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European Provisions For The Establishment of Co-Regulation Frameworks

Carmen Palzer

EUROPEAN PROVISIONS FOR THE ESTABLISHEMENT OF CO-REGULATION FRAMEWORKS

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The concepts of co-regulation, self-regulation and self-monitoring have become central to the current political and academic debate on alternatives to traditional forms of public authority control. The debate concerns many different spheres of political control at national, regional, European and international levels. But what provisions exist at the European level for such regulatory models, especially for co-regulation? This article aims to answer this question.

I. SELF-MONITORING/SELF-REGULATION/CO-REGULATION

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

A. Self-monitoring

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

B. Self-regulation

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* Attorney, Doctor in Law, Institute of European Media Law (EMR), Saarbrücken/ Brussels. The Glossary, *infra* at 49, has definitions of commonly used terms – including "audiovisual," "co-regulation," and "state authority."

[1] For example, the term "self-regulation" is also used to describe regulation of the market by means of supply and demand: Hoffmann-Riem/Schulz/Held, *Konvergenz und Regulierung*, Baden-Baden 2000, p.50; Schulz/Held, *Regulierte Selbst-Regulierung als Form modernen Regierens, Gutachten, Zwischenbericht*, October 2001, p.A-2, This is fairly close to notions of "marketplace regulation" advocated by the U.S. "law and economics" community.

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

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

Self-regulation, on the other hand, is a regulatory framework under which bodies draw up their own regulations in order to achieve certain objectives and take full responsibility for monitoring compliance with those regulations. Such regulations may take the form of technical or quality standards or even codes of conduct defining good and bad practice. A key element of self-regulation is that the participation of those who are subject to regulation is voluntary. Codes of conduct should be drawn up at the instigation of market players (companies, associations, etc). The rules themselves may be laid down by a self-regulatory organization which is created by the parties concerned (ideally involving other interested parties, such as consumers) and which also monitors compliance with the rules and imposes any sanctions provided for by them. Since the State is not responsible for this form of regulation, government sanctions cannot be imposed, but only those provided by civil law, particularly the articles of associations. Codes of conduct may also contain rules on out-of-court mediation, e.g. regarding disputes over the legality of sanctions, and on the structure of relevant complaints bodies.

C. Co-regulation

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

The co-regulation model is based on a self-regulation framework (in its broadest sense), which is anchored in government regulations in one of two ways: the public authority either lays down a legal basis for the self-regulation framework so that it can begin to function, or integrates an existing self-regulation system into a public authority framework. This broad definition covers many different types of co-regulation, depending on the combination of government and private sector elements.[5] The elements chosen as the foundations of a co-regulation framework depend in particular on the task to be performed. If the framework is meant to fulfill what was originally a government responsibility, such as the protection of minors in the media, that task will have to be relinquished by the public authority concerned. The corresponding legal framework must take account of the responsibility still incumbent on the State to ensure that the task is fulfilled effectively and efficiently. The government should therefore monitor the activities of the self-regulatory body; should the latter offer

[4] White Paper on European Governance, see Footnote 6, at 27; a very broad definition appears in the Mandelkern Report, see Footnote 9, at 15: *"... combining legislative or regulatory rules and alternatives to regulation"*

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

inadequate protection of minors, the State must be entitled to intervene. In other areas in which the public authority intervenes after an industry has been fully self-regulating, (e.g. the action taken by the EU to implement the Multimedia Home Platform (MHP) Standard that sets out how interactive multimedia applications may be run in the home for the next generation of digital set top boxes), the government element is completely different. In such circumstances, the original objective of the agreement reached at an industry level is proposed by the market players. When the agreement is converted into or added to legal provisions by the government, not only is the binding nature of the agreement reinforced, but it can also be applied to parties that were not involved in drawing it up. Since the agreement is reached by market players for economic reasons, it is in their own economic interests to adhere to it. The level of State monitoring may be reduced accordingly.

II. EUROPEAN PROVISIONS FOR THE ESTABLISHMENT OF CO-REGULATION FRAMEWORKS

A. General: Co-regulation within the European Union

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

1. European Governance White Paper

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

According to the Commission, if EU rules were complicated even further, it would take a very long time for the Member States to implement them.[7] Moreover, it believes that, in view of the length of the legislative process, the EU cannot react quickly enough to changing market conditions. One possible way of

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[6] White Paper on European Governance, 25 July 2001, COM (2001) 428, *available at* http://europa.eu.int/comm/off/white/index_de.htm (last visited Oct. 18, 2003) [hereinafter White Paper].

[7] *See* White Paper at 25 (Only five of 83 EC Directives which should have been transposed in 2000 had been implemented in all Member States by summer 2001).

improving this situation is by preparing, under certain conditions, implementing measures within the framework of co-regulation.[8] Co-regulation combines binding legislative and regulatory action with measures taken by the actors most closely concerned, drawing on their practical expertise. By involving those most affected in the preparation and enforcement of the measures, there is wider ownership of the policies in question and greater compliance with detailed, non-binding rules. According to the White Paper, the exact shape of co-regulation, the way in which legal and non-legal instruments are combined and who launches the initiative – stakeholders or the Commission - will vary from sector to sector.

2. Mandelkern Report

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

On the basis that government regulation is not necessarily the best or the only way of resolving the current problems facing public administration, the report suggests a number of alternatives. One example is co-regulation,[11] which combines public authority objectives with the responsibility of those subject to regulation. Co-regulation can exist in various forms, combining legislative or regulatory rules and alternatives to regulation. The report mentions in particular two approaches to co-regulation: an "initial approach" and a "bottom to top approach". The first involves establishing, by public authority regulation, global objectives and the main implementation mechanisms and methods for monitoring the application of public policies. Private actors are required to draw up the detailed transposition arrangements. On the other hand, with the "bottom

[8] White Paper at 27.

[9] Final Report of the Mandelkern Group on Better Regulation, Nov. 13, 2001, *available at* http://www.csl.gov.pt/docs/groupfinal.pdf (last visited Oct 18, 2003) [hereinafter Mandelkern Report]

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

[11] Mandelkern report at 15 et.seq.

to top approach", non-compulsory rules agreed upon by private partners are changed into mandatory rules by the government. Similarly, the public administration may penalize bodies for failing to honor their commitments without giving any regulatory force to those commitments.

3. General Conditions for the Recognition of Co-regulation as a Means of Transposing Community Law

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

- Scope

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

- Legal Framework

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

- Co-regulation Bodies

Participating organizations must be representative, accountable, reliable and capable of following open procedures in applying agreed upon rules.[13]

- Public Authority Control

According to the Mandelkern report, co-regulation does not mean that the regulatory or legislative authority is no longer concerned with the effective application of the rules. On the contrary, supervisory mechanisms must be set up. The Commission explains that, where co-regulation fails to deliver the desired results or where certain private actors do not adhere to the agreed

[12] Mandelkern report at 15-16; White Paper at 28.

[13] *See* White Paper at 28. In individual cases, this is a decisive factor in determining the added value of a co-regulatory approach,.

rules, it will always remain possible for public authorities to intervene by establishing the specific rules needed.

- Competition Law

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

- Transparency

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

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

4. Can Co-regulation be Used as an Implementing Tool in Areas Regulated by EU Directives?

The recognition of co-regulation models as implementing tools should pose little problem where directives specifically refer to them as instruments for the transposition of their provisions,[15] as long as those models also fulfill the criteria mentioned above (supra discussion at 1.3).

In other cases, where directives do not mention co-regulation systems, it

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[14] Conclusions of the Presidency of the European Council at Laeken, 15 December 2001, *available at* http://europa.eu.int/futurum/documents/press/oth151201_de.htm (last visited Oct. 18, 2003); *see also* OJ L 281, 23 November 1995, p. 31

[15] *See, e.g.,* Art. 16.1(a) of the E-Commerce Directive, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178/1 of 17 July 2000, according to which codes of conduct drawn up at Community level can contribute to the proper implementation of Articles 5 to 15 of the Directive; see also Art. 27 of the Data Protection Directive, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/31 of 23 November 1995, which states that codes of conduct can contribute to the proper implementation of national provisions adopted pursuant to the Directive. *See* OJ L 202, 30 July 1997, p. 60

is necessary to refer back to the general rules governing the transposition of directives. In principle, the transposition of a directive into national law does not necessarily require its provisions to be formally incorporated verbatim in express, specific legislation by the Member States. A general legal context may, depending on the content of the directive in question, be adequate for the purpose. It is enough to guarantee the full application of the directive in a sufficiently clear and precise manner if persons concerned can ascertain the full extent of their rights, where the directive is intended to create rights for individuals, and, where appropriate, rely on them before the national courts.[16] Modifying an administrative practice[17] or issuing a circular[18] is not sufficient, since these can be amended at any time. Administrative provisions designed to implement a directive are only adequate if they have external effect.[19] Further criteria which transposing provisions must meet depend on the content of the directive: for example, if the directive requires sanctions to be imposed for breaches of its provisions, those sanctions must be effective, reasonable and deterring.[20]

Co-regulation frameworks can be used as an additional mode of transposition as long as they fulfill the necessary conditions. In principle, this is possible because co-regulation is always associated with a legal framework which, together with other rules, can ensure the proper implementation of the directive concerned. The detailed provisions of the directive will have a significant influence on how the system is organized, determining for example whether the rights of individuals should be established in the legal framework or whether the need for transparency and enforceability can be met some other way. If it is necessary to impose responsibilities on individuals for the effective implementation of the directive, consideration should likewise be given to including these responsibilities in the legal framework in order to ensure via government sanctions that the responsibilities are fulfilled. Moreover, the conditions set out by the Commission for the recognition of co-regulation systems as suitable means for the proper implementation of directives (see 3, above) must also be met. Additional rules concerning the exact form of the co-regulation system may be laid down in the directive that is to be transposed.

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

Generally speaking, the actual structure of a co-regulation model depends essentially on the field in which the political objectives are to be

[16] See ECJ case-law, e.g. ECJ, case C-96/95, Commission/Germany, Rec. 1997, p. I-1653; ECJ, case 361/88, Commission/Germany, Rec. 1991, p. I-2567.
[17] ECJ, case 29/84, Commission/Germany, Rec. 1985, p.1661.
[18] ECJ, case 239/85, Commission/Belgium, Rec. 1986, p.3645.
[19] ECJ, case 361/88, Commission/Germany, Rec. 1991, p.I 2567.
[20] ECJ, case C180/95, Draehmpaehl/Urania Immobilienservice OHG, 1997, p. I-2195.

implemented. These structures are therefore extremely varied. This can be illustrated with reference to two specific fields: first, co-regulation of the protection of minors in the television sector as an example of the national transposition of binding regulations, and second, protection of minors in the audiovisual services sector as an example of co-regulation in a field in which the EU and the Council of Europe have introduced non-binding rules, known as "soft law".

1. Protection of Minors in the Television Sector

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

a. European Union

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

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

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

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

minors in connection with advertising and teleshopping.

There are currently no references to co-regulation systems as instruments for the transposition of this Directive. The inclusion of such provisions was called for in connection with the promised review of the "Television Without Frontiers" Directive,[24] although it is doubtful whether any revision will take place in the near future and the scope of such a review is unclear.[25] If the general conditions for the transposition of directives are adhered to (see discussion supra at 4) and if the criteria set out by the Commission for the recognition of the proper implementation of Community law (see discussion supra at 3) are met, there is no reason why co-regulation should not be used to achieve Community objectives in this area. The exact nature of such a co-regulation system cannot be fully discussed here. We can, however, mention a few key aspects: when the framework is devised, it will be important to ensure in particular that the aims of the Directive - e.g. to ban the broadcasting of pornography - can be effectively achieved through national legislation. The related responsibilities of broadcasters must be binding and State sanctions should apply to those who fail to fulfill them. The same applies to the other requirements and prohibitions laid down in the Directive: along with sanctions in case of non-compliance, they should be established within the legal framework. Since basic rights are involved here, it is also important to ensure that those rights are protected by the government. The use of co-regulation should not lead to the unlawful restriction of individuals' basic rights. However, the detailed rules may be drawn up by the co-regulatory bodies set up by the industry. The private sector may also be entrusted with the task of monitoring compliance with the rules, as long as the State, which bears ultimate responsibility for adherence to the provisions, reserves the right to intervene if monitoring by the co-regulatory bodies is inadequate.

Another aspect that should be borne in mind when establishing a co-regulation framework is described in Art. 3 ¶ 3 of the "Television Without Frontiers" Directive. This obliges Member States to set up appropriate procedures for third parties directly affected, including nationals of other Member

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

[25] The Commission is considering three alternatives: an "immediate radical amendment of the Directive", *i.e.* major reform, a "fine-tuning", *i.e.* minor reform, or establishment of a work programme to prepare a proposal at a later date. The Commissioner responsible, Viviane Reding, declared in a speech in Brussels on March 21, 2003 that the third option, which would involve setting up a working group, is the most likely. See http://europa.eu.int/comm/avpolicy/legis/speech_de.htm

States, to apply to the competent judicial or other authorities to seek effective compliance with the provisions of the Directive according to national provisions. If these provisions include codes of conduct and other rules inherent in a co-regulation system, it is possible that a complaints board set up as part of the co-regulation framework to deal with alleged breaches of a code of conduct, for example, could constitute an "other authority" in the sense of Art. 3 ¶ 3. According to Art. 3 ¶ 3, all EC citizens should be entitled to lodge such a complaint. However, the wording of Art. 3 ¶ 3 tends to suggest that "other authorities" could mean other public authorities. On the other hand, a "co-regulation-friendly" interpretation is also conceivable.[26] If this is ruled out, Art. 3 ¶ 3 should be revised in order that the Directive may be transposed by means of co-regulation.

b. Council of Europe

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

[26]Regarding the admissibility of a "self-regulation-friendly" interpretation, see Ukrow, *supra* n.3, at 33 et seq.

[27]European Convention on Transfrontier Television, adopted and opened for signature in Strasbourg on 5 May 1989, entered into force on 1 May 1993 and was amended by the Protocol of 1 October 1998, which entered into force on 1 March 2002; the consolidated text of the Convention and the chart of signatures and ratifications can be found in IRIS 2002-5: 8-11 and at http://conventions.coe.int/treaty/EN/cadreprincipal.htm *Council of Europe* (Oct. 7, 2003), *available at* http://conventions.coe.int/treaty/EN/cadreprincipal.htm

of the EU.

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

2. Electronic Mass Media

a. European Union

Although it has not issued any binding legal instruments in this field, the EU is also making great efforts to protect minors in the audiovisual services and Internet sectors. The most important measure it has taken is the Council Recommendation of 24 September 1998, which deals with the protection of minors and human dignity in the audiovisual and information services industry and which, in its Annex, provides some guidelines for the establishment of a "self-regulation framework".[29] The Recommendation is concerned with all audiovisual and information services made available to the public, whatever the means of conveyance. This includes broadcasting, proprietary on-line services and Internet services.[30] The Council recommends, *inter alia*, that Member States, with the involvement of all relevant parties, should promote the establishment of national frameworks for the protection of minors and human dignity.[31] It also refers specifically to the need for cooperation at Community level in developing comparable assessment methodologies and the need for international Community-wide cooperation between the parties involved in such a

[28] See the rules on dealing with alleged violations of the Convention, Arts 24 *et seq.*

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

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

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

framework.[32] The parties include not only (State) bodies concerned with the establishment and implementation of self-regulation frameworks, but also self-regulatory organizations, complaints bodies, companies and their associations.

The Annex to the Recommendation contains practical guidelines for the organization of the required "self-regulation frameworks",[33] particularly with regard to the content of codes of conduct:

- Legal Framework

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

- Consultation and Representativeness of the Parties Concerned

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

- Separation of Public and Private Sectors

  The respective responsibilities of the parties concerned, both public and private, should be clearly set out.[36]

- Drawing up Codes of Conduct

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

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

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

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

[35] *Id.*

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

- Comprehensive information for users concerning the dangers posed by content, and ways in which they can protect themselves or minors,[37]

- Rules on the establishment of complaints bodies and on the complaints procedure,[38]

- Dissuasive sanctions for violations of the codes of conduct, proportionate to the nature of the violation,[39]

- Rules on appeal and mediation procedures for disputes over imposed sanctions,[40]

- For illegal content: rules on co-operation between operators/service providers and the appropriate judicial and police authorities, in accordance with their respective responsibilities and functions.

- Networking of Appropriate Structures

In order to facilitate co-operation at Community level, the appropriate structures within the Member States should be networked. To this end, all the parties involved in the drawing up of a national self-regulation network and those involved in an effective complaint-management system should set up a national contact point.[41]

- Monitoring of the Framework by Member States

Measures should be introduced for the evaluation of the self-regulation framework at national level.[42] They should serve to assess its effectiveness in protecting the general interests in question. This should take into account appropriate European-level cooperation, *inter alia* on the

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

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

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

[40] *Id.*

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

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

development of comparable assessment methodologies.

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

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

In the United States, several cases have dealt with legislative attempts to regulate Internet content. In *Reno v. American Civil Liberties Union*,[45], the United States Supreme Court held that the Communications Decency Act of 1996 ("CDA")—the United States Congress' initial attempt to protect children from exposure to pornographic material on the Internet—was violative of the First Amendment in its regulation of indecent transmissions and patently offensive

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

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

[45] Reno v. American Civil Liberties Union, 521 U. S. 844 (1997).

material. That conclusion was partly based on the crucial consideration that the CDA's breadth was utterly unprecedented. Subsequent to the Court's Reno decision, Congress enacted the Child Online Protection Act ("COPA")[46] in an attempt to address this concern.

Troubled by the potential impact of this Act, several organizations, who post or have members that post sexually oriented material on the Web, filed a challenge to the statute on its terms (not interpretation) before COPA went into effect, claiming, among other things, that the statute ran afoul of adults' First Amendment rights because it effectively banned constitutionally protected speech, was not the least restrictive means of accomplishing a compelling governmental purpose, and was substantially overbroad. *Ashcroft v. American Civil Liberties Union*,[47] the United States Supreme Court addressed the question of whether the Internet's unique characteristics justified a different regulatory approach and specifically whether COPA's use of "community standards" to identify material that is harmful to minors violated the First Amendment. The court held that the Internet's unique characteristics did not justify adopting a different approach than that previously set forth in connection with regulated speech for purposes of federal obscenity statutes.[48]

b. Council of Europe

The Council of Europe also is concerned with the protection of minors in the audiovisual services sector. On September 5, 2001, it adopted a Recommendation on self-regulation and user protection against illegal or harmful content on new communications and information services.[49] In the Appendix to this Recommendation,[50] it sets out principles and mechanisms that might be

[46] COPA, 47 U.S.C. § 231, provides that whether material published on the World Wide Web is "harmful to minors" is governed by a three-part test, each prong of which must be satisfied before one can be found liable under COPA: (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

[47] *Ashcroft v. American Civil Liberties Union,* 535 U.S.564 (2002).

[48] The preceding two paragraphs and footnotes were inserted by the *Media Law & Policy* Executive Board at New York Law School.

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

[50] Appendix to Recommendation No. R (2002) 8 – Principles and mechanisms

used to achieve this objective. The Member States are encouraged to implement these principles, which are described below, in their domestic law.[51]

- Self-regulatory Organizations

  - Member States should encourage the establishment of organizations which are representative of Internet actors, for example Internet service providers, content providers and users. They should encourage such organizations to establish regulatory mechanisms within their remit, especially codes of conduct, and to monitor compliance with these codes.

  - Organizations in the media field, which already have self-regulatory standards, should be encouraged to apply them to new communications and information services.

  - Member States should encourage self-regulatory organizations to participate in relevant legislative processes and in the implementation of relevant norms, as well as Europe-wide and international co-operation between such organizations.

- Development and Use of Content Descriptors

  - Member States should encourage the definition of a set of content descriptors, on the widest possible geographical scale and in co-operation with self-regulatory organizations, in order to provide for neutral labeling of content. Such content descriptors should indicate, for example, violent and pornographic content as well as content promoting the use of tobacco or alcohol, gambling services, and content which allows unsupervised and anonymous contacts between minors and adults.

  - Content providers should be encouraged to apply these content descriptors, in order to enable users to recognize and filter such content regardless of its origin.

- Filtering Systems

  - Member States should encourage the development of filtering systems, which provide users with the ability to select content on the basis of content descriptors.
  - Member States should encourage the use of conditional access tools by

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concerning self-regulation and user protection against illegal or harmful content in new communications and information services.

[51] Recommendation, para. 1.

content and service providers in relation to content harmful to minors. These might include age-verification systems, personal identification codes, passwords, encryption and decoding systems or access through cards with an electronic code.

- Complaints Systems

  - Member States should encourage the establishment of complaints systems, such as hotlines, which are provided by Internet service providers, content providers, user associations or other organizations. Such systems should, where necessary for ensuring an adequate response against presumed illegal content, be complemented by hotlines provided by public authorities. The development of common minimum requirements and practices should be particularly encouraged. Such requirements should include, for instance, the provision of a permanent web address, 24-hour availability, the provision of information to the public about the legally responsible persons and entities within the hotline providers and about the rules and practices relating to the complaints procedure, including co-operation with law enforcement authorities with regard to presumed illegal content, the provision of information to users concerning the processing of their complaints and the provision of links to other content complaints systems.

  - Member States should also set up, at the domestic level, an adequate framework for co-operation between complaints bodies and public authorities with regard to presumed illegal content. For this purpose, they should define the legal responsibilities and privileges of bodies offering complaints systems when accessing, copying, collecting and forwarding presumed illegal content to law enforcement authorities. Member States should also foster Europe-wide and international co-operation between complaints bodies. They should undertake all necessary legal and administrative measures for transfrontier co-operation between their relevant law enforcement authorities with regard to complaints and investigations concerning presumed illegal content.

- Out-of-Court Mediation

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

- User Information

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

c. Application of Recommendations

These European Council and Council of Europe recommendations have no direct legal effect insofar as the Member States are not obliged to incorporate their provisions into domestic law.[52] Nevertheless, EU Member States are obliged, under the principle of loyalty to the Community (Art. 10 EC Treaty), to base their actions on Council recommendations.[53] The purpose of Council of Europe recommendations is also to encourage Member States to take particular action. Whether the recommendations are binding or not, common international standards are necessary to ensure that minors are properly protected in individual countries where an international medium such as the Internet is concerned. It is therefore sensible, when creating or reviewing national frameworks for the protection of minors on the Internet, to include these provisions, which should as far as possible be compatible with the respective legal systems and practices.

Again the United States used broad, coercive measures, Congress established content filtering mechanisms through the Telecommunications Act of 1996. The Federal Communications Commission, ("FCC") was mandated to create a committee that would develop guidelines and procedures for the identification and rating of video programming that contained sexual, violent, or other indecent material about which parents should be informed before it was displayed to children.[54] Additionally, upon Congressional request, the broadcasting industry established a voluntary ratings system for television programs known as the TV Parental Guidelines.[55] The Act also required that all television sets over 13 inches[56] contain a "V-chip", ("V" stood for violence), that would enable viewers to block display of all programs with the rating created by the broadcasting industry.

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[52] See Art. 249 para. 5 of the EC Treaty: "Recommendations and opinions shall have no binding force."; regarding the Council of Europe recommendations, see Seidl-Hohenfeldern/Loibl, *Das Recht der Internationalen Organisationen*, para. 1548.
[53] See, for example, Hetmeier in Lenz, *EGV-Kommentar*, Art. 249 para. 19..
[54] *47 U.S.C. 303(w)(1).*
[55] A backgrounder on the V-chip and the TV Rating System may be found at the FCC's web site at http://www.fcc.gov/cgb/consumerfacts/vchip.html.
[56] 47 U.S.C. §303(x).

The European model for protecting minors on the Internet is more consensual in nature when compared to the U.S. statutory model. As discussed above,[57] the United States Congress enacted COPA to protect children from the Internet. However, COPA has met with significant resistance from Internet publishers and other proponents of the First Amendment who claim that the law is overbroad and violates basic First Amendment fundamentals. Upon remand from the Supreme Court[58], the U.S. Court of Appeals for the Third Circuit, in *American Civil Liberties Union v. Ashcroft*[59], affirmed its preliminary injunction of COPA finding that the content-based legislation was overbroad and not narrowly tailored to accomplish its legitimate governmental objectives. [60]

III. MATTERS TO BE RESOLVED

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

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

Furthermore, it is unclear how the self-regulatory bodies within the co-regulation framework should be staffed and who is responsible for appointing the people concerned. One idea is to staff them only with representatives of the parties involved, e.g. companies and consumers; on the other hand, State representatives or independent experts could be recruited. It might also be possible to appoint "independent" State representatives, who would be guaranteed independence and would not be subject to instructions from higher authorities. Closely related to this issue is that of whether any public authority representatives involved would or should have full voting rights, a casting vote (eg a right of veto) or whether they should merely act in an advisory capacity. The answer may lie in the need to separate the public and private sectors: the

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[57] *Supra*, note 46
[58] *Id.*
[59] 322 F.3d 240, (2003).
[60] The preceding two paragraphs and footnotes were inserted by the *Media Law & Policy* Executive Board at New York Law School.

two types of regulation should not be combined. The need for separation[61] implies that it should be clearly apparent who is responsible for which areas of decision-making: the State or the self-regulatory organisation. It can therefore do no harm for a public authority representative to act as an advisor or observer within the self-regulatory body. However, if the public sector can have a deciding influence on the actions of the self-regulatory organisation, the whole identity of the framework needs to be rethought: is it still a co-regulation framework? Or is it a State framework that merely makes use of private sector expertise?

Further questions are raised by the conclusions of the Commission's evaluation report on the application of the Council Recommendation concerning the protection of minors and human dignity.[62] What should the coherent approach necessitated by increasing convergence look like? Should all media be included in a co-regulation framework? Or should different frameworks be established and networking be used to ensure that consistent decisions are taken? Clues to the answers to these questions might be found in the reasons why a coherent approach is required: as a result of convergence, different technical methods might be used to transmit the same content, which should be rated in the same way. For example, if it is illegal to broadcast pornographic content on television, it should also be illegal to transmit it to a computer screen via the Internet. It might therefore be wise to create a central, cross-media authority with responsibility for rating all content.[63] The methods used to prevent or restrict the dissemination of such content can then be determined, in accordance with the means of transmission used, by the various co-regulatory bodies. It should also be remembered that some States already have self-regulation frameworks in place for various media.[64] These systems, whose experiences should be built upon, should be incorporated into the new framework as smoothly as possible. Finally, the choice of a particular framework will also depend on local conditions in the State concerned.

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

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

[62] See end of section 2.2.1.

[63] See the NICAM (*Nederlands Institut voor de Classificatie van Audiovisuel Media*) system in the Netherlands: http://www.kijkwijzer.nl/

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

However, a co-regulation framework should not be predominantly financed by the public sector.

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