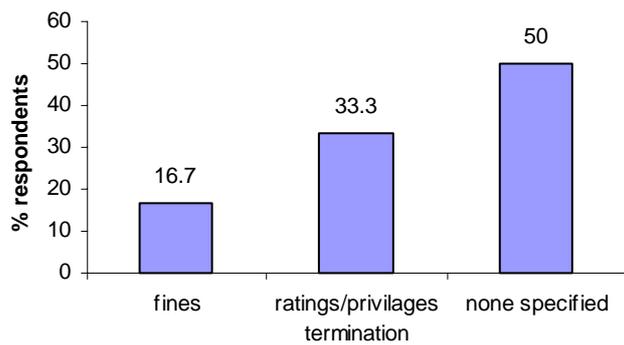
Legal requirements and the nature of the
code (N=11)

self-regulatory	45.5 %
national legislation requirements	27.3 %
other	27.3 %
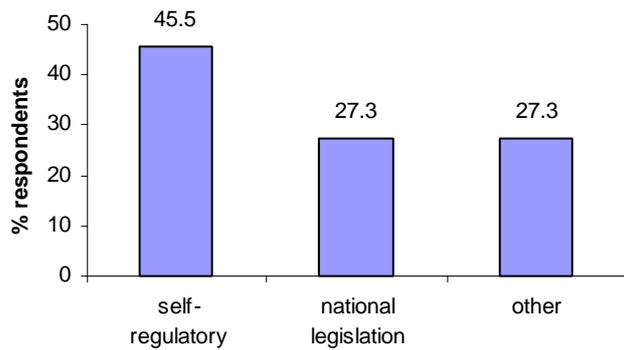
Have there been cases of
litigation/arbitration/mediation relating to
the code of conduct (N=11)

yes	27.3 %
no	72.8 %

code legally
disputed
27%

no legal
disputes
73%
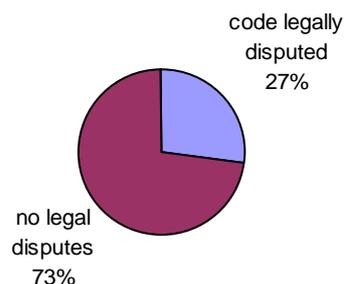
D. Results: A tabulation of yes/no questions

| Question	Yes	No	N
Does an organization have offices/affiliates in other EU states?	41.7 %	58.3 %	12
Does an organization have a code of conduct/guidelines?	91.7 %	8.3 %	12
Does an organization use quality labels or other icons to identify content?	66.7 %	33.3 %	12
Have there been cases of litigation/arbitration/mediation relating to the code of conduct?	27.3 %	72.8 %	11

A standard for transparency of regulation, particularly regarding sensitive issues that impact on speech freedoms, is the publication of basic regulatory data on websites. Our survey shows that there are many examples of good practice in this regard, but there are also areas of the European Internet self-regulatory regime that remain intransparent and therefore it is difficult to gain an accurate picture of the overall level of self-regulatory activity. The following chart outlines the annual levels of activity of Internet self-regulatory hotlines. (Annual data for 2002 or 2003)

Table: Reports and Actions of Internet Hotlines 2002-3
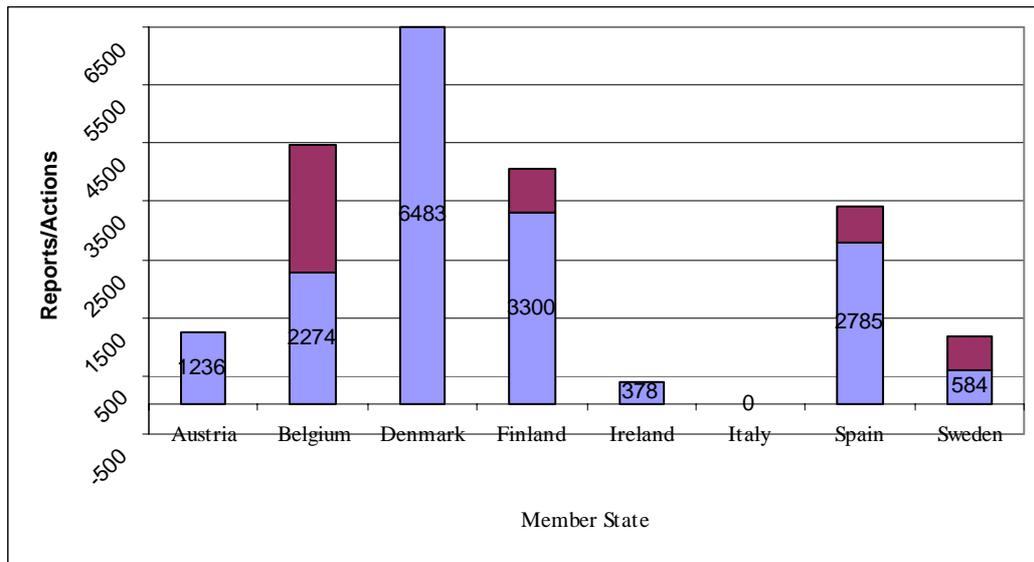
Year	country	self-regulatory body
2002	Austria	Stopline
2002	Belgium	childfocus-Net-Alert
2001	Denmark	Red Barnet Hotline
Oct02-Dec03	Finland	Northern Hotline
	France	AFA Point De Contact
	Germany	ECO
	Germany	FSM
	Iceland	Barnaheill
2002	Ireland	www.hotline.ie
	Italy	Stop-it
Jul-Dec 2001	Spain	Protegeles
	Sweden	Face-it
	The Netherlands	Meldpunt
2002	UK	Internet Watch Foundation

Clearly, there is a great variety of levels of creativity in Internet 'hotline' self-regulation, particularly where the size of the market is taken into account. It is likely that this is due to the early stage of development of hotlines and also variation in levels of awareness. Note the UK IWF is 'off the graph' with over 25,000 incident reports in 2003.

6.2 Best practice examples and New Models

6.2.1 Notice and Takedown[105]

Aside from a few fringe attempts (for example in Singapore and Australia) to apply broadcasting standards of taste and decency to Internet content, most countries accepted, some reluctantly, that it was not pragmatic to do so in this unruly, borderless medium. Therefore the focus of self-regulatory activity moved to *illegal* content, assuming a similar standard for printed press and private viewing of material with regards to obscenity, hate speech, defamation, copyright infringement and related areas. And the question of the responsibility of those Internet service providers who carry that content to consumers has been raised in numerous court cases and regulatory decisions during the past decade. Broadly, the current regime obliges those service providers to take down – or restrict access to – material posted on the Internet only when they have been told to take it down and they are satisfied it is illegal.

Notice and Takedown (NTD) is emerging as the key tool in Internet content regulation, and this method of regulation is being developed also to apply to mobile Internet services. The E-Commerce directive underlies the notice and takedown procedure as applied by ISPs in the UK. The framework is outlined in articles 14.3, 21.2 and section 46. This reflects a liability regime that basically places an obligation on ISPs to remove illegal content only when the ISP 'obtains actual knowledge". When ISPs have such knowledge, they must remove or disable access to the content. This framework has crystalized into a process of regulation described as notice and takedown. When the ISP receives notice, usually from a user or a hotline specifically set up for the purpose, of illegal content, then the ISP becomes responsible for taking it down if it is illegal. A similar NTD procedure has been instituted in the US, under the Digital Millennium Copyright Act. This obliges ISPs to take down material when they are notified of copyright infringement. The DMCA appears to be more stringent regarding the procedure for NTD, outlining the need for specific staff needed to run the procedure and some rights for appeal.

This overall framework has been controversial both sides of the Atlantic, for various reasons: it places a sensitive censorship role in private hands and because it is unclear that ISPs in a rapidly changing sector, have the resources or inclination to undertake the necessary review of notice procedures. The dangers of NTD are numerous: some argue that it is either under-effective, allowing illegal content to remain accessible, and others that it is administered sloppily, with legal content being removed without sufficient due process, rights of appeal or transparency. There are also problems of monitoring that are discussed by Ahlert, Frydman and others. The US regime applies exclusively to copyright infringing material, whilst the EC regime applies in general to illegal content, including copyright infringement. In Europe at least, there has been some disquiet about a system that was devised to deal with categories of illegal and harmful content such as hate speech and child pornography being used primarily to police copyright infringement.

In addition, a broader structure of Internet content regulation has developed alongside ISP procedures in the form of the hotlines for international reporting which to a certain extent mitigate the problems of cross-border reporting and jurisdiction.

Hotlines are contacted by users who suspect they have found illegal content, and those hotlines then review the material, handing on to law enforcement/ ISPs where necessary. The networks of hotlines, which receive public funding both through the European Commission and national bodies are very developed in Europe.

Whilst this system appears to have worked well in the half-decade it has now been running, there does appear to be some danger of confusion about the exact breakdown of roles. Hotlines do make a judgement call about whether content is illegal, and ISPs may not, when they have the 'authority' of a hotline decision then invest sufficient time in the review procedure. Where responsibilities and procedures are not clearly laid out in the statutes of the Hotline and code of the ISP, then there is clearly room for buck passing between hotlines and

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[105] In this section I draw upon research conducted for this project by Christian Ahlert and Chester Yung, and on the work of Benoit Frydman and Isabelle Rorive (insert refs).

ISPs. Also, where it appears that ISPs are not engaging the resources necessary to make those judgement calls, it would seem obvious to suggest that ISP associations faced with notice to take down could engage the adjudication mechanisms at the national hotline rather than develop their own procedure. When the Directive is next reviewed, these procedures will come under scrutiny. Article 21.2 outlines the intention to review NTD and the attribution of liability under the Directive.

Clearly there may be perverse outcomes from the limited liability, mere conduit-notice and takedown model of Internet content regulation. In particular, this model encourages the ISP to be as ignorant as possible of the content transmitted, since knowledge implies responsibility. It may be a system that is designed more with ISP liability and less with the objective of preventing illegal or harmful activity in mind. This dilemma of hear no evil see no evil speak no evil has operated as an uneasy compromise between desire to control illegal material and a concern for protection of freedom of speech rights. In the absence of any basic transparency of ISPs with regard to this issue it is impossible to evaluate the effectiveness of this procedure or its likely outcomes. The irony of the current situation is that its apparent defectiveness renders notice and takedown tolerable: if it were more effective in removing content, and more transparent about removal and blocking, it is likely that there would be loud calls for reform.

6.2.2   Filtering

Internet filters are fitted as standard in most browsers and have been a key part of the promise of self-regulation in practice. There has been widespread debate about the problems of filtering: over and underblocking, technical difficulties and the lack of technical skills among parents being the most widespread. There is also an established controversy regarding the effectiveness of filters, and the merits of filters that rely on block lists, versus the range of walled garden alternatives.

6.2.3   Innovation and digital dangers

Mass use the Internet has become part of the everyday social fabric of life. The technology has become a key part of social activities as varied as cricket and cannibalism. As such, the range of potential problems and harms associated with its use continues to grow. Therefore the perceived responsibility – and liability - of business for the role of the technology in such fields has the tendency to grow and shrink and be subject to ongoing controversy, as the issue of "stranger danger" and chat-rooms amply demonstrates.

Interactive communication such as chat-rooms and bulletin boards offer their own dangers and have in several jurisdictions led to the development of specific legislative reforms which outline new offences (such as the UK regime which outlaws "grooming" of potential abuse victims on the Internet). The debate about ISP liability in this field has been similar to that which emerged around NTD. Where providers are aware of abuses, as for example with moderated chat rooms, they have a responsibility to act, by cooperating with law enforcement. Where they don't, no such responsibility is incurred. Ironically this has arguably led to the strongest growth in this sector being in unmoderated chat, as commercial providers such as Microsoft and AOL have closed down most of their moderated chat services in Europe to reduce liability risk.

6.2.4   Specific Privacy Codes

Alongside the general ISP codes that have been the subject of this study, a great many websites carry a privacy code, thought his trend has been in some decline in recent years. Several studies of privacy codes and compliance have been carried out, by the OECD, by the UK Information Commission, and others. [106]Privacy policies, like many others, generally incorporate a kite mark.

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[106] Global Report, Selfregulation.info 2003 p28.

6.2.5 Trustmarks

Trustmarks have emerged as a key aspect of self-regulation of web content in particular through the application of a recognisable trustmark to sites that have signed up to a common set of standards, usually codified into a written code of conduct. This form of self-regulation has been particularly evident in the case of those sites that require high levels of public trust in order to be successful, such as e-commerce and health information sites.

For this form of regulation to work, each stage of the process below needs to be successful. There are numerous successful models of trust-marks in terms of the development of appropriate codes and pan industry groups to monitor compliance, but the central and profound challenges to this model come in monitoring compliance with the code. Our research showed that this is very rarely proactive, and generally complaints driven. (Wagemans 2003). Therefore in general sites are very rarely removed from a trust-mark scheme (particularly where trustmark schemes are financially dependent on their members). Another key challenge lies with consumer awareness. Research shows that 1. brand awareness of trustmark schemes is low. Particularly where there is competition between trustmarks, the consumer is unlikely to recognise a purely Internet trustmark, and 2. the costs of investing in brand awareness through advertisement are likely to be prohibitively high. Therefore the efficacy of this regulatory tool, when it is entirely dependent on consumer awareness of trustmarks, must be questioned. Only when labels are machine readable, or when media literacy and awareness schemes enlist the help of public education campaigns can there be any hope of success. If the latter course were to be seriously supported, it would be inappropriate that trust-marks were commercial enterprises. There is a strong argument for public funding and here, and for a coordinating regulatory role to ensure that competition between kite marks does not lead to perverse outcomes.

Internet Content Trustmark Regime: The Theory
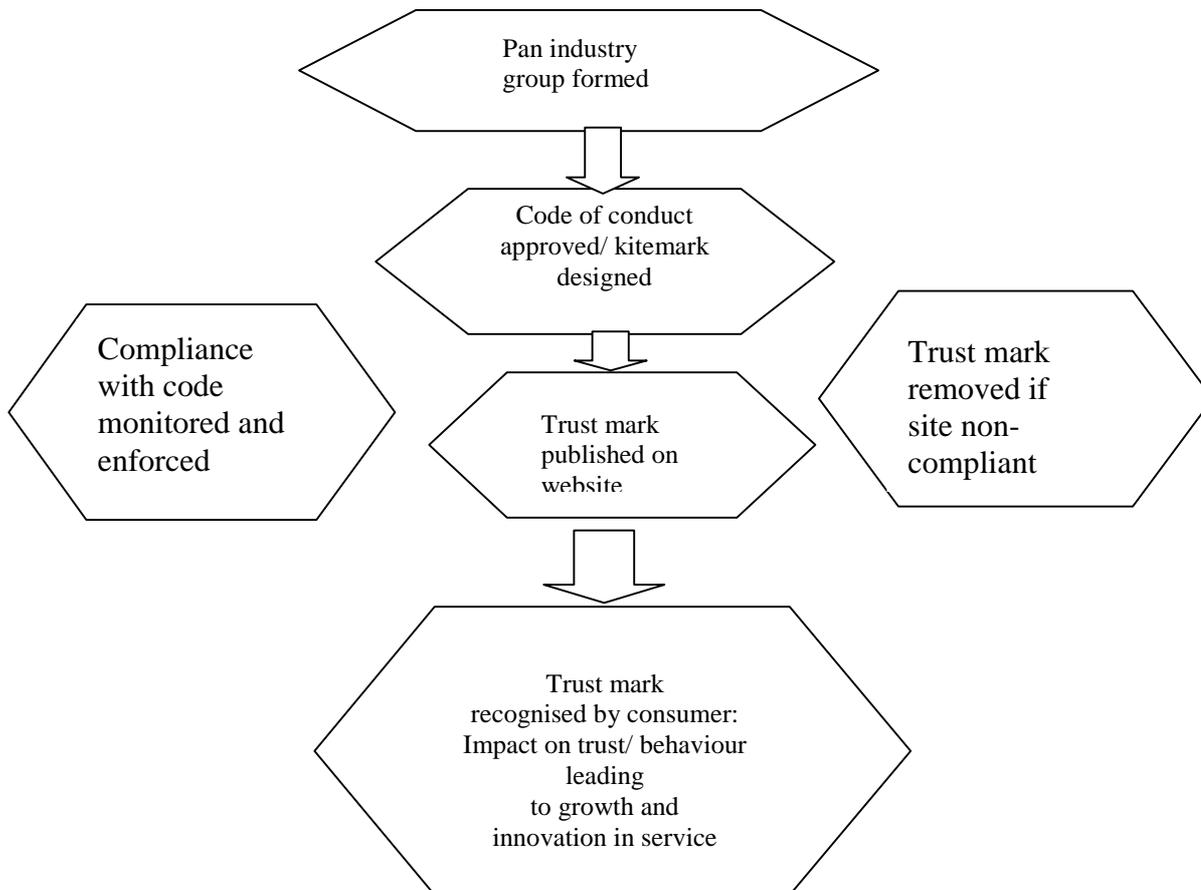
6.2.6 Awareness

Public funding has also flowed into public awareness schemes under the slogan, 'if you can't regulate, educate'. Delivered from national education budgets and also by regulators and civil society, (the new regulator in the UK has a statutory duty to support media literacy) awareness and safety advice programmes also aim to raise awareness of the filters and hotlines available to the public. These schemes have had varying success. We have been unable to find any comparative research on rates of awareness of safety features and also complaints mechanisms in European countries.

6.2.7 New Debates

More recently there has been a debate, particularly in Europe, about the particularly important role of search providers, particularly the market dominant providers in the provision of Internet content. The discussion has focused inter alia on two areas: the commercial role of search provision and the potentials for search level filtering and provision of child-friendly search.

6.3 ISP Codes of conduct

How are 5 Cs used in this sector?

The first decade of the Internet saw a fertile and creative growth in self-regulation via codes of conduct, with most activity taking place among the ISPs. However there are also some activity specific (e.g. chat room codes) and objective specific (e.g. privacy codes) that have emerged, with codes often overlapping, conflicting and complementing one another. In addition, various players are contractually constrained by the *terms of service* they offer customers and membership organisations such as the Internet Society and the Society of Computer Professionals operate voluntary codes of conduct. Acceptable Use Policies are codified and applied at various stages in the value chain, for example by a small proportion of ISPs and by providers of public access to the Internet such as libraries and education institutions.

Our research focused on the ISP codes of conduct, monitoring the content, constitution, coverage communication and compliance related material in the code.

6.3.1 Main Results

Of all the ISPA codes analysed, the Irish code of conduct was the most stringent, or comprehensive. In this study, we use the word stringent or comprehensive to refer to codes that covered most of the areas of interest in self-regulation; i.e. answers to the questions in Table 1 were almost exclusively positive. The French and Canadian codes, by contrast, were the least stringent, covering the least number of areas. In particular, the French ISPA code applied only to ISPs and not to ICPs, did not have an explicit review/amendment procedure, provided no guidance on information regarding business, provided no hate speech provisions, and had no formal sanctions mechanisms specified.

The observations must be viewed within the larger legal and media-regulatory framework. For example, although the French and a number of other national codes did not contain provisions for hate speech, they did refer to national legislation that makes hate speech in general illegal. This and other issues of legal and practical context are important in evaluating codes. Therefore codes that may be more stringent, or more comprehensive, do not necessarily result in a more regulated environment for ISPs in a country. This is an important distinction to maintain in viewing and analysing the results presented throughout this report. Figure 1 shows degrees of code comprehensiveness across the national cases of ISP codes of conduct.

ISP Code Stringency by Country

main issues covered
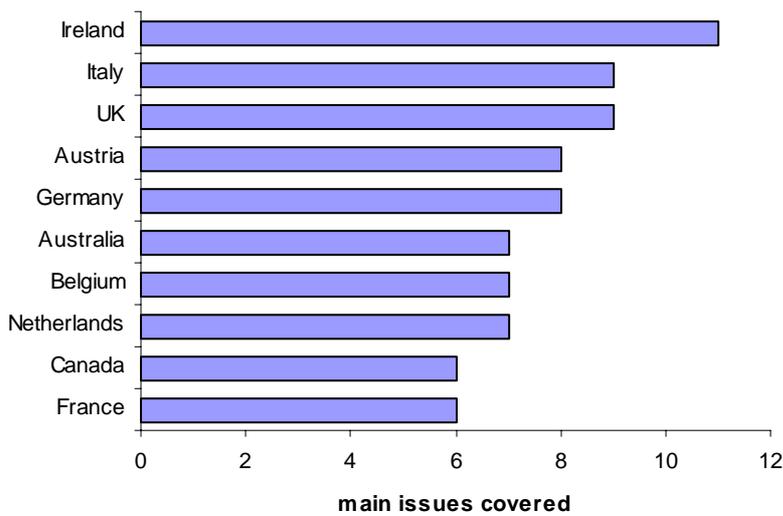
Of all the issues examined (as outlined in the list of questions in Table 1), the main issue covered by all 11 ISP codes of conduct examined was illegal activity. All codes made explicit reference to a series of measures (from hotlines to fair practices to national legislation to cooperation with authorities) in condemning and/or otherwise strictly discouraging ISPs from engaging in conduct that was illegal mainly under national law. Cooperation with law enforcement and complaint mechanisms also ranked high on the list of issues included by national ISP codes. Figure 2 summarizes the 11 issues analysed by their prevalence in 11 countries' ISPA codes of conduct.

Main Issues Covered by ISP Codes of Conduct

% national codes covering the issue [n=11]
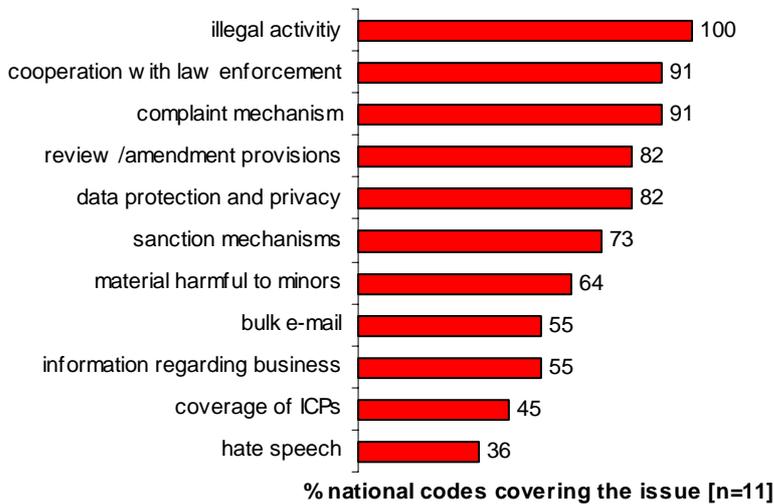
The issues least likely to be included in the code of conduct were issues of ICP coverage and provisions regarding hate speech online. This finding is very significant in that it shows that self-regulation as it is set up by the 11 national ISP codes of conduct has limited reach in dealing with some of the most pressing public concerns over Internet use—namely issues of sensitive and/or illegal content such as hate speech, incitement to violence and xenophobic speech. Understanding this observation, again, requires us to consider the fact that ISPs in many of the countries analysed have legislation prohibiting hate speech. Furthermore, the fact each of the 11 country codes had a provision for illegal activity means that in most of the countries not dealing explicitly with hate speech, this issue was covered under the provision of illegal activity.

6.3.2   Analysis

Issue Penetration and Code Completeness:

Table 2 below summarizes the findings of the review by indicating each of the country's ISP codes coverage of 11 issues: coverage of ISPs, provisions for review and amendment, provisions concerning illegal activity, provisions limiting access to material harmful to minors, provisions regarding hate speech, provisions regarding bulk e-mail, data protection and privacy provisions, complaint mechanism, provisions that regulate cooperation with law enforcement and third parties, and sanction mechanisms. Listed below are the eleven areas of inquiry for the selfregulation.info ISPA review. The chart that follows shows the penetration level of each issue in terms of the number of codes in which each issue was coded for.

	y/n	AT	BE	DE	FR	IE	IT	NL	NO	UK	
		ispa	ispa	fsm	ispa	ispa	ispa	ispa	isp	ispa	
Issue A	5/4	Y		Y		Y	Y		Y		Designed to Apply to Both ISPs and ICPs?
Issue B	7/2	Y	Y	Y		Y	Y		Y	Y	Formal Provisions for Review and Amendment?
Issue C	5/4		Y		Y	Y	Y			Y	Regulates Information Regarding Business?
Issue D	9/0	Y	Y	Y	Y	Y	Y	Y	Y	Y	Provisions Concerning Illegal Activity?
Issue E	5/4	Y		Y	Y	Y	Y				Provisions Limiting Access to Material Harmful to Minors?
Issue F[*]	3/6			Y	Y					Y	Provisions Regarding Hate Speech?
Issue G	4/5				Y	Y		Y		Y	Provisions Regarding Bulk E-mail?
Issue H[*]	8/1	Y	Y		Y	Y	Y	Y	Y	Y	Data Protection and Privacy Provisions?
Issue I	9/0	Y	Y	Y	Y	Y	Y	Y	Y	Y	Complaint Mechanism?
Issue J	8/1	Y	Y	Y	Y	Y	Y	Y		Y	Provisions that Regulate Cooperation with Law Enforcement and Third Parties?
Issue K	8/1	Y	Y	Y		Y	Y	Y	Y	Y	Sanction Mechanisms?

[F] It is worth noting that all nine countries reviewed had coded for illegal content, this means that countries in which racist or xenophobic speech is illegal, it is incorporated in the code by reference.

[H] FSM Code excludes issues covered by advertising, privacy, consumer and competition legislation.

As we have seen, there are a range of approaches to self-regulation and codes in the internet sector, but some marked convergence between codes on the European level. Our code library contains codes that are extremely detailed such as the Irish code and others that leave a great deal more discretion to stakeholders and the regulatory board. It is surprising that details of the notice and takedown scheme are not listed in more codes as it is essential that ISPs are more transparent in this regard. Clearly, analysis of codes can only take us so far. In particular, most codes have broad articles relating to illegal content and to cooperation with law enforcement. As they are situated in varying national contexts their behaviours will depend on the local law context, so where there are greater differences, the same code will be interpreted

differently in different jurisdictions. Those fields where there are the most consequential differences in national law will be with regard to hate speech, defamation and obscenity. In regard to these fields jurisdictional issues are likely to complicate future pan-european cooperation in the field of internet self-regulation .

Section 7: Self-regulation of the electronic game industry

The dominant model for self-regulation of video games on the pan-European level is the Pan European Games Information rating system (PEGI), implemented in the spring of 2003 by the Interactive Software Federation of Europe (ISFE), the pan-European trade association. The rating system is a result of a period of collaboration and negotiation between stakeholders from national self-regulatory organizations and the industry, and the project also received either advice or support from major video console manufacturers, experts in the field, and relevant stakeholders within the European Commission. As of March 2004, sixteen European states were participating in the scheme and the most notable country not included was Germany due to its new legislation on protection of minors that includes video games and the Internet within the larger national self-regulatory framework.[107] The PEGI age categories are 3, 7, 12, 16 and 18, and all the games also receive up to six content descriptors, warning that game's content includes discrimination, drugs, fear, bad language, sex, or violence. (See figure) In order to understand the philosophy, the structure, and the functioning of this new pan-European system, we analyzed three national-level self-regulatory systems that served as either explicit models or a starting point for designing and implementing the PEGI ratings. The three most prominent self-regulating bodies of the electronic game industry by 2003 included the Entertainment Software Rating Board (ESRB, a program of the Interactive Digital Software Association in the United States), the Video Standards Council (VSC, a programme of the European Leisure Software Publishers Association in the United Kingdom), and the Kijkwijzer (a programme of the Netherlands Institute for the Classification of Audio-visual Media in the Netherlands).

Figure: PEGI content descriptors

Our comparative methodology was adapted to the special needs of case of the video games. In addition to the analysis of official procedures, structures and the relevant institutional histories of the three self-regulatory bodies, we also conducted interviews with experts involved in the work each of the three bodies, held meetings and a workshop to discuss the problems of ratings and enforcement, and followed the dynamics that led to the evolution of the pan-European PEGI system out of the existing national ratings.

Overall, our analysis found a set of important similarities between the three systems: They are all independent, non-profit organizations; they are founded by the industry and put a high priority on protecting industry interests; they have well developed public outreach and publicity programs designed to explain how their rating systems serve the public interest; they cooperate with the government either as required by law or as a sanction mechanism; they consider all parts of the producer-supplier-consumer chain and have developed programs to address not only rating at production, but also distribution and marketing; they provide guidance on application of rating icons on packaging; they have an informal and internal procedure for evaluating their rating mechanisms and making changes to them; they have a formal complaint and appeal procedure for settling disputes.

However, the three national self-regulatory systems also exhibited important differences in the areas of government cooperation and linkage; relationship with other industries' rating bodies, the mechanisms and the standards of the rating procedure;

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[107] The participating countries included Austria, Belgium, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

applicability of the codes and rules to the Internet; and independence of the complaints and appeals process.

7.1 Enforcement

Our analysis uncovered important distinctions in the ways the three national systems are equipped to deal with complaints, enforcement and cooperation with the government. Of the three, the U.S. ESRB was most robust and well-developed in this area, although its structure and the process of dealing with complaints differed significantly from the European models. The ESRB procedure for appeals on a wide range of issues—from rating assignments to advertising to online privacy—is centred around the role of the general counsel. The ESRB General Counsel, or the ARC General Counsel in the cases that complaints regard advertising, reviews the substance of the written complaint and decides whether to initiate an investigation. Investigation and review are initiated only if very high standards are met. For example, a complaint regarding a company's advertising practice will not be considered if the advertisement in question is: (1) "not national in character (i.e. is a commercial message and/or advertising or marketing material, that is not disseminated and./or targeted to consumers on a national level within the United States or to a substantial portion of the United States)," (2) "the subject of pending litigation or an order by a court," (3) "the subject of a federal government agency consent decree or order," (4) "permanently withdrawn from use prior to the date of the complaint and acceptable verification of such withdrawal has been received," or (5) "of such technical character that ARC could not conduct a meaningful analysis of the issues without sufficient merit to warrant the expenditure of the division's resources." In addition, the general counsel can refuse to investigate a claim if he/she finds it "baseless, frivolous, or being presented for any improper purpose." The final way out of considering a complaint is for ARC to appeal to its reserved "right to refuse to open or continue to handle and investigation and review where a party has violated any of the procedures of ARC," the right whose purpose is "to maintain a professional, credible, and unbiased atmosphere in which ARC can effect a timely and lasting resolution to a case in the spirit of furthering voluntary self-regulation of advertising and the voluntary cooperation of the parties involved."[108] Once the ESRB decides to launch an investigation or a complaint, it acts on behalf of the public interest or the complainant against the company that is subject of the complaint.[109] Although generally complaints are remedied immediately, ESRB has procedures in place to proceed to arbitration of any disputes. For persistently improper conduct, ESRB may refer the offender to the appropriate governmental agency. ESRB also has a detailed policy for handling complaints by game publishers, such as if a publisher disputes and would like to appeal the rating assigned to a game. These appeals are reviewed by an independent Appeals Board, which may award a less restrictive rating by two-thirds majority vote.

In contrast to the U.S. ESRB model, the VSC (Video Standards Council) complaints board is entrusted with addressing complaints regarding the breaches of the VSC Rules in the United Kingdom. The VSC's stated policy is to give more importance to correcting the breach than to imposing sanctions, although sanctions such as suspension of membership or referral to a third party can be imposed. After an assessment form has been submitted by a member, indicating the self-assigned rating, the VSC can object to the rating or decide that the game should be rated by the BBFC. In those cases, the VSC suggests a resolution to the company. If the company does not agree, the rating is assigned by the VSC Appeals Committee that consists of the ELSPA General Secretary, a representative of the BBFC, a retailer, a member of the VSC Consultative Committee, and the VSC President. The committee is chaired by the President who can break a tie by casting a vote.

Our third model shows yet more variation in the way complaints are handled. NICAM's Independent Complaints Committee consists of four members with no ties with the

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[108] See "Principles and Guidelines: Responsible Advertising Practices of the Interactive Entertainment Software Industry," Advertising Review Council of the ESRB, Second Edition as amended Jan. 31, 2001. ESRB, New York, May 1, 2001. Reprinted in the Appendix II.

[109] See "Principles and Guidelines: Responsible Advertising Practices of the Interactive Entertainment Software Industry," Advertising Review Council of the ESRB, Second Edition as amended Jan. 31, 2001. ESRB, New York, May 1, 2001. Reprinted in the Appendix II.

industry. The type of complaints that applies to video games is general misclassification and failure to publicize Kijkwijzer ratings/pictogram meanings. In the film industry, complaints include marketing, through previews, of films classified under older-age category than the feature. This could potentially apply to marketing of electronic games, but no specific provision for games exists at this point in time. A written complaint must be filed within six weeks of the violation; the committee decides on whether to hear the complaint within two weeks; and the decision is made within eight weeks of the hearing. [110] In addition, the NICAM Advisory Committee has set up the Coders Committee to deal with non-binding recommendations in case a producer has "doubts about classification result such as arrived by the system." More broadly, the Coders Committee can address other industry complaints regarding NICAM regulations and the Kijkwijzer categories, and refer the complaints to the NICAM management. [111]

All three self-regulatory bodies had a method of cooperation with the government, including the law enforcement agencies in area of enforcement. The ESRB voluntarily cooperates with the United States Federal Trade Commission, as well as other government bodies. In cases the ESRB itself concludes that there has been a violation of the agreements with the participants in any of its programs, the ESRB can refer the case to the appropriate government agency. But, conversely, participation in ESRB programs, like the ESRB Privacy Online Programme, offers certain safe harbour provisions, protecting a company from actions of the FTC. A part of the rating process of the VSC is to refer games that contain realistic motion picture (or soundtrack) containing scenes of violence or sex not suitable for minors to the BBCF. After the referral, the VSC represents the interests of the industry before the BBCF, and has in the past argued against imposing stricter rating or censorship. The VSC cooperates with other governmental authorities in cases it is obliged to do so by law, which is the case with BBCF referrals as well. This cooperation can be result of a repeated breach of the VSC Rules. NICAM is legally co-operating with the Media Authority, set up under the Dutch Media Act to ensure that no Dutch broadcasting license holder broadcast material that could cause serious damage to persons below the age of 16. According to the Media Act, this currently applies only to broadcasting and not to other media. NICAM's Complaints Committee was in part set up for this purpose of addressing the Media Authority's concerns.

Finally, when it comes to enforcing their decisions and employing sanctions, the three systems all rely on the voluntary character of self-regulation. The ESRB may take action in cases that the ESRB finds that a publisher may have obtained a rating improperly or is improperly using the trademark rating icons of the ESRB. The possible forms of action that the ESRB General Counsel can take include, but are not limited to, mandatory re-labelling of packaging, revocation of trademark licenses, mandatory modification of advertisements, mandatory ESRB training, temporary suspension of rating services, recall of product, monetary fines of up to US$10,000, and the commencement of litigation or other legal action. In case of violation of the ARC advertising code, ESRB can also refer the file to the appropriate outside agency, release information regarding the referral to the press, and to the media in which the advertising at issue has appeared, and may publish and report the advertiser's actions and ARC's referral. The ESRB Privacy Online policy provides for referral of companies to the Federal Trade Commission in cases a company had signed up to participate in the program but had failed to follow its Principles and Guidelines. VSC sanction mechanisms are reserved for repeated offenders, as the VSC's stated policy is to first seek industry's cooperation in improving practices to correct for the breaches of the Rules. Once it decides to impose sanctions, the VSC can terminate membership in the organization that includes loss of benefits. The VSC can also use a referral to the government or the BBFC as a sanction mechanism. But in practice, VSC represents the interests of publishers in front of the BBFC. If BBFC refuses to classify a game, it effectively acts to ban or delay its publication until an appeal. [112] NICAM can impose a warning or penalty as a result of a successful complaint before the NCIAM

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[110] "Classification as Self-regulation," Kijkwijzer information packet, NICAM, Hilversum, Netherlands.
[111] In 2003, the Coders Committee consisted of Mignon Huisman (KRO), Brenda Visser (RCV) and Harold Oomes (SBS group), who hold their appointment for one year.
[112] See the case of the 1997 game *Carmageddon* published by SCI, Take 2's *postal* and BMG's *Grand Theft Auto*. (as well as *Kingpin* and *Shadowman*) The cases are described by the VRC.

Independent Complaints Committee. The fines are not specified for games, but for videos and film they are up to NLD 25,000 and for broadcasters up to NLD 50,000. The fines and warnings are public. The complainant or a party subject to the complaint can appeal the decision of the Complaints Committee. A separate, three-member NICAM Appeals Committee, with no ties to the industry, rules on the appeal within four weeks. But NICAM maintains declaimer over complaints regarding actual content of the product.

7.2   Best Practice: PEGI as a Hybrid Model System

From our analysis of the three systems, it becomes clear that the PEGI system resulted from the initiative of the UK ELSPA, and was importantly influenced by the British self-regulatory experience. However, the addition of content descriptors and more reliance on the manufacturers are only two of several important influences from the Dutch NICAM model. In that sense, the ISFE's PEGI rating system is a self-regulatory mechanism that incorporated the institutional and historical lessons of British self-regulation in the areas of films released on video, and later video games, with new and original thinking behind the Dutch experiment of rating media content regardless of the medium in which it is found.

Because PEGI is the only pan-European system, it has a potential of serving as a best-practice model for other industries in search of a coordinated scheme of self-regulation across EU Member state boundaries. The experience in this industry sector indicates that national self-regulatory agencies can serve as important advocates of implementing a pan-European system, but their initiative has to be accompanied by a consensus that there is indeed a need to implement a system that transcends national boundaries. In the case of the video games, the pan-European system was also made possible by the fact that the UK ELSPA system was well developed and that the vast majority of the other Member States either lacked any system of video games ratings or had only started to think about adopting their other media rating mechanisms to deal with this relatively new and expanding media industry.

However, the exemption of one of the world's largest national markets for video games, namely Germany, from the PEGI system serves as an important reminder that even the most successful 'pan-European' self-regulatory models may not live up to all the Member States' concerns or national legal requirements. Germany's newly-implemented laws on the protection of minors placed video and computer games within the overall media 'co-regulatory' framework, with a shared responsibility between a self-regulatory body on the federal level and länder governments on the local level. Such a national scheme, *a priori*, one can argue, precludes Germany from relying on an entirely voluntary pan-European system of video ratings.[113]

7.3   Trends, Dilemmas, Challenges

Video and computer games were among the last of media to be subjected to public and government scrutiny over suitability of their content for children. Drawing on experiences of the video and film industries, the response of several electronic game industries in both Europe and North America has been to introduce self-regulatory mechanisms of content rating according to age suitability. This is not to say that some Member States, such as Germany and until recently France, relied more heavily on the government to participate in determining what video game content should be available to the minors.

The examination of the three self-regulatory mechanisms that predated the PEGI ratings showed considerable diversity of approaches to constitution, content, coverage, communication and compliance elements in their codes of conduct and practices. The United Kingdom has appeared as the most difficult case as the Video Recordings Act has only limited but still significant application to the electronic game industry. One way out of these complexities would have been to negotiate safe harbour provisions (as was the case with the ESRB and the Federal Trade Commission in the U.S.) or to amend legislation to introduce a government-endorsed self-regulatory body (as was the case with the Dutch Media Act and NICAM). The solution, however, was found neither in following a strictly American or a

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[113] However, one could envisage a system where local governments could delegate the rating responsibility to a pan-European self-regulatory agency.

strictly Dutch approach, but instead adopting the ideas of the British-dominated ELSPA to a new pan-European system.

Second, another important decision that was to be made before PEGI was to come in force was whether to pursue video self-regulation within a national media self-regulatory scheme (i.e. Germany) or to separate the video games industry and address it through its own rating system (eventually the PEGI system). The experience of the Video Standards Council showed the difficulties of applying the same rating mechanism to videos and games without applying it to films and music; with development and convergence of technology, the preferred approach is either the universal or the highly specialized. This problem is compounded by the challenge of interactive gaming, with development of consoles that allow playing against (or with) anonymous players, who can communicate during the game.

Section 8: Self-regulation of the film industry

In many ways, it is a mistake to talk about the strict notion of self-regulation when it comes to the European film industry. In fact, the public concern over the content of cinematographic art and entertainment – from the first black and white theatrical releases to television, video, on-demand movies, DVDs – has deep roots in the classical models of statutory regulation. A large and diverse body of detailed statutory rules for protection of minors, and consumers in general, has been developed in every EU member state. However, even in the traditional area of classification for theatrical exhibition, national boards have started to move away from censorship and more towards advisory content ratings. The development of the EU audio-visual policy, the Commission's concern for the protection of minors, and the promotion of self-regulation have, nevertheless, started to create a new legal and policy environment.[114] Technological changes have also led most classification boards to consider, at least, the role of the Internet, movies-on-demand, new advertising, and DVD/video distribution across EU Member States' boundaries.

Our analysis in this sector focused on film classification systems in 17 European states, with attention to the elements of self-regulation that have started to appear in selected countries and parts of the film entertainment industry.[115] For this purpose, we have adopted our methodology to the film industry and analyzed guidelines conceived broadly and raging from a code of conduct in the cases of self-regulatory models to set of guidelines and practices in the cases of more direct government regulation. Our analytical questions fall into areas of coverage, constitution, content, communication, and compliance. *Coverage* refers to the scope of the classification system, focusing on the forms of film exhibition to which the classification applies, the extent different industry actors play in the process, the applicability of the rating across the production-distribution-consumption chain, applicability to the Internet, and its reach beyond national borders. *Constitution* refers to the organization and character of the classification body, focusing on its governance and the body's relationships with the government, the industry, consumer groups, and other industries' rating bodies. *Content* refers to the system of screening and assigning age categories, comparing issues of content concern and the standards of different age categories of the EU Member States. *Communication* refers to the mechanism by which the assignment of age ratings is communicated to consumers, in particular the rules governing its display in movie theatres and on DVD/video packages, public awareness, and ethics of advertising. *Compliance* refers to mechanisms for appeals, resolution of disputes, and sanctions at the classification body's disposal.[116]

8.1 Key Indicators

Unlike other industries (such as ISPs for example), film rating bodies keep detailed and generally easily accessible statistics on the number of films submitted for classification and ratings given. Especially when the rating bodies are part of a government ministry or other body, and further the work of such bodies subject to judicial review, detailed records of complaints and resulting actions is also kept and available to the public. In comparison to industry-run bodies such as the United States' MPPA (Motion Picture Association of America),

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[114] See European Commission, Green Paper on the protection of minors and human dignity, Amended June 30, 1997 (original 1996); European Commission, Protection of Minors and Human Dignity in Audiovisual and Information Services, Consultations on the Green Working Paper, Commission Working Document SEC(97)1203, Brussels, June 13, 1997; European Commission, Council Recommendation 98/560/EC, September 24, 1998, Official Journal L 270 (Oct. 7, 1998); European Commission, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions on Certain Legal Aspects Relating to Cinematographic and Other Audiovisual Works. COM(201) 534 final, Brussels, September 26, 2001.

[115] The unit of analysis, therefore, were the guidelines for the process of classification. Our ultimate goal was to put the results of our analysis into a comparative perspective that unifies the analysis of self-regulation and codes of conduct across European Union Member States and media sectors.

[116] By adopting the methodology used in the analysis of self-regulation in other media we achieve two important goals: (1) We make our analysis comparable to the results of the other reports; (2) We analyze the film classification systems with special attention to variables relevant to self-regulation. Even in cases where content regulation conforms to the model of direct government regulation, we therefore expect to draw important comparative insight for furthering our knowledge of self-regulatory schemes, and more specifically self-regulatory codes of conduct.

ratings standards and justifications for rating decisions are also significantly more transparent across European cases.

For example, the database of films screened by the United Kingdom BBFC shows changes over in the number of movies screened (blue line in the figure below) and cut (red line in the figure below). The historical change seems to indicate, in the particular example of the UK, that (1) the number of movies screened has steadily declined after the Second World War, with a slight increase in the past decade, (2) the number of movies cut by the BBFC has declined in recent years to a practically negligible level. This trend is mirrored in other European countries, where rating boards have started to move away from the practice of cutting and out-right censorship and toward a new role of providing advice to parents and other viewers. This might also reflect maturity in the film production industry and greater awareness of the risks presented by self-regulatory codes. Another type of indicator, such as those kept by the MPPA in the United States, involve a comparison of commercial success of movies with different age ratings. Here, evidence indicates that a restricted age rating (such as R in the United States, or 18 and above in many European countries) significantly lowers the odds that a movie will make it to the top of the highest-grossing releases. Together, such indicators seem to suggest that there is a strong commercial incentive for releasing movies that are suitable to minors and are not to be cut by national film rating bodies.

Films screened and cut by BBFC
1914-2003
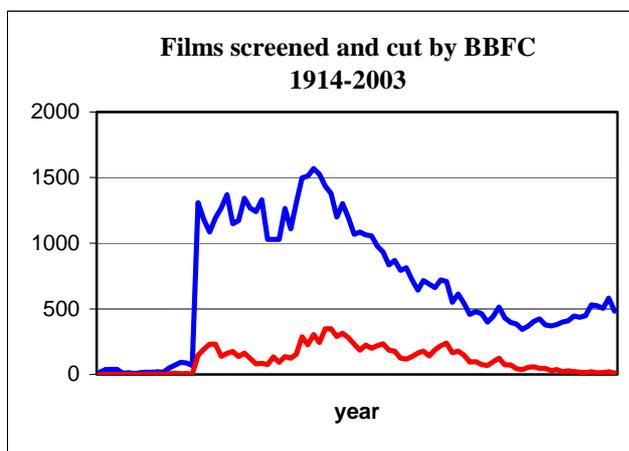
8.2   National Models

Film classification for theatrical release is mandatory in ten countries in our sample, and voluntary in Austria, Denmark, Finland, Germany, Luxembourg, the Netherlands. The existing national systems also exhibit sometimes high levels of complexity and shared responsibility between different levels of government, stakeholders, the industry, and the public. For example, in Austria film classification and protection of minors are subject of länder law, in each of the nine federal units, and it is länder governments that have jurisdiction over matters of film classification for screening in theatres.[117] The Austrian Board of Media Classification (ABMC) serves as a federal-level classification body with advisory powers only, but whose advice on classification is usually followed by the länder. [118] The regional aspect is also present in the United Kingdom, Germany, Spain and Belgium.

The classification of movies for distribution on video and DVD is not covered as thoroughly as is theatrical release in four countries: Austria, Belgium, Luxembourg and Sweden. In Austria, there is no law for classification of videos and DVDs, and they bear the German FSK classification if imported from there.[119] In Belgium, videos and DVDs do not require mandatory rating, and are instead subject to voluntary industry scheme set up by the

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[117] Kinogesetze and Jugendschutzgesetze are the local laws dealing with public movie viewing and the protection of minors, respectively.

[118] Established in 1948, the Board of Film Classification was the previous body tasked with this role, but it was changed into the ABMC in the summer of 2001.

[119] In the federal unit of Salzburg, the law requires DVDs and videos to be labelled according to the German FSK classification system.

Belgium Video Federation (BVF); but the imported videos and DVDs carry French and Dutch age category labels. In Sweden, although the classification of videos is voluntary, a rating protects the parties behind the video/DVD's distribution from possible prosecution under the Penal Code for pornography or violence.

Our analysis of guidelines and practices in film classification reveals a great level of attention to content, much more than in newer media sectors such as the Internet or electronic games. In discussing its rating practices, for example, the BBFC talks about "difficult context issues, not only checking boxes." Its screening committees address issues of address, appeal, context, effect and other. This high level of complexity and interpretation is not confined to the British example. A typical example of such complexity appears in rating violent content. Across Western Europe, different countries approach with different seriousness representation of violence through comedy, satire, horror, since fiction, or documentary films.

In terms of diversity of content covered, all EU systems are formally at a similar standard. Violence and sex preoccupy classification committees' concerns in most countries, while categories such as nudity, language, drug use and hate speech tend to be covered either in countries with stricter public morality standards (such as Britain and Ireland) or in countries with a special content concern (e.g. limiting hate speech in France and Germany). In terms of defining age categories, important differences exist across the scale. Sweden's and Denmark's highest non-pornographic adult category is age 15. Age 16 is the default adult category in Austria, Belgium, Iceland, and the Netherlands. Age 17 is the highest category in Luxembourg, and all the other countries define adult audience by the 18 and over category.

The overall approach to content differs from deciding what kind of content is suitable for public consumption to what kind of content children need protection from. Ireland and Portugal in particular outline in their guidelines the responsibility of the classification committees to take into account issues related to morality. While in Ireland this is done by the Censor's Office, in Portugal there is a voluntary Catholic community's content classification.

Hence, an analytic comparison of guidelines, practices and legal standards reveals a well-known empirical trend in classification standards across Europe. Sweden tends to tolerate a great deal more nudity than countries such as the United Kingdom or Norway. Language, drug use, and discrimination preoccupy the attention of the popular classification systems of the BBFC and now the Dutch NICAM. France and Germany remain committed to screening movies for sensitive issues of hate speech, and have become increasingly concerned with protecting their underage viewers following the highly publicized (in the media) outbreaks of violence among teenagers.

8.3   Trends

An important changing aspect of classifying content is censorship, either through complete banning of movies, or through mandatory cuts imposed by the rating board. There has been a steady trend towards relaxing censorship in several countries. Most recently the Finish government worked for five years to abolish adult censorship. In Norway, the movement has been away from paternalistic protection and more towards the ratings playing an advisory role. In particular, the ratings regarding horror and science fiction are becoming less strict and a special value is placed on realism versus artistic or fantastic representation of questionable material. While censorship remains an option under Norwegian law, the national classification board has committed itself to refraining from banning films and has allowed previously banned films to be distributed freely.

The continuous revision procedure adds to the complexity of the content rules is the continuous revision procedure. Luxembourg is introducing a new law; Norway aims to put all media classification under one umbrella by 2005; Germany has introduced a novel co-regulatory framework; Italy has restructured its ministerial organization of classification; NICAM is setting new standards in self-regulation; and French film classification officials are admitting a growing need to protect children and young people. Even the BBFC has recently adapted its system. In August of 2002, it changed the age 12 classification to 12A, which allows those under 12 years of age to see a 12A movie if accompanied by an adult. This change

is accompanied by a content descriptor, shifting the role of ratings away from censorship and towards parental advice and empowerment.

Good communication of the guidelines' standards, publicizing of the age ratings, and comprehensive treatment of previews and advertising are emerging as a major strength of film classification systems across Europe. Specific guidelines on display of age categories and content descriptors (where applicable) are given by classification bodies. In cases where the classification system covers videos and DVDs, as discussed above, there exist formal rules on packaging and display. Public outreach and media education campaigns have also emerged as a crucial part of a successful classification system. This feature varies across different models of film classification. In cases where the classification system is a part of the government, such publicity campaigns are funded directly by the ministries responsible. However, even in cases of pure self-regulation such as NICAM, the government has worked with the industry to raise the profile of the newly introduced system and inform the parents about the meaning of the different age categories and content descriptors. In fact, the successful branding of NICAM's Kijkwijzer symbols and the public campaign behind it have been credited as crucial factors in determining the future not only of NICAM but also, possibly, of other self-regulatory schemes in media classification. The Dutch media campaign included television commercials, brochures for libraries, cinemas, video stores, and children healthcare organizations. As in most other countries, NICAM is relying on its online website as an important means not only for communicating with parents and consumers but also with the public and the industry in general. The rating process itself is carried through distribution of an electronic questionnaire for the purposes of in-house self-rating.

8.4   Dilemmas and Challenges

There is much room for speculation in discussing how film classification boards are adopting their roles to the new technologies, including the Internet and movies-on-demand. Here is where the reliance on self-regulation potentially holds the most promise, as demonstrated in the developing moves of the Dutch NICAM system. The Irish Ministry of Justice has also launched a special self-regulatory initiative under the Internet Advisory Board. Classification boards such as the Finish one have incorporated movies-on-demand within the same framework they use for all films. And the BBFC was a subject of a difficult debate when it came to decisions on what its role should be in the rating of video games. Other strategies include dealing with the question of the Internet through regulation of advertising and of previews.

The movie industry involves exceptionally high stakes – financially, politically and culturally. Financially, the amount of money theatrical releases make is directly dependent on the rating given by a national rating body. Politically, rating bodies have to deal with complicated issues of public censorship and the pressure on them to liberalize their practices is only growing across Europe. Culturally, cinema has been an established forum for national cultural production – with rating bodies being an integral part of a broader government framework for supporting national film production in several European countries (most notably perhaps France and Greece). With the existing stakes as high as they are, it is difficult to contemplate a complete shift away from regulation and towards more self-regulation even on the national level in many cases. This is nothing to say about harmonization of standards across EU Member States and establishment of either pan-European rating bodies or pan-European age categories for theatrical releases.

However, at the same time, the fact is that English-language movies continue to dominate the European market for theatrical releases, and vast majority of movies (including those that are commercially successful and seen by millions) come from the United States, where they have already undergone a self-regulatory rating procedure through the MPAA industry-run scheme. This well-recognized feature of globalization is only compounded by increasing movement of goods across EU Member States boundaries, including videos, DVDs, films on the Internet, and TV programming. These technological and economic developments are bound to continue to clash with the demands of governments to maintain control over the rating process in the majority of EU Member States.

Section 9: Mobile Internet Services and Codes of Conduct

Mobile phones can now be used to access the public Internet and download graphic files, sound and video clips. They can be used for adult services and premium services, such as the 3 'G's: girls, games and gambling. Though the discussion of Codes of Conduct in this section must begin with a technical explanation of why the technology now permits Internet access and requires content regulation, a graph may illustrate how the late 1990s simple 2G/GSM phone has become an Internet access device.

From GSM simple phone to More Advanced Devices[120]
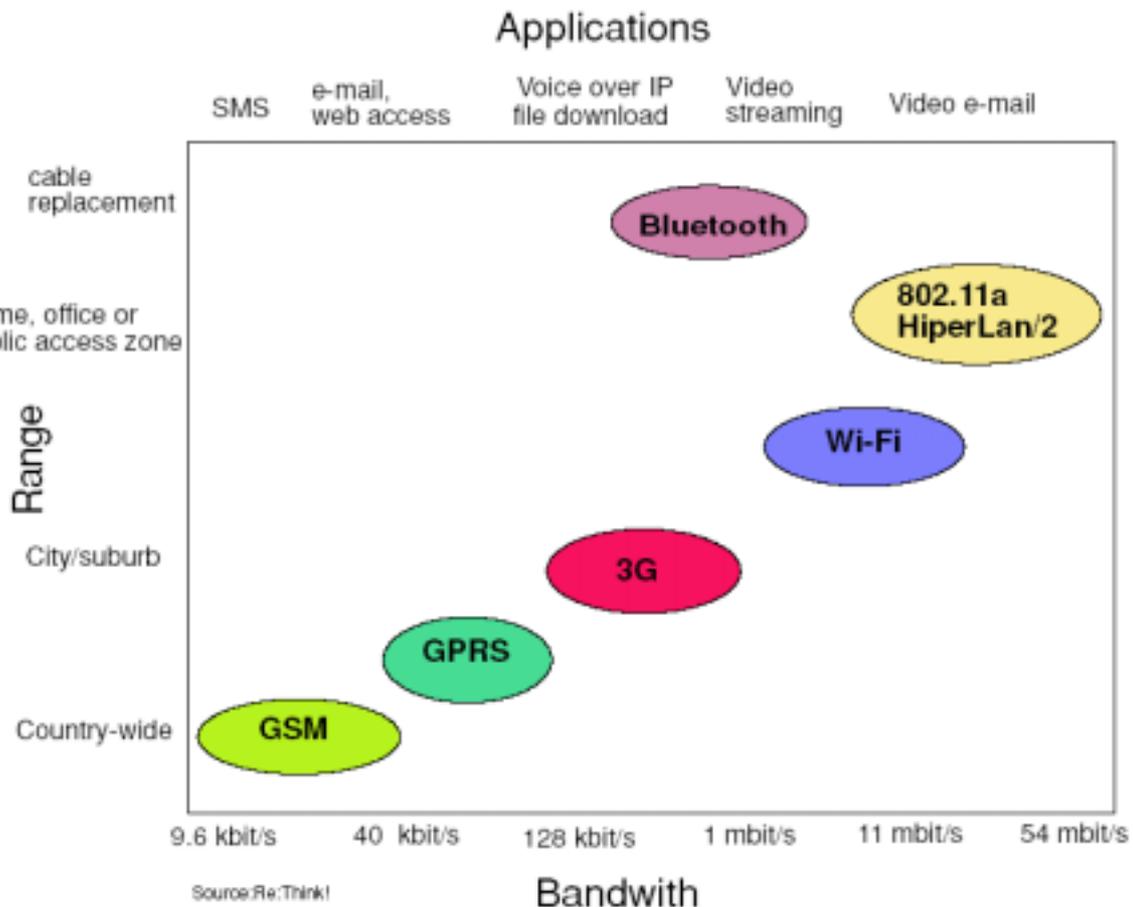
Mobile services have been used to serve web pages to European users since approximately 2000. The first generation of mobile Internet devices used Wireless Application Protocol (WAP) to deliver specially programmed, normally simplistic and graphic-poor pages over narrow-band Global System for Mobile (GSM) networks. These 2G networks delivered data at about 65% of the speed of the modems used for fixed line computers circa. 1994/5. The screen for GSM-only devices is typically very small and monochrome, and the pixilation (granularity) of the screen means that photographic images are cartoon-like. Text services (Short Messaging Services or SMS) on GSM devices have developed as 160-character text messages, rather than WAP-enabled chat or listserve.

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[120] Source Croxford and Marsden (May 2001)

Sibis Survey of EU citizens

Do you have a mobile phone for your own personal use and do use it to view WAP pages or communicate via SMS? (EU-15)
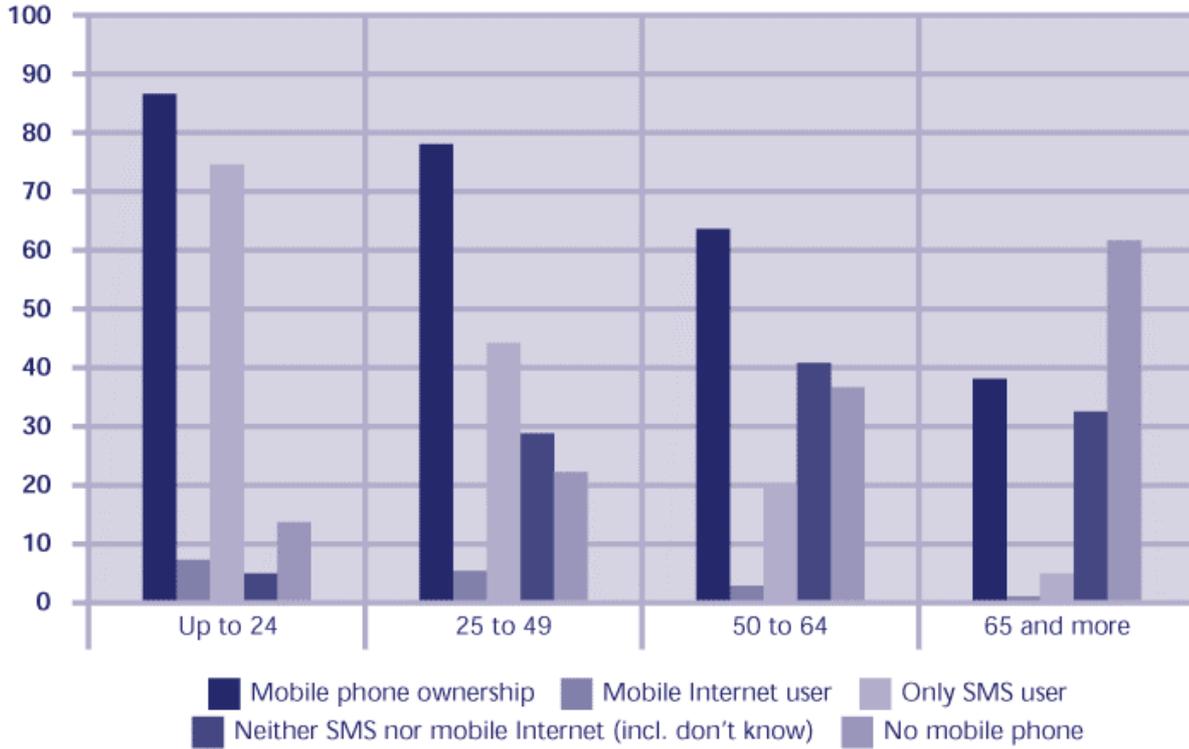
Table 3: Explaining the Evolving Generations of Standards and Handsets for Mobile Internet

	2 GSM	2.5 GPRS	3 G	WiFi & Bluetooth	Smart Phones
Download speed kb/s	9	26	64-384	c.5000 (WiFi); 50,000 (WiFi5)[121]	Dependent on network
Typical phone					
Content types	SMS, WAP surfing and ringtones	Graphics, photos, games downloads and MP3	Video streaming and capture, broadband applications	All – including DVD quality video download	Public Internet

The 2nd Generation of handsets, for GPRS services, offers 64k colour screens, access at up to 27kb/s to 2.5G networks, and larger screen size. Text is enhanced by images. The 3rd Generation – so-called SmartPhones – and the data-card connected Personal Digital Assistants and laptop computers – are all enabled to receive web pages without re-coding for WAP. These are therefore the first portable Internet devices. Accessing the WWW at GPRS speeds, increasing to 3G (perhaps 384Kb/s) and WiFi (up to several megabits), they can approximate

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[121] Depends on 'backhaul' DSL speed – see generally Croxford and Marsden (2001).

the wired Internet use experience. With larger full-colour screens, they are fully specified Internet devices for image, sound and video.

9.1   Legal and Regulatory Framework: Mobile Service

Mobile networks in Europe have very limited competition, with between 3 and 6 networks in major markets. The costs of terminating calls on mobile networks, previously unregulated, have recently been examined and regulated in the UK in a regulatory action[122]. European action on a similar complaint from 1999 is still pending.

The only commercial broadband network for mobile is that of Hutchison Whampoa's 3 service in the UK and Italy (as at 01/03/04). Operators have indicated that by end-2004, most EU member territories will have metropolitan broadband wireless services – by 3G and WiFi 'hotspots' – which means that customers with handsets will have a real Internet experience.

The European Commission has reported on Member States' regulation of mobile content:

> Germany, France and Finland indicated that transmission via mobiles, in particular through UMTS [3G], is covered by regulation. Sweden considers that its legislation on illegal content is in principle applicable to mobile phone transmissions, but mentioned that this had not been tested in the courts. The Netherlands argued that the self-regulatory provisions had been drafted in a technologically neutral way, but were limited to "hosted information".[123]

In addition to these 'blanket' regulations of fixed content extended to mobile, the UK and Norway responded by pointing to codes of conduct being developed to learn from fixed ISP self-regulation. The UK code is the central case study in this section.

9.2   Self-Regulation in Practice in Mobile Content

Mobile networks already have two examples of regulated self-regulation in place before Codes of Conduct are considered. These are:

- an ombudsman service for customer complaints over pricing and service, and

- a premium rate regulator (for instance RegTel in Ireland or ICSTIS in the UK).

Both are shared with fixed line telephony, and are mandated under European law.

9.2.1   Ombudsman Scheme for Consumer Disputes:

In the UK, Vodafone was instrumental in establishing OTelO, and T-Mobile and Orange in establishing the Communications and Internet Services Adjudication Scheme (CISAS), an ombudsman for ISPs and phone companies. OTelO charges all members a fee, CISAS is free – an interesting example of regulatory competition[124].

9.2.2   Premium Service Self-Regulator:

ICSTIS is a member of the International Audiotex Regulators Network (IARN), the European (and Australian) self-regulatory network for premium services. Operating since 1995, the 15th meeting in November 2002 has been followed by a long period of inactivity[125]. Member self-regulators have indicated that continuing support for IARN depends on resumed activity. If

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[122] See http://www.ofcom.org.uk/static/archive/oftel/publications/mobile/ctm_2002/docs_index.htm for a full list of documents submitted by Oftel, or the full Competition Commission report at
http://www.ofcom.org.uk/static/archive/oftel/publications/mobile/ctm_2003/ctm2.pdf
The Report is 15 chapters with 9 appendices and took a year to research and publish.
[123] COM (2003) 776 Final at 12: http://europa.eu.int/comm/avpolicy/legis/reports/com2003_776final_en.pdf
[124] See http://www.arbitrators.org/cisas/ for ISP and mobile ombudsman; http://www.out-law.com/php/page.php?page_id=ispsandtelcosmust1069270107&area=news for news of CISAS' establishment and parentage, and http://www.otelo.org.uk/content.php?menuID=2&pageID=23 for details of the OtelO membership board. For legal measures, see Article 34 of the Universal Service Directive: 2002/22/EC of 7 March 2002:
http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/documents/l_10820020424en00510077.pdf
[125] See http://www.iarn.org/ last visited 3 March 2004, and interviews with national self-regulators February-March 2004.

IARN were to fail, that would signal decreased pan-European coordination in premium services, at a critical time when the mobile industry needs such a co-ordinatory network.

European broadcasters, fixed and mobile operators increasingly use premium services to fund interactive television 'reality' and quiz programmes, such as Gross Bruder/Big Brother/Gran Hermano. In the UK, mobile premium texting is doubling in value each year, and was worth £200million/€300million annually in 2003[126]. Total premium voice calls were worth €1billion in 2003, with mobile about 10% of that total. Directory enquiry calls were worth €400million. The entire UK premium rate industry – the largest in Europe – was worth €1.7billion.

Tables: ICSTIS 2002 Annual Report Breakdown of Complaint Types and Services[127]

WHAT ARE COMPLAINTS ABOUT? The table below shows the main reasons for complaints received in 2002:	2002	2001
Inadequate pricing	235	699
Misleading information	258	385
Failure to supply requested information	176	30
Inadequate contact details	156	224
No prior permission	119	57
Pricing prominence	113	184
Inappropriate promotion	92	88
Unreasonable delay	92	93
Non-fulfilment of competition prizes	88	74
Legality	69	110

WHAT TYPES OF SERVICE CAUSE COMPLAINTS? The table below shows the types of service which attracted most complaints in 2002:	2002	2001
Adult entertainment	2,547	1,113
Fax	1,260	994
Competitions	1,214	1,172
Text message	1,210	159
Information	315	328
Ringtones and logos	271	375
Dating	268	113
Live conversation	146	104
Consumer credit	142	443
Data capture	128	62

The biggest increases in complaints were for adult, text message and dating services. Interviewees have explained that many complaints and especially telephone enquiries relate to adult services, which are in fact spurious based on family members discovering breaches of callers' anonymity.

9.2.3 Other Regulatory Requirements on Telephony Content

- Intercept, Integrity and Surveillance: Networks must comply with network integrity and security measures to ensure surveillance is possible and that the emergency number 112 is accessible.

- Mobile Handset Theft: Mobile networks also have systems to deactivate the SIM card of phones reported as stolen.

- Number Portability: Further measures to monitor phone use include a Home Location Register (HLR) in each Member State, to permit mobile numbers to be ported by subscribers from one network to a new subscription on a different network.

- Spam Blocking: In several Member States, unsolicited commercial messages (spam) are regulated by, for instance, the UK Telephone Preference Service (www.tpsonline.org.uk/) and E-Mail Preference Service, again in common with fixed telephony. Mobile networks also undertake unilateral action.

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[126] Source: IAPCODE estimate based on ICSTIS 2003 figures.
[127] ICSTIS (2003) *Annual Activity Report 2002* at p7. Note that complaints increased by 60% from 2001 to 11,552 : http://www.icstis.org/icstis2002/pdf/ACTIVITY_2002.PDF

9.3   IAPCODE Analysis of Adult and Illegal Content Regulation

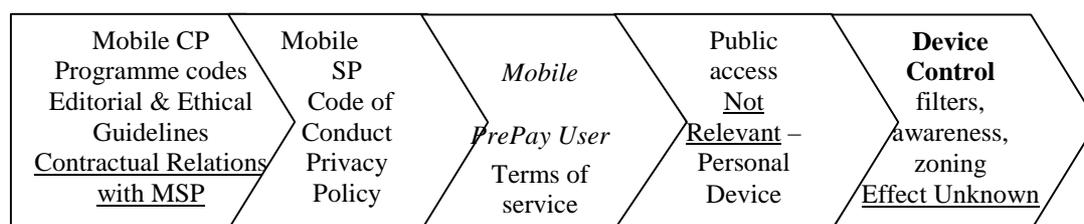Ahlert, Alexander and Tambini explain that:

> Major concerns for the self-regulatory framework include adult content (porn), interactive services, unsolicited messages, commercial transactions, location based dating, gambling, and peer-to-peer. The major necessary strategies for dealing with these concerns are content rating, filtering and blocking, notice-and-take-down procedures, public awareness, cooperation with the government.[128]

They identify the scale economies which make effective and sustainable regulation of the mobile Internet possible:

> The emerging market for 3G services in the European Union will be dominated by a few major mobile network operators, which in theory should make self-regulation a realistic and viable alternative to state regulation. Uncertainty of actual consumer uptake despite projected high popularity of 3G, media convergence, and the evolving EU regulatory framework all offer incentives for 3G mobile operators to invest in self-regulation.[129]

Note in the value chain below several innovations compared with the familiar fixed line Internet value chain. First, for services in the mobile portal, there is a strong contractual sanction for MCPs failing to fulfil their self-regulatory duties, which in the fixed environment is true only for the largest portals, such as MSN, Yahoo! and AOL. Second, the pre-pay user has no regulatory sanction from the MSP, with no contract and no billing relationship, though the MSP could discover the identity and block service to the SIM card of users if unacceptable use is discovered. Third, the type of network control at the institution of work/research/education that the public access layer establishes, is not relevant in the mobile environment except in the case of group contracts for mobiles given to employees.

Even before the start of the value chain there is a fourth critical difference: the MSP owns the network and can control the content flow onto networks in a manner unfamiliar to narrowband fixed ISPs. Therefore the lack of control over end-users is replaced by a control over the network. This is a critical change from end-to-end where control must be exercised close to or at the end-device, in that mobile networks can institute control in the network itself, are required so to do for law enforcement purposes, and choose so to do to stop spam overwhelming the network. That is not to suggest that as a policy choice such a radical departure from fixed Internet regulation is to be recommended, not least on speech grounds, but it does represent a different architecture of the ISP-network provider relationship.

Mobile CP Programme codes Editorial & Ethical Guidelines Contractual Relations with MSP	Mobile SP Code of Conduct Privacy Policy	*Mobile PrePay User* Terms of service	Public access Not Relevant – Personal Device	**Device Control** filters, awareness, zoning Effect Unknown

The mobile industry is identified as learning lessons from a decade of Internet regulation, and

from earlier experience in Japan and South Korea, where 3G networks have operated since 2001/2. The early experience of spam, child prostitution and peer-to-peer breaches of copyright were noted prior to the drafting of the first European Code of Conduct, that in the UK[130]. It is predated by the broad content controls instituted across all electronic media distribution

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[128] Ahlert, Alexander and Tambini (2003) European 3G Mobile Industry Self-Regulation: IAPCODE Background Paper for World Telemedia Conference at 2: see http://www.selfregulation.info/iapcoda/031106-mobiles-revised-bckgrd.pdf

[129] Ibid at 2.

[130] Mobile Network Operators (January 2004) *UK code of practice for the self-regulation of new forms of content on mobiles* available at www.orange.co.uk

networks in Germany[131]. Note that smaller markets in the same language normally follow the larger: hence Austria and Switzerland follow Germany, and Ireland follows the UK[132].

9.3.1   Best practice examples

Constitution, Coverage and Content

The UK Code was drafted by a committee including all six network operators and virtual operators (3, Vodafone, Orange, T-Mobile, Virgin Mobile, O2) and the consultant Hamish McLeod, who acted as spokesman for the group. Informal consultation with content providers, infrastructure and handset suppliers and government at national and European Commission levels took place, as also with IAPCODE[133]. The six operators include all four of the largest pan-European operators[134]. A draft was presented for public consultation prior to the full publication of the Code in January 2004. Details of the Code's implementation (see below) are being arranged at the time of writing.

The UK Code explains that:

> The Code covers new types of content, including visual content, online gambling, mobile gaming, chat rooms and Internet access. It does not cover traditional premium rate voice or premium rate SMS (texting) services, which will continue to be regulated under the ICSTIS Code of Practice."[135]

It also does not cover Internet content or peer-to-peer communications, in common with fixed ISPs. In 'Section 3: Illegal Content', it explains that "Where a mobile operator is hosting content, including web or messaging content, it will put in place notify and take-down provisions."

Under Section 4, operators pledge to 'continue' to take action against spam – they already have prevented much content arriving on-net. Therefore to this extent, Internet content is to be filtered and excluded. Further, each operator is introducing an adult content filter though timing is indeterminate[136]: "It is anticipated that filtering for Internet content will be available from mobile operators during 2004."[137]

Communication

The six operators have consulted widely with stakeholders, and intend to convey their Code to customers, already having the Code on their websites, though navigation to the Code requires a specific search[138]. Encouragingly, the need to ensure brand awareness is not tarnished by adverse press and publicity is likely to make this a central element not only of a minor compliance budget (as with mobile phones and child exposure to radiation) but part of the massive marketing budget of the operators. The involvement of consumer groups in implementing redrafts and implementation of the Code is not known.

Compliance

Unlike the ombudsman schemes explained above, the UK Code for Content does not have a central arbitrator for disputes: "Each mobile operator may choose or need to use different

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[131] See Ahlert et al at p20 on the KJM interstate regulatory commission, implementing the 2003 *Interstate Treaty on the Protection of Minors and Human Dignity in the Media*

[132] Interviewee from Austrian 3G network licensee, London 30 January 2004.

[133] Dialogue continued after the launch of the Code: European networks, content providers, consumer groups and regulators met in London 29-30 January 2004 for the 'Delivering Adult Mobile Content Responsibly' conference which IAPCODE chaired for Total Telecom. Network operators were also present at the Safer Internet Action Plan's Safer Internet Day event on 6 February.

[134] 56% of the 2000 European subscriber market was O2, Vodafone, T-Mobile and Orange – TIM and Telefonica Moviles, with less significant interest outside their domestic markets, are small in pan-European terms. See Ahlert et al at p4.

[135] UK Code at p2.

[136] Vodafone Live! Is introducing its filter in 'spring 2004', interviewee London 29 January 2004.

[137] UK Code at p4.

[138] See for instance http://www.orange.co.uk/about/regulatory_affairs.html - the Code is the first download item in the middle of the page.

organisational and technical solutions to enable it to meet aspects of the Code."[139] The content scheme is an opt-in self-classificatory scheme overseen by an independent classification body, which is the scheme adopted by ELSPA. Content is classified as '18', adult content, or not – with optional interim ratings for younger children (in Section 7). Enforcement of the Code is dependent on individual operators and it is unclear how this will be recorded and publicised: "Each mobile operator will enforce the terms of the Code through its agreements with commercial content providers." The Code is therefore a beginning of a regulatory conversation, with many details to be considered, and no key indicators of success or failure thus far.

9.3.2 Key indicators: what statistical evidence is there of usage of the Code?

None available to date – but tabloid newspapers have covered playground scandals extensively in Ireland and Australia (see IAPCODE archives for January 2004). In Japan, evidence of public concern leading to legislation to outlaw spam subject to opt-in, and to outlaw children's access to dating sites, has emerged[140].

ICSTIS, the UK premium regulator and Vodafone commissioned research in 2003 to identify consumers' attitude to premium rate mobile services. It demonstrates overwhelming approval for child access controls, and own-access controls[141].
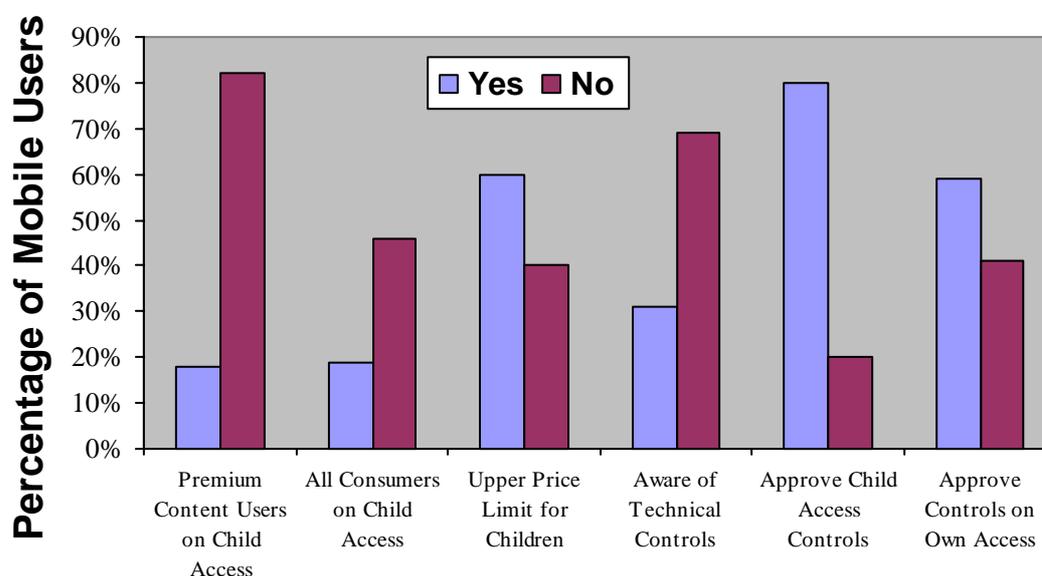
9.4 Dilemmas and challenges: hot topics developing

Differences Between Fixed and Wireless Internet

The Code itself is unremarkable, but its early adoption, prior to many adult services being known to the general public, is an exceptional achievement and reflects high awareness in the sector both of potential harms and of the value of self-regulation. In part, this can be attributed to the market size and regulatory resource of the four giant companies behind the drafting. However, there are also vital concerns that make the adoption of content controls by the mobile industry both different to narrowband ISPs and potentially a forewarning of broadband fixed ISPs' role: this Code is actually the first BSP Code.

There are six key differentiators between fixed and mobile Internet usage[142]:

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[139] UK Code at p2.

[140] See ITU (2004) *Shaping the Future Mobile Internet Society: The Case of Japan,* Document SMIS/06, authored by Srivastava and Kodate, at http://www.itu.int/osg/spu/ni/futuremobile/general/casestudies/JapancaseLS.pdf at p50: (2002, July) *Law on Regulation of Transmission of Specified Electronic Mail* – spam law, and (2003, September) *Law of regulating the act that attracts children using the Internet opposite-sex introduction sites* – anti-paedophile law.

[141] Beaufort International (2003) *Premium SMS Services Research*, at p5, at http://www.icstis.org.uk/icstis2002/pdf/SMS_RESEARCH_REPORT_MAY03.PDF

[142] Categories adapted from Tambini and Verhulst (2000) analysis of broadcasting at Chapter 1.

1. <u>Pervasiveness</u>: many secondary and even primary school students have phones with colour screens at the birth of the wireless Internet;

2. <u>Supervision</u>: mobile use by its nature is unsupervised;

3. <u>Filtering Defaults</u>: porn-screening defaults when available will be opt-in, unlike opt-out Internet Explorer, AOL and Google;

4. <u>Convergence of Capture and Distribution in One Device</u>: digital image capture and distribution is integrated – porn distribution is 'One Click Away' from digital image capturing;

5. <u>Peer-to-Peer File Sharing</u>: messaging and filesharing drives usage amongst children and profits per bit to networks;

6. <u>Liability</u>: networks are also the ISPs, and under recent surveillance legislation (e.g. the UK RIP Act 2002) have to keep a database of all Internet pages and files accessed for up to three years.

Technically, mobile Internet on-net can exclude off-net and really 'wall in' mobile Internet users. That would eliminate P2P including pornographic images by banishing mobile users from the wider Internet, which appears an over-reaction to existing and emerging problems, and creates restrictions on speech freedoms.

Broadcast video on 3G, whether time-delayed or live-streamed, presents less problems than the early video-over-broadband debates circa 1995. That's because of principles then laid down: don't regulate directly but expect networks to observe watersheds and adult content rules wherever possible. Revisions to the EU 'Television Without Frontiers' debate are being discussed just as video over mobile appears, but mobile platforms are currently excluded from regulation.

Protecting children on-net is the very least that networks can do. The fixed Internet experience has been learnt from, but mobile is a more powerful platform for abuse than fixed, and filters do not work properly (as examined above in Section 1, they suffer from 'Goldilocks syndrome' – too hot on blocking or too cold, never just right).

9.5 Some Specific Conclusions for the Mobile Networks and Content Providers

Clearly, because mobile Internet self-regulation is so novel, an exhaustive 5C analysis has been neither possible nor desirable. There is only one code, and it is in an experimental stage.

Legitimate adult content will be a major driver for wireless Internet profits: adult content filtering (Vodafone's Content Control bar launched this spring, bango.net's filters) will be opt-in, not opt-out. Legitimate networks and content owners need to protect 'on-net' brand and limit liability from the porn and P2P piracy that 'off-net' users and cowboy site operators will create. Commercial adult content on the Internet is driven by the free referral site model: free porn in small doses leads to paid porn on 'official' sites.

Illegal and harmful content can be entirely user-generated and distributed. Legitimate 3G content owners make no money from off-net P2P adult content; because the receiver pays (unlike in fixed telephony and ISP access) and networks do profit per bit, mobile operators are perceived by consumers to have a higher duty of care.

Protecting children from profitable adult content in walled gardens is the first, and very least, that networks can do. They have learnt from the fixed Internet in taking such action early. But more will have to be done, especially with <u>communication</u>: educating consumers and introducing effective filters early. The opt-in filtering of mobile networks will help (though bango.net reports that 1% of its 5 million credit-carding users have opted to avoid adult content). <u>In content</u> areas, networks still have the dilemma of acting on the distribution of P2P illegal and harmful content, the distribution of pirated and adult content. Networks have engaged in the debate early to make sure that regulatory action is reasoned, not tabloid-generated. We are not suggesting that peer-to-peer should be regulated by networks on behalf of governments driven by moral outrage at well-publicised child porn cases. However, evidence from Japan suggests that the mobile Internet has played a part in paedophilia and

child prostitution and worse. Given the personalisation of Internet technology amongst children, that is to be expected. Further research is of vital importance in this field.

Section 10: Comparison between self-regulation in converging media sectors

General conclusions from sectoral studies are drawn below, with summaries of key findings. We explain how important legacies of institutional regulatory schemes appear to be, before exploring in depth two Internet self-regulation findings: that where self-regulation exists, its practise is very uneven across the EU, and that where it is does not exist, there is an urgent and growing need for technical assistance that has not so far been met.

Our key finding is that technological progress brings about increasingly rapid and turbulent change and self-regulation can respond more rapidly and efficiently than state regulation. There is no universally acceptable recipe for successful self-regulation, as regimes must be adjusted to the needs of each sector and other circumstances (technological change, changes in policy to respond to changes in technology, a country's legal system, case law of European courts, and so on).

To illustrate, broadcasting is an area in which technological progress brought complexity and the increase of self-regulation responds in part to policy changes prompted by those technological changes. The European monopolistic broadcasting model which developed with radio, maintained for television, was first challenged by commercial terrestrial services. Further pluralism brought about first by cable and satellite, and then digital technologies including the Internet, forced changes in the regulatory environment and public authorities increasingly delegated the power to regulate to market actors. The trend is towards continued delegation (with regulatory authority audit of the resources, procedures, transparency, stakeholder participation and market effect of the self-regulatory scheme adopted).

10.1   Summary of Key Findings by Media Sector

Our surveys revealed the following key findings:

Press: press councils have not followed a pure self-regulatory model in any country, being formed in response to direct threat of government legislation. The exception, Catalonia, may prove the rule, given its unusual regional circumstances within Spanish federal jurisdiction.

Broadcast: a clear trend towards content self-regulation has developed, though national models demonstrate clear divergences. There is also a difference between the self-regulatory type in publicly funded broadcasters and commercial broadcasters.

ISPs: A clear model has appeared following the 1998 Recommendation, and pan-European groupings such as EuroISPA and INHOPE are spreading best practice effectively.

- Different national, even company-based, approaches to Notice and Take Down reveal more than cultural specificities. There is a dangerous trend towards a private form of censorship in NTD approaches, and a 'shoot first, ask questions later' approach to removing questioned content..

- 'Put back' should be seriously considered as a policy option when the E-commerce Directive is reviewed. Presently ISPs appear to be substituting their view of illegal, harmful (and copyright infringing) content without effective legal procedures for content producers to respond and appeal. This is a direct infringement of freedom of expression on the Internet, which is unchecked by current legislation.

- Filtering, trustmarks and chat rooms remain areas where self-regulation has raised far more concerns than solutions. Urgent further research is needed.

Film Classification: This case study produces the most divergent results, in part due the longevity of regulatory traditions in the medium. A converged approach across film, video and computer games has been followed in Netherlands, in a co-regulatory model with legal sanction. In Germany, a politically inspired new co-regulator KJM has recently been formed (2003) which covers all sectors.

Computer Games Ratings: a genuinely pan-European games rating system has been negotiated over 3 years, with the exception of KJM in Germany. The degree of coverage of

PEGI appears wide, but as gaming platforms increase with broadband interactivity and mobile platforms, the success of this pan-European (except Germany) scheme remains to be judged.

Mobile Internet self-regulation is an entirely new, but promising, system for a single country thus far. Given the pan-European scope of the major UK networks and the brand extension that this offers for rating/filtering, and for consumer education and kite marking, it promises a pan-European solution much like PEGI. However, it is apparent that national co-regulatory bodies such as NICAM and KJM have the potential through their legal remit to fragment a pan-European solution (and hence a single market for content).

10.2   The Legacies of Mono-Media Self-Regulatory Schemes

A very obvious cross-sectoral conclusion is that legacy and history matter:

- o   Print as the oldest and most political sector has survived the century or more of self-regulation relatively unscathed, perhaps reflecting its liberation from the state-censored 1930s-40s.

- o   Broadcasting and film have produced stronger state control, with co-regulatory solutions for producers and journalists very much devolved from state control rather than resulting from own-initiative.

- o   Computer games, ISPs and mobile, as recent phenomena emerging from these off-line media legacies, have thus far maintained a more coherent co-regulatory model.

- o   The development of co-regulatory solutions in some countries, notably Germany, may result in stronger public interest intervention in the fledgling self-regulatory schemes we have surveyed.

Historical analysis shows that self-regulatory schemes in the media have generally been designed in response to regulatory crises in which legislative control could only be avoided by instituting an effective self-regulatory scheme. Historical legacies matter in regulatory design, and this 'emergency' nature of self-regulatory inauguration is important. Print succeeded in self-regulating, broadcasting was government regulated, and film was classified by censors in part due to historical accidental timing. In the period from 1918 to the 1970s, direct state regulation by the state was at its zenith, coinciding with broadcast and film content censorship. By the 1980s and especially 1990s, state withdrawal from high-technology sectors resulted in a less intrusive political reaction to the excesses of video games, video cassettes and ultimately Internet content. The transfer of regulatory responsibilities from the traditional media to the online news services of broadcasters and newspapers has been accompanied by increasing deregulation in broadcasting on the one hand and the extension of print media regimes to online services on the other. Already developed self-regulatory mechanisms were translated into the new medium, but with some deregulatory consequences for both new and old media.

Our fieldwork found that codes are adopted for one or more of the following reasons:

- As an alternative to direct state regulation;

- To prevent government regulation;

- To build public trust, consumer confidence;

- To avoid legal or user-perceived liability (though codes may in some cases increase liability and due diligence commitments);

- To protect children and other consumers;

- To exert moral pressure on those who otherwise behave in an "unprofessional" or "socially irresponsible" way;

- As a mark of professional status;

- To raise the public image of their industry;

- To provide a cheaper/ faster mode of dispute resolution from the courts; and[143]

- To develop a set of common standards for services and products.

In addition to these findings, however, there may be other hidden motivations that respondents are less likely to report. In particular the adoption of a code of conduct can be a conscious or unconscious attempt to exclude competitors from a market by raising barriers to entry.

10.3   Convergence, the Single Market and Future Trends in Self-regulation

Significant economies of scale are likely to be realised through functional integration of certain key aspects of the content regulation value chain horizontally across sectors and across EU Member States. Computer games rating has illustrated the potential for developing a common pan-European ratings structure. Germany and the Netherlands operate a cross-media rating and labelling scheme. In a situation of increasing cross border trade within the EU, this trend is set to continue. An important use of the Internet is to access news. Journalistic ethics online, often an extension of systems developed for the print media over decades, has the potential for a pan-European structure. Online news services, online versions of newspapers, news aggregators, as well as self-regulatory mechanisms to which they may belong could soon acquire relevance beyond national borders. Readers may start seeking access to self-regulatory bodies and complaint mechanisms located outside national jurisdictions.

The legislative role of the European institutions is currently minimal in cross-border cooperation, because of a lack of legal competence in this field (prior to any EU constitutional settlements as a result of current debates in spring 2004), but more research and development, benchmarking and technical assistance in disseminating best practice between Member States is essential to introduce economies of scale and scope in self-regulation across the various converging media sectors in the single market, and to ensure greater effectiveness of self-regulation.

The general trend is towards an expansion of scope of co-regulation, often at the expense of statutory regulation. IRAs such as Ofcom in the UK are exploring the possibility of 'sunsetting' particular regulations in the event that co-regulatory alternatives can be found. Clear procedures for auditing self-regulatory schemes should be devised and implemented, according to transparent criteria. We explain the criteria and process in Section 12.

10.4   Funding and Sustainability of Media Self-regulatory Regimes

Adequate resourcing is the key to successful self-regulation. Policy on self-regulation must take into account a broader view of the sustainability, effectiveness and impact on free speech of self-regulatory codes and institutions. We recommend applying an auditing procedure for establishing self-regulatory institutions and codes. Given the centrality of speech freedoms in constitutions, we hold that this regulatory audit burden is a minimal price to pay for effective self-regulation in the public interest.

Where there is a clear industry interest in self-regulation to improve market penetration, or to head off threats of statutory regulation, there are adequate market incentives for resources to be allocated to self-regulatory activities. However the calculation of enlightened self interest required is vulnerable to changing personnel and market structures such that self-regulatory institutions, where they do not have access to levy funding, will not enjoy the funding necessary to meet standard requirements of transparency, accountability and due process. Where funding is provided to encourage self-regulation, funding should be directed to those self-regulatory institutions that are able to fulfil general audit criteria, including freedom of expression tests, and therefore likely to develop into self-sustaining codes and institutions.

A wide variety of models of self-regulatory tools exist. Some of these are based on adequate standards of transparency, inclusion, due process, resources and so forth, and some

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[143] See COM(2002) 196 Final Green Paper On Alternative Dispute Resolution In Civil And Commercial Law 19.04.2002 http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf at 10-12.

clearly are not. As a result there is some concern with the development of codes that insufficient standards apply to both law enforcement/child protection and protection of freedom of expression rights. If these mechanisms are improperly structured we can expect public harm to result in the medium term. The European Commission and Council of Europe should develop and publish clear benchmarks for acceptable levels of transparency, accountability and due process and appeal, particularly with regard to communications regulation that may impact upon freedom of expression. Self-regulatory institutions should follow the guidelines for transparency and access to information that are followed by public and government bodies according to international best practice. At the very least self-regulators should provide summaries of complaints by clause of code of conduct, numbers of adjudications, findings of adjudications on their website. Failure to conform to these baseline standards of transparency should be viewed as a failure of self-regulation.

10.5   Self-regulation and Freedom of Expression

Self-regulation has an ambivalent and tense relationship with fundamental rights to freedom of expression. Where freedom of expression is defined <u>negatively</u> against state interference, self-regulation is likely to be viewed favourably for its impact on freedom of expression. However this does not mean that positive rights to free speech are protected by self-regulatory institutions. On the contrary, because self-regulatory institutions are not public bodies there may be fewer forms of redress against them. Self-regulation could be used instead of government regulation to avoid constitutional free speech issues when regulating more stringently: for example, broadcasting pre-publication control as carried out by the FSF in Germany and similar bodies in other countries.

Self-regulation offers a complaints procedure and alternative dispute resolution: the press councils offer the possibility of achieving redress via a complaints mechanism faster and less onerous than courts. However, there may be less protection for rights than with the protection offered by the law. For example injunctions, fines and sanctions may be unavailable within a self-regulatory regime. Similarly victims may not be able to access financial compensation if complaints are resolved by self-regulation rather than in court.

10.6   Stakeholder Participation in Co-regulation

In more established and legitimate self-regulatory authorities, code drafting and revising often includes various levels of outside participation and consultation with interest organizations such as consumer associations, trade unions, and non-governmental organizations. Self-regulatory codes vary from some based on exhaustive consultation with all stakeholders to codes that have been written by one lawyer with apparently no consultation to simply "borrowing" codes from others without any effort at tailoring model codes to local circumstances (not even substituting the original scheme's name on it!) Those who are included in code development and adjudication include:

- members of the public that are independent from any special interest or organization (also called "independents" or lay members);

- consumer representatives;

- experts solicited for their opinion in the process; and

- professionals within the regulated area.

Despite recent progress, consumer groups often lack the technical and legal knowledge of the application of media self-regulation to the Internet, especially in new capabilities of mobile and broadband. If co-regulation is to operate successfully, it is essential that IRAs or ministries, in cooperation with the Commission, ensure that a continual programme of technical and regulatory education be provided to consumer groups for their effective participation and trust in co-regulatory fora.

From the Press Council survey, a key lesson is that it is essential to achieve a balance between the self-interest of the industry represented on its board and the participation of lay members. This combination strengthens its legitimacy. This, in turn, may lead to a virtuous circle in which the enlightened self-interest of the industry can help the media to willingly fund

the mechanism of code implementation, and abide by the decisions of the council. Industry professionals should constitute a minority on boards of content self-regulatory bodies. Measures should be adopted to ensure that bodies that are 100% funded by their industry are not captured by it. These measures could include: fixed tenure for board members, dismantling separate "funding boards" (who may attempt to hold regulatory boards to ransom), replacing them with a compulsory levy on industry participants, as currently applies to premium telephony in for instance the UK. This transparent and guaranteed funding then permits industry participants to play a much greater expert role in advising the regulator, with less conflict of interest.

10.7 Cross Sectoral Comparison

The table below illustrates that there is a degree of cooperation across sectors and across countries between self-regulatory institutions. With regard to cross sectoral cooperation, it is clear that cooperation tends to focus on rating and labelling functions in the regulatory process, and take place where there is a degree of linguistic and cultural homogeneity.

Country and industry coverage of selected EU self-regulatory schemes:

	ISPs	Film	Video	Broadcast	Press	Games
Belgium		cicf	bvf	FSF Self-regulate	RAAD	ISFE
Denmark		mccy			DPC	
Finland		fbfc			CMM	
Greece		yc				
Portugal		cce			SCMV — Ombudsman / Press Council	
Sweden		sbb				
UK	EuroISPA	bbfc	vsc		UK PCC	
France		cnc	sev			
Ireland		ifco				
Italy		rc				
Luxembourg		cds			Press c.	
The Netherlands		NICAM			RAAD	
Spain		cccf			CIC in Catalonia	
Austria		abm	fsk		RAAT	
Germany				FSF KJM Press c.		

Note. This table is indicative, not exhaustive

Colour legend:

government   private sector

regulation   self-regulation
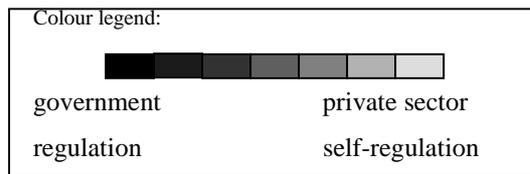
Refer to sectoral analysis for translation of acronyms

Section 11: Trust, Political Culture and Media Self-Regulation: A Cross-Country Comparison.

In considering the range of self-regualory solutions across Europe, it is necessary to reflect on exactly why there is a range of responses, and whether it is possible to conceive of a European model of media self-regulation. What is the most important national factor with regard to self-regaultion, and what are the barriers to international cooperation? Is it legal and constitutional and the implications for self-regulation or rather the differences in cultural content standards?, or is it rather a more complex set of factors relating to institutional political economy. This chapter aims to place our media self-regulation survey in the context of country-level differences and EU-wide changes that impact on member states in contrasting ways. We find this level of analysis to be most useful for understanding self-regulation on the national level, for policy-making that is concerned with coordinating national media approaches across sectors, and for evaluating prospects for convergence in practices on the EU level.[144] Our approach also entails difficulties in assessing changing political cultures, for instance the enormous political, economic and socio-cultural changes in Iberia since Spain and Portugal joined the EU in 1986. Cultural as well as economically rational motivations differentiate state and market actors. This is illustrated by comparative national surveys of telecommunications reform[145], as well as broadcasting regulation[146], and technical self-standardization processes[147]. International organizations present further complexity: multilateral solutions may therefore be theoretical solutions to intractable real-world problems. Yet, when self-regulation is put into practice this is often first done on the national level, and here attention to economic governance, political culture, civil society and institutions in general may make a crucial distinction in assessing which self-regulatory schemes succeed and which fail.

11.1   Hypotheses for Internet Content Self-Regulation

The analysis aims to identify patterns of similarities and differences between countries, and establish whether it is sectors or national variances that produce difficulties in harmonization of Internet self-regulation. The kind of questions we ask are:

- Is self-regulation likely to succeed in some countries but not in others?

- What are some specific potential problems in adopting self-regulation?

- How does this affect prospects for pan-European self-regulatory schema?

- Where cross-border agreement can be considered, how can it be facilitated?

Rather than scanning country by country, a task better suited to individual country experts, we consider groupings of countries, and in the following sections, we consider three potential hypotheses:

- *Culture:* EU member states differ in cultural norms regarding acceptable levels of risk associated with violent or sexually explicit content.

- *Economics*: Individual sectors in EU member states are able to coordinate across on specific technologies and content types, for instance computer games ratings and mobile content filtering

- *Politics*: EU member states still have different economic and cultural institutions in place that establish the norms necessary for success of self-regulation; while some institutions promote coordination between stakeholders and the trust of the public, others fail to provide the environment where self-regulation can be established or practiced.

The first relates to cultural variances between member states, the second to variances between sectors which are nationally culturally specific and those where sectoral cultural values appear to be pan-national. The third hypothesis relates to a broader institutional puzzle that importantly relates to one of the important economic motivations behind the European Commission promotion of self-regulation – namely, to establish

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[144] While the flaws in isolating unilateral or mono-sectoral regime analysis may be apparent, a broader holistic analysis may be expected to raise as many difficulties as it resolves.

145 Levy, Brian and Pablo Spiller (1994) *The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation* 10 J. Law, Economics and Organisation 2 at 201-246

[146] Wolfgang Hoffman-Riem (1996) *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries* Guildford Press; Eli M. Noam (ed)(1985) *Video media competition: regulation, economy, and technology change* Columbia University Press.

[147] Cowie, Campbell and Christopher Marsden (1999) *Convergence: Navigating Through Digital Pay-TV Bottlenecks* 1 Info 1 at 53-66

a more competitive, more integrated, and faster growing EU economy. In the following sections we attempt to identify from our case studies which of these hypotheses hold true

Our analysis of comparative self-regulation led us to consider the effect cross-border movement of content has on national self-regulation. Internationalization of producers directly catalyzes pan-European schemes of self-regulation. In the case of press, broadcasting and film ratings, we found that regulatory, self-regulatory and co-regulatory mechanisms were developed exclusively on the national level:

- *Press* is the least international and there is least content consumption outside of the countries in which it is produced;

- *Broadcasting* is characterized by a production process that is more mixed, yet programming is still very nationally specific, and in many cases such authority is even devolved to sub-national, regional levels;

- *Film classification* was an interesting paradox in that content is very international, in fact most of it being imported from the US. However, due to the legacy of national-level censorship, even recently developed and highly self-regulatory mechanisms such as the Kijkwijzer ratings by the Dutch NICAM are exclusively national.

The legacy of media structure and national settlements in offline media appears to be even more important in creating path dependency and historical 'lock-in' of national regulation than could be anticipated. In contrast to these more traditional media industries, we see more cross-border self-regulatory efforts in ISPs, electronic games, and even video and DVDs:

- *ISPs and electronic games*: EU-wide associations help coordinate national self-regulatory efforts, and in the case of games implement a single rating mechanism for all of its members.

- *Videos and DVDs*: the cross-border effect is that content is rated in one member state and then sold and consumed in a neighboring one comprising the less dominant territory of a single linguistic market:

  o In the case of Austria and Germany, a formal arrangement has been developed where localities in Austria implement the German largely self-regulatory mechanism of ratings.

With Internet content rating in particular, national border issues play an even less important role. Here, trust marks and filtering techniques are applied regardless of where content originates and is consumed. Hotlines across the EU have also had to deal with the problems of territorial jurisdiction and are constantly moving to increasing cooperation between such organizations across the EU and in North American and Japan (for instance by INHOPE).

It appears from the film classification example that even in a highly internationalized industry, it is local consumer/political preference for national cultural ratings (for violence, strong language or nudity, for example) which prevails. However, in the case of computer games, a pan-European ratings system was possible, with no national legacy to place obstacles in the way of a single market approach. Here one area of possible future research is to study preference heterogeneity across generations and EU regions. While national cultural issues are important for traditional media, the fact that they are no obstacles for content in new media makes us seriously doubt that essential national differences within the EU as a decisive new media regulation policy issue.

To analyze the institutional aspect of national differences that are most likely to affect emergence and functioning of self-regulatory practices, we next focus on a set of national factors, describing the relationships that exist in our case studies.

11.2   National Factors

We examine economic, political, cultural and enforcement distinctions in media self-regulation between the countries surveyed. We take these to be internal in the sense that they are <u>unique institutional features</u> of domestic economic and political systems in which media policies are implemented. These factors are both directly constitutive of the practice of self-regulation, and changes in either these national factors or in media policy affect each other to some extent. More importantly, our analysis of different industry sectors can now be placed in this broader institutional context that explicitly takes into account national divergence and convergence in economic foundations, political culture and regulatory regimes.

11.2.1 Varieties of Economic Institutions

In examining the economic foundations of European markets, the accepted point of departure is the literature on 'varieties of capitalism', distinguishing between Liberal Market Economies (LMEs) and Coordinated Market Economies (CMEs). The central reason why the analysis is key is that self-regulation aims to overcome the very market coordination problems that present the theoretical puzzle in the 'varieties of capitalism' thesis. Countries can be grouped into:

- LMEs (generally native English-speaking OECD countries) and

- CMEs (most Continental Europe, especially Germany, and East Asia).

In the study of self-regulation, this applies in interpretation of the dynamics of stakeholder mobilization and cooperation in different media industries across our cases.

In our analysis of self-regulation of different media industries, we were able to identify different levels of stakeholder recruitment into the self-regulatory mechanisms. In most cases, the government played a key role in initiating the drafting of a code of conduct and establishment of an organization tasked with implementing self-regulation. However, the character of government involvement varied across countries. In the case of ISPs, it was both a threat of government intervention and the assumption that government would not be able to regulate Internet content directly that led to development of self-regulation by the industry, which is exactly the same dynamic as in press regulation a generation earlier.

11.2.1.1 CMEs and Media Self-Regulation

Germany: the model of close cooperation between government and all relevant stakeholders was already evident in the broadcasting, the film industry, and the press. Internet content regulation has already been integrated into the national media "co-regulatory" structure. The pan-European industry-led electronic game self-regulation scheme has not been implemented in Germany exactly because this CME has already established its national-level network among stakeholders to integrate games content regulation into the national scheme that deals with protection of children across all media.

Italy: Other more "coordinated" approaches are exemplified in the government's attempts to work with the industry and civil society to develop a self-regulatory system for Internet content.

Belgium and Spain: the incorporation of the different linguistic communities into decisions over media content, and the Spanish regimes that incorporate the concerns of the Catholic Church are also examples of more coordinated approaches to media self-regulation.

11.2.1.2 LMEs and Media Self-Regulation

The approach can be recognized not only in the US (which remains the prototype of such a model) but also to some extent in self-regulation as applied in Ireland, UK, and increasingly in the Netherlands.

Ireland: the government declared a very decisive policy to enforce Internet co-regulation. The ISP code of conduct, once established, was voluntary and left to the industry toimplement. The Internet Advisory Board in Ireland reports directly to the Ministry of Justice, and there is little evidence of the kind of thick network of coordination that exists in Germany. Even higher content standards – for broadcasting, press, and film ratings – are decided either as a matter of government policy in accordance with the Constitution.

United Kingdom: Internet content, videos and electronic games were left almost entirely out of the reach of government, civil society and interests groups. However, as the regime slowly changes with the introduction of Ofcom, we may see a movement towards a more coordinated, continental model in the overall economic structure of media self-regulation.

Netherlands: NICAM presents an interesting case of government's disengagement, and as such it perhaps stands on the cross-roads between the ideal types of CME and LME approaches to self-regulation.

The 'varieties of capitalism' approach allows us to see how self-regulation fits into different institutional arrangements that characterize EU national economies. Development of self-regulation is itself a form of institutional change, going beyond a static picture of institutional arrangements, in large part spurred by the new demands of the digital economy and economic reforms coming from the evolving process of EU integration.

11.2.2 Comparative Political Cultures

Political culture is intimately related to the foundations of a national political economy. However, distinctions between coordinated and liberal market economies do not capture elements of political culture such as trust and social capital. In this field, different analysts have interpreted political culture to mean citizens attitudes towards the government, 'thickness' or depth and organization of social and community networks, or general understanding of the norms of conflict and cooperation. Our focus in examining political culture is to analyze briefly how very concrete manifestation of culture such as attitudes towards the government, levels of trust, and a general level of social capital can provide conditions for development of media self-regulation. We also pose the difficult questions of whether religion, gender roles and national identity play a role fashioning media content and national responsibilities for content regulation. Table 11.2 below displays a summary of content concerns for self-regulatory codes in three different media industries, for EU states.

Table 11.2. CODE OF CONDUCT CONTENT CONCERNS IN THE EU

	Film							Video Games						ISPs						
	Vviolence	Nudity	Sex	Language	Controlled substance	Hate	Other	Violence	Bad language	Fear	Sex	Drugs	Discrimination	ICP coverage	Business information	Illegal activity	Material harmful to minors	Hate speech	Bulk email	Data protection and privacy
Austria	✔	✔	✔				ɔ							✔	✗	✔	✔	✗	✗	✔
Belgium	✔	✔	✔				ɔ							✗	✔	✔	✗	✗	✗	✔
Denmark	✔	✔	✔			ɔ	ɔ													
Finland	✔					˅	˅													
France	✔	✔	✔	✔	˅	˅	˅							✗	✗	✔	✔	✗	✔	✔
Greece	✔	✔	✔			ɔ	ɔ													
Ireland	✔	✔	✔	✔	˅	ɔ	˅							✔	✔	✔	✔	✔	✔	✔
Italy	✔	✔	✔	✔	˅	ɔ	ɔ			✔				✔	✔	✔	✔	✗	✗	✔
Luxembourg	✔	✔	✔			ɔ	ɔ													
Netherlands	✔	✔	✔	✔	˅	ɔ	˅							✗	✔	✔	✗	✗	✔	✔
Norway	✔	✔	✔			ɔ	ɔ							✔	✗	✔	✗	✗	✗	✔
Portugal	✔	✔	✔			ɔ	ɔ													
Spain	✔	✔	✔	✔	˅	ɔ	˅													
Sweden	✔	✗	✔	✗	✗	ɔ	˅													
UK	✔	✔	✔	✔	˅	ɔ	˅							✗	✔	✔	✗	✔	✔	✔
Germany	✔	✔	✔	✔	˅	˅	˅	✔			✔		✔	✔	✗	✔	✔	✔	✗	✗

(A single large ✔ spans the Video Games columns for most rows.)

As we can see, there is a wide variety of subject areas which are adopted by different national codes, more particularly for ISP Codes of Conduct (where Ireland is most comprehensive). Hate speech appears a particularly nationally-determined concern, and in Sweden, film censorship concentrates almost exclusively on sex and violence, whereas in France all seven content categories are used. It is all the more remarkable, therefore, that video games ratings have broad pan-European acceptance, despite German exceptionalism.

Our sectoral industry analysis of self-regulation showed that political culture in terms of trust and social capital is likely to play a role along the entire value chain. As soon as the process of content production is complete, codes of conduct are applied to self-regulate such content. Not only does the process of drafting and implementing a code of conduct differ across different countries, the very content of the code is likely to be influenced by dominant conceptions about the levels of trust and social capital. We now examine how trust affects self-regulation both [1] between parties and also [2] between the scheme and the general public.

11.2.3 Trust Amongst Parties in Self-Regulation

The first horizontal level is between stakeholders, who either succeed in coming together to self-regulate, or who lack enough trust in each other and instead pursue more adversarial paths such as litigation, de-regulation, or demanding more government regulation. Once a self-regulatory scheme is set up, social capital plays a role in providing a secure environment in which actors can rely on the established code of conduct as a means of protection from ad hoc government interference. Hence, in addition to the economic incentives for joining a self-regulatory scheme, we also expect higher levels of trust and social capital to encourage stakeholders and industry members to consider a code of conduct as a credible document and encourage them to join the scheme.[148]

Ireland: ISP self-regulation shows that the government's steadfast commitment resulted in high levels of participation in the scheme from the country's largest ISPs: the Irish ISPs participated in the drafting of the code, and the implementation of the code was left to their industry association. Both contributed to continued commitment of the industry to the self-regulatory scheme.

UK: New UK regulator Ofcom is in 2004 engaged in the process of building trust in self-regulation following the Communications Act 2003 that restructured the institutions of media regulation. In particular, Ofcom is tasked with accreditation of co-regulatory codes of conduct, and this task can be completed successfully only if Ofcom first earns the trust of the industry and commands not only the power of credible threat but also the trust that it will promote self-regulation impartially for large and small content providers and carriers, without an indirect advantage to those associated with, and potentially capturing, public policy (particularly BT, BSkyB, Vodafone and the BBC, all of whom can stimulate universal access to broadband and digital TV).

We have also observed that lack of trust and social capital can lead to setbacks and obstacles to implementation of codes of conduct:

Italy: government attempts to implement a code of conduct for Internet content, particularly for the protection of minors, was not successful in part because the government did not earn the trust of a majority of the country's ISPs.

Film Classification: Low levels of trust also exist across countries in the area of film classification. Different national rating boards simply take the issue of film classification to be of such national importance that they refuse to delegate such power to a pan-European body. While most analysis of the lack of harmonization in the film ratings has assigned the phenomenon to cultural differences, our analysis of content standards already reveals many similarities and cross-border influences. The lack of cooperation among Europe's national rating boards must involve legacies that do not conform to contemporary political conditions.

11.2.4 Consumer Trust and Media Literacy in Self-Regulatory Solutions

The second vertical level on which both trust and social capital play a role is public awareness. Our sectoral analysis identified the issues of public awareness and media literacy to be of key importance, both as stated in many codes of conduct and in the practical implementation of the self-regulatory scheme. In order for many content rating schemes to function, parents need to be aware that the ratings exist, able to interpret them correctly, and informed enough to know how to apply them to the decision of whether their children should access a webpage, see a movie, or play a video game. While it is not immediately obvious that this process of awareness and media literacy is related to trust, in order for any such scheme to be effective it is imperative that parents are confident in the ratings given. In effect, when buying a video game, going to the

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[148] The concept of social capital is not usually applied to market actors, or to organizations. However, our argument here is that just like individuals in a community can benefit from high levels of social capital (e.g. networks and trust), so can stakeholders, including market actors and organizations.

cinema, or installing an Internet filter, parents delegate an important part of their decision about what their children should see to the self-regulatory scheme. They trust self-regulation to deliver and enforce the media content standards for their children. The issue of social capital is more difficult to analyze, but it is certainly relevant in the case of age verification mechanisms. In communities with high social capital, voluntary or mandatory age-verification mechanisms can be expected to be more easily and more consistently implemented.

11.2.5 Civil Society and Self-regulation

On a more general level, the presence of a vibrant and active civil society is often taken as a valuable component of fostering responsiveness, transparency and accountability of government policies in general.[149] As such, a vibrant civil society can be expected to improve the chances that self-regulatory schema for media would be implemented and sustained successfully. Strong civil society in this area is characterized by presence of well-organized interest groups, including consumer advocacy groups, societies for protection of children and minors, parents' associations, and groups dedicated to protection of speech and artistic expression. Regardless of the media industry in question, national self-regulatory schemes with active and well-organized civil society groups that incorporate a more diverse group of stakeholders, than only the representatives from the government and the industry, create a virtuous circle of participation, transparency, responsiveness and publicity. Maintaining the primacy of public interest concerns within the media self-regulatory framework entails fostering the input of national civil society organizations.

Religious and cultural differences between countries have been subject of intense debates in foreign and domestic policy. In this context, it should not be surprising that EU member states find themselves on opposing sides of many of the cultural divisions constructed in the scholarly and policy literature – reflecting religious differences, linguistic similarities and distinctions, colonial and Cold War history, and pre-democratic historical legacies. Although our analysis of broadcasting, press, and film standards shows anticipated differences– delineating Mediterranean, Scandinavian, Anglo-Saxon content concerns – it is important to note such differences also exist across industry sectors and are also influenced by issues other than culture. Religion also has quite complex influences:

Spain and Ireland: despite the fact that both have relatively strict religious standards on film content, their regulation strategies in this area depart significantly: Ireland uses government censorship while Spain has a self-regulatory scheme for video ratings that tries to incorporate the standards concerns of the Catholic community.

Italy and Sweden: Both nations are characterized by higher participation of government and reliance on government regulation in areas such as film. Lack of development in self-regulation cannot be assigned to religious or cultural differences alone. If this were so, we would expect their self-regulatory experiences to diverge proportionally to the two countries' religious and national traditions: they are actually remarkably similar for two such different political and social cultures.

Computer Games: cultural obstacles to pan-European content rating have already been overcome by the pan-EU self-regulatory system in electronic games, forcing us to reconsider when and where culture determines prospects for success of either national or EU-level self-regulation.

11.2.6 Regional and Generational Diversity: Within and Across Nations

It is important to note that issues related to culture – in terms of trust, social capital, religion and national traditions – need to be placed in the context of regional diversity within nations, and commonality between different country's citizens within the European Union. In media self-regulation, the issue of generational differences is already a key cultural distinction that has little to do with national cultures. Additionally, levels of education and the place of residence influence people's media literacy, access to the Internet, and media content consumption and standards in general ,as we will see from the 2004 Eurobarometer survey of trust in Internet e-commerce.

In our analysis, we have observed that film and video rating schemes already devolve authority to regional authorities in countries such as the United Kingdom, Germany, Belgium, and Austria. The pan-European computer games self-regulation scheme was in part made possible because of the relative lack of

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[149] For an in-depth theoretical discussion of different concepts of civil society, see Andrew Arato and Jean-Louis Cohen, *Civil Society and Political Theory* (Cambridge, Mass.: MIT Press, 1992).

a legacy of organized political institutions both within the industry and among national stakeholders concerned with video games rating.

Is there an institutional 'regulatory gap' in new technologies such as computer games and the Internet? If so, we might expect the expertise gap to be reflected in user group change from older media types. Detailed 2004 Eurobarometer figures illustrate that young educated professionals across Europe are more similar than national populations, and therefore form a more uniform community for self-regulation.

EUROPEAN UNION PUBLIC OPINION ON ISSUES RELATING TO BUSINESS TO CONSUMER E-COMMERCE – EXECUTIVE SUMMARY
The European Opinion Research Group

Socio-demographic analysis

		Yes	No	Don't know
EU15		16	83	1
Gender	Male	20	80	1
	Female	13	86	1
Age	15-24	23	77	1
	25-39	25	75	0
	40-54	17	83	0
	55+	6	94	1
Education	Up to age 15	5	95	1
	16-19	16	84	0
	20+	28	72	1
Occupation	Self-employed	23	77	0
	Managers	32	68	0
	Manual workers	16	84	0
	House persons	8	91	1
	Unemployed	17	83	0
	Retired	4	95	1
	Students	27	72	1
Residence	Rural/village	14	86	1
	Medium town	15	84	0
	Large town	21	79	1
Income	--	11	88	1
	-	12	87	1
	+	18	81	1
	++	29	70	1

Income and education were important issues in the analysis of the use of the Internet, with very clear differences in the level of e-commerce usage between highly educated and/or well paid respondents as opposed to less highly-educated/less well paid consumers.

While only 5% of those educated up to age 15 had made purchases through e-commerce, the figure rises to 28% of those educated to age 20 or beyond.

Similarly, while only 11% of those on the lowest income had **made purchases over the Internet**, this figure rises steeply to 29% for those at the other end of the income scale.

There was also a noticeable difference between the buying habits of people in cities (21%) as compared with those living in the country where the figure was only 14%. The same is valid for occupation: managers (32%) were twice as likely to have **made purchases over the Internet** than manual workers whose figure is only 16%.

Finally, only 6% of people aged over 55 had bought in this way compared with 25% of those aged between 25 and 39.

By contrast, national figures simply reveal enormous gaps between four tiers of countries: tech-savvy (Sweden, Denmark, Netherlands), tech-conscious (UK, Germany, Ireland, Austria, Finland, Luxembourg), tech-cautious (France, Italy, Spain, Belgium), and late-adopters (Greece, Italy and Portugal)[150].

Where mobile phone penetration is almost uniform in the EU 15, Internet use may be expected to become similarly become similarly ubiquitous and uniform. Differences in Internet use between grandparents and grandchildren may always exceed those between teenagers in different countries. This 'generation gap' may explain why video and computer games classifications have been easier to harmonize on a pan-European basis than more intrusive content types such as suitable adult content. Nevertheless pan-European regulation of such content types as spam and privacy regulation demonstrate that progress is possible.

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150 These four tiers equate to percentages of population who have purchased online, from 31-37% (tech-savvy), 17-26% (tech-conscious), 9-12% (tech-cautious), 3-7% (late adopters).

11.2.7 Self-Regulation and the Courts: Private versus Public Enforcement Practices

Analysts have studied diffusion of regulatory models and globalization of trends in deregulation, combined with an increasing adversarial approach to litigation. There is also an increasing attention to regional governance in the European Union, which relates to our previous discussion of regional diversity as well as a general role of regional governments and their relationship to Brussels[151]

A mode of viewing self-regulation is to consider it as a form of privatizing enforcement, reducing the role of the government but also preventing the proliferation of adversarial private litigation that characterizes US regulatory practices. In this respect, self-regulation is both cost saving and can be seen to build on institutional foundations such as trust and coordinated markets (especially in CMEs) in order to prevent some of the negative side-effects that come with ending public enforcement in the form of government legislation or litigation through courts[152]. Most notably, this feature affected self-regulation of ISPs after the first Yahoo! trial in France. ISPs across Europe became hesitant to protect the privacy of their customers and looked for ways to avoid the possible risk of costly litigation, often by over-reacting to requests for takedown. In this situation, the new E-Commerce Directive served to re-establish trust by providing a safe-harbour provision of ISPs that comply with all of its demands for a functioning and fair notice-and-take-down policy. If self-regulation continues in this area, we may see further divergence between the EU and the US approach to ISP responsibility over issues such as copyright and harmful content. At issue is not only the difference in free speech definition and protections but also in the regulatory approach to how given standards are enforced. With self-regulation, EU member states have an option of a privatized form of enforcement that relies neither on expensive litigation nor on government legislation.

However, this is a further area where national differences come into play. For example in press self-regulation, we see different radically different volumes of libel suits between countries such as the UK and Italy. Again, in addition to culture, differences in the type of standard enforcement are a possible explanatory variable. Across Europe, if self-regulation of media continues to develop, we may see different degrees of privatization of enforcement.

11.3 Conclusion: Mechanisms of Self-regulation in Europe

It is arguable that the media self-regulatory tradition (though originating in the modern era in Scandinavian ombudsmen) is most advanced in the LME countries (in part due to their intact liberal constitutional survival of the 20th Century and avoidance of Fascism and Communism). One would expect that countries most politically committed to a role of the state in economic planning would be least willing to delegate regulatory authority to non-state action. At the same time, if self-regulation is based on high levels of trust and very dense network between overt state intervention and non-state stakeholders, then co-regulation seems more likely to develop in CMEs such as Germany. The intermediate form of co-regulation emerges where the stronger the state's view of its role in economic and cultural policy-making, the stronger also its view of its co-regulatory role in important economic sectors, including especially Internet. In this country-level analysis, we have not accounted for cultural views of media industries in full, and clearly much regulation of broadcasting and film is based on the promotion and protection of national content industries, with France the strongest example. While we cannot conclude with certainty under which institutional conditions self-regulation develops, we found evidence that in order to fully understand the pattern of media self-regulation development in Europe we must take into account national factors such as economic foundations, political culture, civil society, and regulatory trends. Because these factors are internal, they also change as policy is implemented and takes hold. Therefore with potential development of more media self-regulation on the EU level, we anticipate that such developments may affect institutions that underpin national media markets, cultural media concerns, and the way standards are enforced in practice. We find that the cross-national media self-regulation comparison reveals some divergences from prior hypotheses of

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[151] For the discussion of the difficulties in even beginning to measure and study the fiscal relationship between Brussels and local governments, in the English case, see Iain McLean et al. (2003), *Identifying the Flow of Domestic and European Expenditure into the English Regions,* Report Commissioned by the Office of the Deputy Prime Minister, Sept. 5, www.nuff.ox.ac.uk/projects/odpm

[152] See generally See COM(2002) 196 Final Green Paper On Alternative Dispute Resolution In Civil And Commercial Law 19.04.2002 http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf at 10-12.

economic, political and cultural governance, which help to point forwards towards prospects for further media self-regulation.

We note from our study that nationl media self-regulation schema, despite unique national legacies and continued differing national priorities, are moving in the direction of convergence, not divergence:

- The distinctions between LMEs and CMEs are narrowing at European level, with market-led reforms in CMEs and greater attention to co-regulation in LMEs;

- There is evidence of much greater stakeholder and civil society participation in media self-regulation, with more participants and greater transparency;

- Media literacy is increasing greatly, in large part due to the resources available on the Internet;

- Both sub-national self-regulation, and new content type regulation by generation rather than national community, are evident in sectors as diverse as press and video games.

The prospects for further pan-European schema, and for much greater coordination where national self-regulatory schema persist, is stronger than for any previous mass media generation. We urge the European institutions to continue to drive research, and technical assistance, into best practices in order to encourage this convergence of self-regulatory forms. While this report and project reveals many areas where coordination can help to introduce best practice, it also reveals many areas where divergence is based, not on intractable national differences of culture, economics or politics, but based on the amount of skilled experienced resource available to create effective self-regulatory institutions. With training and best practice dissemination, this 'self-regulatory' gap can be closed between sectors and nations in the Community.

Section 12: Watching the Watchdogs: Accreditation of Self-regulatory codes and institutions

12.1 Accreditation for Sustainable Self-Regulation: A Policy Toolkit

Much of the literature on self and co-regulation advocates retaining some 'backstop powers' to add legitimacy to self-regulatory agencies, and to guard against self-regulatory failure. These include specific guidelines for good self-regulatory practice which can be used to (i) facilitate decision-making regarding when self-regulation is likely to offer a viable alternative to statutory regulation and (ii) enable ongoing monitoring and evaluation of self-regulatory schemes.[153]

The UK converged communications regulator Ofcom has recently outlined its proposed criteria for evaluation of co-regulatory schemes. Such criteria would be used by Ofcom when they are considering a transfer of regulatory functions to self-regulatory schemes[154]. In summary these criteria demand that self-regulatory schemes be:

- Beneficial to consumers;

- Clear division of responsibilities between co-regulatory body and Ofcom;

- Accessible to members of the public;

- Independent from interference by interested parties;

- Adequately funded and staffed;

- Achieve and maintain near-universal participation;

- Provide effective and credible sanctions;

- Provide auditing and review by Ofcom;

- Publicly accountable;

- Consistent with similar regulation; and

- Provide an independent appeals mechanism.

Whilst clearly enlightening, in the light of the conditions for success outlined with regard to earlier research on self-regulation and to the principles of the NCC, we might ask if Ofcom's general principles go far enough: clearly in comparison to the NCC's rigid and clear guidelines they lack the following elements:

-clear benchmarks and performance indicators

-assessment of the appropriate balance of lay and industry representatives according to the particular structure of the body.

-assessment of the industry/ market structure and the degree of exclusion of potential free riders/ rogue traders

-Specific assessment of the impact on fundamental rights particularly free speech.

12.1.1 Watching watchdogs

Most attention to self-regulation and its accreditation by statutory bodies or government departments has focused on the issues of effectiveness, transparency and sanctions i.e with features of the self-regulatory institution and code. These aspects of the self-regulatory regime remain very relevant, but accreditation must also involve other dimensions such as financial sustainability, implications for speech freedoms and the structure of interests in the industry sector. If criteria such as those recently outlined in the UK by Ofcom are to justify a shift to self-regulation there must also be some reflection on the nature of the public policy objectives concerned, and whether they are likely to be coterminous with the aims of the industry itself.

In the UK, the Report of the Joint Scrutiny Committee on the draft Communications Bill (2003) made recommendations that Ofcom should not merely deregulate in favour of self-regulatory bodies, but it should audit those bodies and schemes that offer to replace statutory schemes. Many of the recommendations of that committee have been incorporated into a scheme for assessing self-regulation being run by Ofcom. In the light of the research presented here, however, even the auditing regime recommended by the scrutiny committee may fall short of an adequate regime.

[154] Ofcom (2004) Consultation Document "Criteria for Transferring Functions to co-Regulatory Bodies" January.

12.1.2 Volume of complaints and record keeping.

Does a large number of complaints indicate a healthy and effective self-regulatory body of which large numbers of the public are aware, or does it rather indicate either a rent-seeking body or a failure to prevent harm? Such questions must be answered on a case by case basis but trends in complaints should be monitored by the accreditation agency. Self-regulatory bodies must maintain maximum transparency.

- an effective self-regulatory agency will maintain detailed records of: number of complaints, logged against which article of the code is held to be breached. Full reports of both upheld and refused complaints should be recorded and published.

- records of complaints and adjudications should be maintained, where possible according to a comparable categories, over time and made publicly available via a website.

12.1.3 When is self-regulation likely to be sustainable?

Here, it is necessary to separate initial feasibility studies, which are carried out by regulators with a view to moving from regulation to self regulation, and the ongoing monitoring, which will have different criteria and tests. With regard to conducting initial feasibility reviews, attention must be paid to industry sector. In particular the following factors will be relevant in determining if a sector is likely to be successful in developing self-regulatory schemes:

-Number of players in market

-Proportion of players committed to self-regulatory scheme

-Possibility of free-riding by rogue suppliers in the same market

In the media sector, many institutions of self-regulation experience severe financial difficulties, particularly those that are seeded by public funding and emerge where there is no spontaneous buy-in from the industry. Where financial difficulties are likely to result in a failure of the self-regulatory body fulfilling some of the standards outlined elsewhere in these criteria (with regards for instance to the transparency and reporting requirements outlined in this document – which are expensive) the accreditation agency may warn that self-regulatory privileges could be removed.

12.1.4 Competition Oversight

Many commentators (cf Angela Campbell) argue that there are fundamental contractions between the aims of promoting rigorous competition and the aims of building collective action and institutions for self-regulation. This is because self-regulatory institutions offer increased possibilities of collusion and can in themselves constitute higher barriers to market entry and impose industry standards. Where regulatory authorities have responsibilities for both competition and standards, it may be appropriate to incorporate some competition issues in the accreditation scheme. Self-regulatory schemes are often accused of being fronts for market foreclosure, therefore audit should:

- monitor whether the scheme as a whole is proportionate

- outline the costs of regulation and whether they constitute an unreasonable barrier to entry

- monitor, where there are complaints, the technical standards which result from the self regulatory institution (e.g. filters, kite-marks, APIs). Where necessary, open standards for key software in self-regulation should be the rule.

12.2. Accreditation: by whom?

Selfregulation.info research has been concerned with two quite distinct questions with regard to accreditation. On one hand, we are concerned with the accreditation of self-regulatory regimes in themselves as a form of co-regulatory oversight. This refers to the light-touch monitoring and audit of self-regulation by bodies such as IRAs. On the other hand we have conducted research on accreditation of individual services such as websites by a self-regulatory body with reference to agreed standards or a code of conduct. (Workshop 27th February 2003).

On the Ofcom model, the independent regulator adopts the role of an accreditator of self-regulatory schemes. There have been cases when such functions are adopted by government institutions. Clearly, from the point of view of freedom of expression the two-step removal from government interference that would pertain in the case of the independent NRA would be preferable. It is obvious but nonetheless extremely

important that clear and justiciable criteria are set out in advance as disputes between accreditation agency and self-regulatory institutions could damage credibility and legitimacy of both.

Accreditation for website content can work in the case of national e-commerce trustmarks because buyers and sellers have one common concern – security and reliability in the transaction. Content website accreditation has no such over-riding concern that can create network effects in accreditation. Best practice does exist: INHOPE and EuroISPA have achieved widespread and effective cooperation amongst legitimate content providers, in cooperation with the police. Consumer knowledge of trustmarks, ISP liability and hotlines is very low. Educational approaches appear to have had very limited impact thus far, due to lack of coordination and funding, with the IAP a striking exception.

Success stories in trust creation are seen most clearly in business-to-business transactions on the Internet, for instance tScheme in the UK[155], acclaimed by the UK E-Minister because it "demonstrated the flexibility and adaptability to changing circumstances which is almost impossible to achieve through a traditional regulatory model"[156]. The more fragmented nature of consumer content on the Internet, and the non-professional use to which content is put, means that publicising a universal self-regulatory scheme for both industry stakeholders and the wider public is made doubly challenging.

Accreditation of self-regulation is another complex form of co-regulation. If handled correctly it can lead to more effective and legitimate self-regulation, but when handled wrongly could amount to the re-imposition of heavy handed regulation and inappropriate government interference. The IAPcode project has outlined a scheme for accreditation of quality marks. Quality marks have been seen as a key building block in the internet self-regulation regime, but one that is underdeveloped.[157]

According to the eEurope action plan[158] there are five types of action with regard to accreditation of trustmark schemes:

1) simple codes of conduct;

2) self-applied quality labels;

3) user guidance tools;

4) filtering tools and

5) third-party rating and accreditation system.

Of these, third party accreditation, using assessment of an independent accreditation scheme is arguably the most effective and certainly the most expensive. In addition, decisions will have to be made regarding whether an accreditation scheme for quality marks should be proactive. On one model an accreditation scheme may merely outline a code of conduct or principles to be observed. A more demanding model is more proactive and reviews a website before a quality mark is applied. Alternatively, auditors may respond to complaints or may constantly police and review websites that carry a quality kite-mark. Clearly, the tougher and more proactive solutions are more expensive.

This research identified the central challenge as developing brand awareness of accreditation amongst consumers. In this model, trust-marks form the basis of accreditation of individual websites. Third party accreditation for trustmarking would take the form of the following basic procedure:

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[155] Website at http://www.tscheme.org/
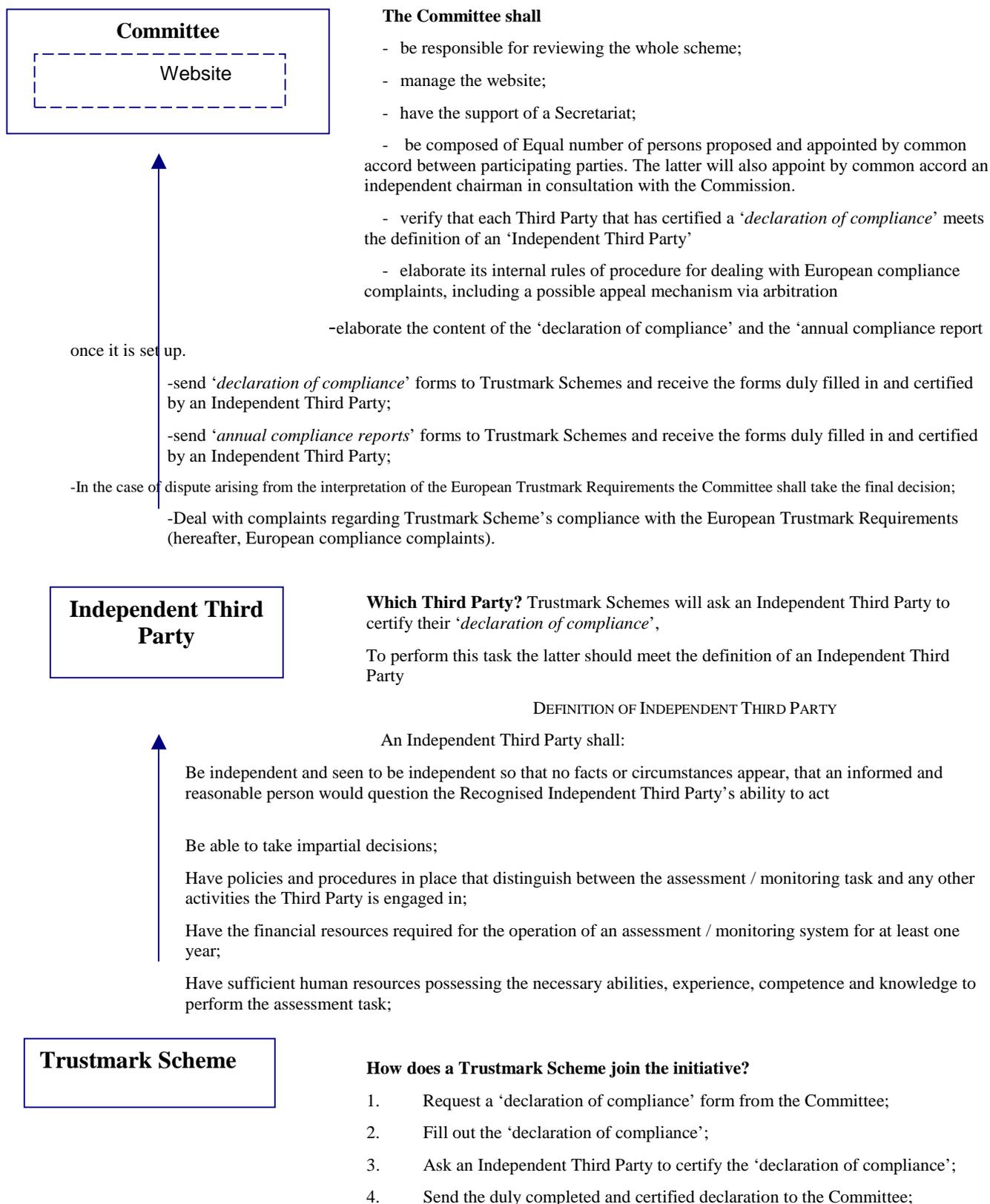[156] Leyden, John (2004) Digital certificate regime wins UK gov plaudits, 'The Register' 22 April
at http://www.theregister.co.uk/2004/04/22/pki_self_regulation/
[157] See Petra Wilson; European Commission, JRC, "Health web sites – quality criteria". Paper presented to PCMLP/EC workshop: 27th February 2003.
[158] Communication COM 2002-667 final, issued in November 2002

Figure 12.1. Neutral Third Party Assessment of Trustmark Schemes[159]

Committee

Website

The Committee shall

- be responsible for reviewing the whole scheme;

- manage the website;

- have the support of a Secretariat;

- be composed of Equal number of persons proposed and appointed by common accord between participating parties. The latter will also appoint by common accord an independent chairman in consultation with the Commission.

- verify that each Third Party that has certified a '*declaration of compliance*' meets the definition of an 'Independent Third Party'

- elaborate its internal rules of procedure for dealing with European compliance complaints, including a possible appeal mechanism via arbitration

-elaborate the content of the 'declaration of compliance' and the 'annual compliance report once it is set up.

-send '*declaration of compliance*' forms to Trustmark Schemes and receive the forms duly filled in and certified by an Independent Third Party;

-send '*annual compliance reports*' forms to Trustmark Schemes and receive the forms duly filled in and certified by an Independent Third Party;

-In the case of dispute arising from the interpretation of the European Trustmark Requirements the Committee shall take the final decision;

-Deal with complaints regarding Trustmark Scheme's compliance with the European Trustmark Requirements (hereafter, European compliance complaints).

Independent Third Party

Which Third Party? Trustmark Schemes will ask an Independent Third Party to certify their '*declaration of compliance*',

To perform this task the latter should meet the definition of an Independent Third Party

DEFINITION OF INDEPENDENT THIRD PARTY

An Independent Third Party shall:

Be independent and seen to be independent so that no facts or circumstances appear, that an informed and reasonable person would question the Recognised Independent Third Party's ability to act

Be able to take impartial decisions;

Have policies and procedures in place that distinguish between the assessment / monitoring task and any other activities the Third Party is engaged in;

Have the financial resources required for the operation of an assessment / monitoring system for at least one year;

Have sufficient human resources possessing the necessary abilities, experience, competence and knowledge to perform the assessment task;

Trustmark Scheme

How does a Trustmark Scheme join the initiative?

1.   Request a 'declaration of compliance' form from the Committee;

2.   Fill out the 'declaration of compliance';

3.   Ask an Independent Third Party to certify the 'declaration of compliance';

4.   Send the duly completed and certified declaration to the Committee;

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[159] Source. Selfregulation.info. Background paper 'An introduction to the labelling of websites'for DG Information Society conference 'Quality labels for websites- alternative approaches to content rating' 27 February 2003, Luxembourg. Ton Wagemans, Programme for Comparative Media Law and Policy, Centre for Socio-Legal Studies, Oxford University.

5.   The latter, when receiving an appropriate application (a duly completed 'declaration of compliance' form, regularly certified by an Independent Third Party), shall

- Allow the Trustmark Scheme to add this compliance to its trustmark;

- Add the Trustmark Scheme to the website.

12.3. Accreditation of self-regulation as a form of Co-regulation; Self-regulation feasibility audits

Thus far we have outlined some of the conditions for successful media self regulation. These can be developed into outline benchmarks and principles for performance of self-regulatory functions. In the light of review of current self-regulatory practice, the specific nature of the media and communications industry and the general literature on self-regulation, we recommend that accreditation should be developed in two particular ways: first, more attention must be paid to the basic interest structure of the industry and the degree of basic motivation to self-regulate. This reflects the acknowledgement that successful self-regulation generally relies both on corporate social responsibility *and* the interests of the relevant sector in increasing trust amongst the public. Second, accreditation of self-regulation should incorporate a basic rights impact assessment. As we have identified, there are a number of ways in which complex issues of freedom of speech may complicate the development of self-regulatory institutions.[160] Below we outline some basic features of an accreditation scheme for new self-regulatory schemes including these two prior steps. In the internet context, such a scheme will incorporate some aspect of branding or consumer trust-mark recognition and therefore incorporates some of the observations from the previous section.

Figure 12.2. Accreditation of self-regulatory schemes
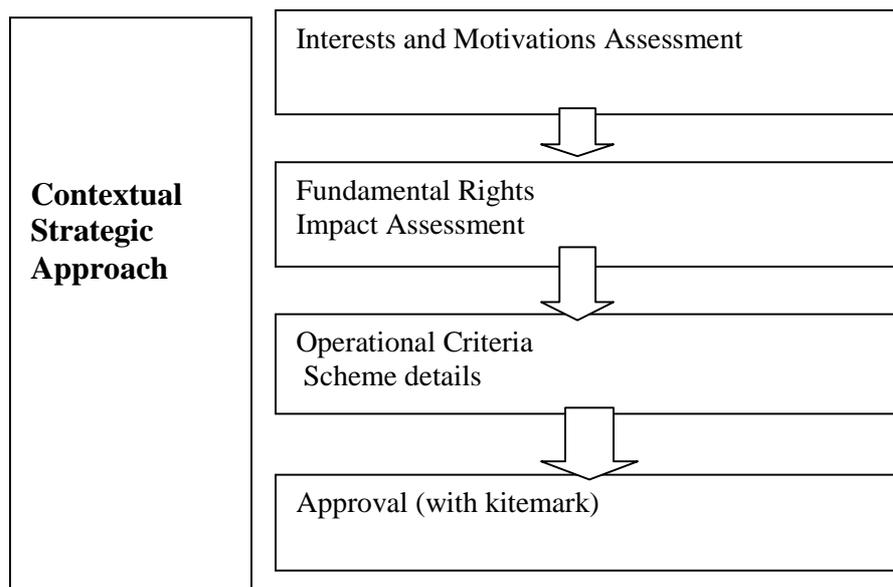
12.4   A Contextual Strategic Approach.

Principles

Self-regulation, like politics is the art of the possible and the setting up of a self-regulatory scheme is a pragmatic problem. Setting high standards for self-regulation may serve to discourage self-regulatory activity on the part of industry bodies or it may serve to make self-regulation in general prohibitively expensive. In that light, any assessment of self-regulation should incorporate a strategic, context sensitive approach.

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[160] See above, introduction, appendices on Notice and Takedown, and, inter-alia Rights Watch White Paper "A Way Forward for Notice and Takedown. www.rightswatch.com.

Benchmarks

Progressive targets could be developed for the activities of self-regulatory institutions including the speed of response. In such a dynamic approach, self-regulatory solutions could be approved in exchange for 'undertakings' relating to key performance criteria at Section 3 below.

12.5.1 Step One: Interests and Motivations Assessment

12.5.1.1 Principles

Self-regulation is dependent on particular market structures and interests on the part of industry groups. Successful self-regulation increases consumer trust in a service or product and therefore expands the market for it, leading to a virtuous circle in which there is a clear self-interest for the sector as a whole in improving performance. This will be particularly effective where the following characteristics are present:

- coincidence of interest between the objectives of market expansion and the public policy objectives isolated by the self-regulatory board in public consultation.

- inclusion of all players in the self regulatory body. Rogue traders that are able to compete with a lower cost base (cost of compliance and cost of paying for self-regulation through fees or levy) will encourage lower standards and a race to the bottom, often with a generally detrimental impact on trust in the service and on the cost of building trust through self-regulation. Therefore self-regulatory solutions that do not incorporate all players are likely to fail.

- high elasticity of demand for services. Self-regulation will tend to work best for services that are non-essential, or where market expansion relates to non-essential use of products and services. This is because industry wide self-regulation with the aim of increasing trust across the board will only be cost effective if demand can be increased relatively easily by increasing trust. Demand for basic services is less flexible.

- high subjective awareness of the threat/costs of alternatives to self-regulation on the part of key players. As the history of press self-regulation illustrates, even where lower ethical standards can drive market expansion, industry players can develop effective self regulation if they are constantly aware that failure to do so could result in the imposition of expensive and complex statutory alternatives.

12.5.1.2 Benchmarks

Indicators might include:

- Assessment of the objectives contained in public regulation and the extent to which these are coterminous with those of the industry itself.

- Measures of demand and its responsiveness to trust measures

- Analysis of the current state of the market and of the industry body developing self-regulatory solutions: are there any significant players outside the fold? What proportion of the market do they control, and could they undermine self-regulatory regimes by free-riding?

Measurement of opinion and awareness regarding the threat of statutory regulation in the event of failure of self-regulation. (I.e measurement of 'credibility of threat' of statutory solutions).

12.5.2 Step Two: Fundamental Rights Impact Assessment

12.5.2.1 Principles

The activities of self-regulatory bodies in the media sector can impact on fundamental rights of freedom of expression. This should include an assessment of the impact of the co-regulatory audit/ assessment itself, which if operated in a heavy handed way, or if handled directly by government agencies, could in itself constitute an infringement of basic objectives of pluralism and speech freedom.

In addition, the shifting of responsibility away from codes agreed to by Parliament to private boards should in some cases require Parliamentary approval and oversight. This can be given in general legislation, as it has been given in the UK Communications Act.

The Rights Impact Assessment should operate on two levels:

- first relating to the liability regime and the implications for review against fundamental rights (esp ECHR).

- second relating to the general impact on free speech of users.

Composite scores could be established on the basis of a weighted questionnaire applied to self-regulatory solutions, together with wide discretion for experts review.

12.5.2.2. Benchmarks

-What specific functions are being proposed for self-regulation? (rating, filtering, access control and adjudications).

-Will there be an impact on prior restraint? (high score)

-Where content is being removed, will it be available elsewhere?

-Have principles of transparency and appeal been observed (e.g. transparency of takedown rates, and the potential for "put back".

-Will this impact upon particularly sensitive areas of speech such as: political speech; scientific discourse; or is it restricted to less sensitive areas such as general entertainment, sport.

12.5.3 Step Three: Operational Criteria. Scheme details

Drawing on previous research and the recommendations of NCC and others we can finalise the following list of potential criteria for assessing self-regulatory schemes.

12.5.3.1 Principles

Objectives: These must be clear, intelligible and set out clear standards.

Content: the following elements must be clearly set out in the code of conduct: rules, monitoring, enforcement, sanctions, consultation on codes and a redress mechanism.

Structures and Governance: The structure for implementing the above should be legitimate. A code administered by a trade organisation may face legitimacy deficit and impartiality/ independence of adjudication must be defended. Therefore a dedicated structure, including independent representation, external monitoring of compliance, public accountability and adequate publicity functions. Resources must be sufficient to support these structures. Finally performance indicators for redress (including time taken to deal with complaints and surveys of complainants) should be identified, enabling regular review of self-regulatory bodies.[161]

12.5.3.2 Benchmarks

-Analysis of code objectives and mission statements in terms of clarity and 'plain language' criteria.

-Content of code complete according to self-regulation 5C approach

-Measurement of expert opinion regarding independence and transparency of body sufficient to grant it autonomy and legitimacy.

-Transparency benchmarks relating to: records of numbers of complaints, categorised against code of conduct, adjudication, time from initial complaint to redress, sanctions used, repeat offending.

12.5.4 Step Four: Approval

Approval should be given to a regulatory scheme if the above criteria have been applied, but this should be subject to regular, periodic review, and potential of review in response to specific complaints regarding the scheme.

12.6 Conclusion, Recommendations and the Need for Further Technical Assistance

12.6.1 Self-Regulation and Co-Regulatory Audits

There is no universally acceptable recipe for successful self-regulation, as regimes must be adjusted to the needs of each sector. However, it is clear that policy on self-regulation must take into account a broader

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[161] This is paraphrased from the NCC guidelines on self-regulatory structure. (www.ncc.org).

view of the sustainability, effectiveness and impact on free speech of self-regulatory codes and institutions. A tool for doing this would be an auditing procedure for self-regulatory institutions.

Universalism is an important requirement for self-regulatory schema, to ensure industry 'buy-in', to prevent both free-riders and (its obverse) accusations of cartellization, to ensure a unified scheme is advertised to the public – thus simplifying media education – and to sustain the scheme. In a thoughtful submission to Oftel's 2000 consultation on self- and co-regulation, the Federation of Electronic Engineers stated that:

> The regulator can play an important role as a facilitator in the development of self-regulation. Such involvement on the part of the regulator may at the outset make these initiatives appear more like co-regulation than self-regulation, however, once established such initiatives will often operate successfully without further active participation by the regulator … key players may be reluctant to invest time and resources into the development of self-regulatory schemes unless they have the backing of the regulator from their inception … there is also a need for transparency, which again can be facilitated by the regulator. In particular, the regulator's website can provide a useful location for hosting details on self-regulation.[162]

The survey of digital media self-regulation has shown again and again that sustainability of self-regulation can be critically encouraged by the encouragement of the independent National Regulatory Agency (IRA).

12.6.2   Co-regulation: the Role of IRAs

There is a lack of credibility in Internet co-regulatory fora generally. This is in part due to lack of technical and regulatory expertise, but also due to a lack of wider industry partnership. Industry must be compelled to take active part in co-regulatory initiatives. Whereas large multinationals (such as Microsoft, AOL, and ISP subsidiaries of national telcos) and voluntary actors (typically from research or educational backgrounds) engage with user groups, smaller for-profit content and access providers are not fully engaged. To ensure commercial operators take content co-regulation seriously, IRAs should be encouraged to actively convene a co-regulatory forum on a quarterly basis located at their offices, with minutes and participants published on the IRA website. This will introduce much-needed transparency into the co-regulatory process. Effective co-regulatory schemes will find this no extra burden, indeed a stimulus for new members and educational function for the consumer. Accrediting co-regulatory codes of conduct and behaviour can only be carried out under the auspices of IRAs, who have the regulatory resource, stakeholder participation and competition law exclusion to effectively institute a voluntary kite-marking scheme. IRAs may choose to sub-contract the scheme's functioning to a third party.

12.6.3   Audited Self-Regulation for ISPs

A broader procedure for audit of self-regulatory activity, incorporating assessment of market structure and interests in self-regulation and an assessment of impact on fundamental rights can ensure better self-regulation. IRAs already undertake this role, both as competition authorities in granting competition law clearance to self-regulatory bodies, and also in the telecoms and broadcast sectors in devolving rule-making to approved self-regulatory bodies (see Chapters 3 and 8). This must take place within a dynamic and pragmatic framework which encourages rather than discourages self-regulatory activity where it is appropriate. We recommend a 'national resource audit of ISP and content sectors' – to answer essential questions of effective and sustainable ISP self-regulation:

     a.   Who is engaged in the Notice and Take Down regime?

     b.   What is the dedicated legal resource in each ISP?

     c.   Who performs the freedom of expression function in each ISP?

12.6.4   Technical Assistance: Benchmarking and Research

Our final recommendation concerns the wide variety of best and poor practice found by sector across the surveyed countries. In particular, the ISP sector reveals not only a lack of resource but non-existent self-regulation in some countries with little or no tradition of media self-regulation. In these sectors and states, it is not regulatory audit of what exists that is necessary, but training and technical assistance to create co-regulatory institutions in the first place. A concern for the TAU was that it was well-resourced self-

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[162] Federation of Electronic Engineers (2000) *FEI Response to Oftel on 'Encouraging Self and Co-Regulation in Telecoms to Benefit Consumers'* Document No. FEI 00/0313 of 18 September at p6, Question 5.

regulatory bodies looking to become even better designed that sought TAU assistance, rather than new entrants into self-regulation from less developed Internet markets.

From our field surveys, it became clear that newer Internet countries and MayDay Accession states to the EU have substantial need of technical assistance in formulating co-regulatory schemes. Such assistance is needed in legislative and technical areas as much as in co-regulation itself. In particular, stakeholder/consumer groups require assistance in playing an effective role in co-regulatory discussions. Co-regulatory practice needs to take account of rapidly developing technologies and content types in [a] broadband; and [b] mobile Internet networks. The Commission is urged to establish expert groups in these areas.

It is therefore suggested that a Technical Advisory Board be established for co-regulatory schemes, best practice and policy research. The TAB can take composition from national experts (in the manner of the defunct Legal Advisory Board). It requires an active secretariat and a willingness to consult at short notice where issues of content regulation arise. Its members must be literate in law, regulatory design and implementation, and also the technical and economic development of the network.

The TAB would also need to advise the Safer Internet Forum on achieving a progressive, forward-looking agenda, actively engaging industry and stakeholder interests (including technical stakeholders) through partnerships with for instance the spam forum now established by the OECD. The TAB would be required to engage with other advanced Internet stakeholders from East Asia, North America, and from sectors including software, content and hardware developers. Without these inputs, its work would be limited in scale and scope to a regional and narrow view of the Internet.

12.7 Final Summary

An imperfect self-regulatory solution may be better than no solution at all, and we must not raise our standards so high that self-regulation is never attempted. But there are limits to how much imperfection can be tolerated, and for how long. If self-regulatory codes and institutions are insufficiently transparent and accountable, and if they do not observe accepted standards of due diligence, they will lose the trust of the public and fail. There is a danger that some aspects of internet self-regulation fail to conform to accepted standards. We recommend co-regulatory audit as the best balance of fundamental rights and responsive regulation.

List of Technical Abbreviations

AGCOM	Italian communications regulator
ARC	Advertising Review Council, a self-regulatory body within the U.S. Entertainment Software Rating Board (ESRB).
ASA	Advertising Standards Association
BACC	Broadcast Advertising Clearing Centre
BBFC	British Board of Film Classification
BSP	Broadband Service Provider (mobile or fixed line)
BVC	Belgium Video Corporation
CMM	Press Council of Finland
COCON	IAPCODE library of Codes of Conduct
DMCA	Digital Millennium Copyright Act 1998 (US)
ELSPA	Entertainment & Leisure Software Publishers Association (UK)
ESRB	Entertainment Software Rating Board (US)
FSF	Voluntary Television Review Body (Germany)
FTA	Free To Air
FTC	Federal Trade Commission (US)
FSF	Freiwillige Selbstkontrolle Fernsehen - Voluntary TV Review Body (Germany)
GPRS	General Packet Radio System
IARN	International Audiotex Regulators Network
ICRA	Internet Content Rating Agency
ITC	Independent Television Commission (UK)
ICSTIS	Independent Committee for Standards in Telephony and Information Services
ISPA	Internet Service Providers Association (UK)
ISFE	Interactive Software Federation of Europe
ISAS	Internet Services Adjudication Scheme (UK)
IWF	Internet Watch Foundation (UK)
KJM	Interstate regulatory commission for the implementation of the 2003 Interstate treaty on the Protection of Minors and Human Dignity in the Media)
LMA	Land (German state) Media Authority
MCPs	Mobile Content Providers
MPPA	Motion Picture Association of America
NICAM	Netherlands Institute for the Classification of audio-visual Media
NTD	Notice and Takedown
PEGI	Pan European Games Information
PCC	Press Complaints Commission
S4C	Welsh Fourth Channel Authority
TAB	Technical Advisory Board
ORF	European Broadcasting Company
VSC	Video Standards Council
WAP	Wireless Application Protocol

Bibiography

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