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The Potential For Practice Of An Intangible Idea

Tarlach McGonagle

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Introduction: An Intangible Idea

In recent times, traditional regulatory systems have been coming under careful scrutiny in the context of the nascent quest at the European level for better, more effective regulation, as a means of achieving improved governance. Unsurprisingly, the media have been one focus of relevant discussions.

Having "developed by accretion, as piecemeal responses to new technology," contemporary media regulation can be considered "complex and unwieldy".[1] Different regimes often apply to different media, and each regime is characterized by its own specificities. In consequence, it can prove difficult to identify or achieve consistency in these different regimes. The reality of ongoing and projected technological changes has already precipitated fresh thinking about the best (regulatory) means of attaining desired objectives; of honoring specific values. This is particularly true in light of trends of convergence and individualization.

At this juncture, the notions of self- and co-regulation have been introduced into the debate. As patently demonstrated elsewhere,[2] these are fluid notions, watertight definitions of which remain elusive. The definitional dilemma has been compounded by a lack of consistency in interpretations of the relevant (and other proximate) terms, not to mention linguistic difficulties arising from translations. The least that can be stated with certainty is that the terms indicate "lighter" forms of regulation than the traditional State-dominated regulatory prototype.

A further difficulty with the concretization of the debate on regulatory matters is the difficulty of developing practical guidelines for co-regulation *in abstracto*. The term "co-regulation" is one of many different shades, with each shade being distinguished by the degree of involvement of the various parties. A crucial

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* LL.M. (International Human Rights Law, University of Essex, 2001), Ph.D. candidate at the Institute for Information Law (IViR), University of Amsterdam. The Glossary, *infra* at 49, has definitions of commonly used terms – including "audiovisual," "co-regulation," and "state authority."

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

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

question is whether State involvement would be direct, at one remove, or even more indirect. A wide range of different principles and techniques could determine the level of involvement of a public authority in co-regulation. In any event, co-regulation is always likely to exist under the umbrella of general law dealing with immutable social goals and values.

This article[3] investigates the potential of co-regulation for implementation in the electronic mass media ["audiovisual sector" in original text] (although examples of self-regulation are occasionally drawn upon by way of illustration or comparison).

I. COUNCIL OF EUROPE

In light of the growing awareness of the need for greater diversity in regulatory types, the Council of Europe (COE) has already demonstrated that its thinking does transcend traditional regulatory parameters. This has been borne out by successive European Ministerial Conferences on Mass Media Policy.[4]

In Resolution No. 2 on Journalistic Freedoms and Human Rights, the conviction was expressed "that all those engaged in the practice of journalism are in a particularly good position to determine, in particular by means of codes of conduct which have been voluntarily established and are applied, the duties and responsibilities which freedom of journalistic expression entails."[5] Principle 8 of the Resolution builds on this preambular statement by stating that ["public authorities"] "should recognize that all those engaged in the practice of journalism have the right to elaborate self-regulatory standards -- for example, in the form of codes of conduct -- which describe how their rights and freedoms are to be reconciled with other rights, freedoms and interests with which they may come into conflict, as well as their responsibilities."

In the subsequent European Ministerial Conference on Mass Media Policy, there was a palpable reluctance to pursue traditional regulatory routes for the information society.[6] Although the theme of this Conference does not fall squarely in the domain of traditional electronic mass ["audiovisual" in original

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

[4] Texts adopted at COE Media Ministerial Conferences are available at: http:/www.humanrights.coe.int/Media/documents/dh-mm/MinisterialConferences(E).doc.

[5] 4th European Ministerial Conference on Mass Media Policy (Prague, Dec. 7-8, 1994), *The media in a democratic society*, Resolution No. 2: Journalistic Freedoms and Human Rights.

[6] 5th European Ministerial Conference on Mass Media Policy (Thessaloniki, Dec. 11-12, 1997), *The Information Society: A Challenge for Europe*. *See in particular* Resolution No. 2: Rethinking the Regulatory Framework for the Media, (*especially* Preambular paras. 4, 7(v)).

text] media, it is of more than a mere passing interest. In the context of convergence and digital broadcasting, in particular, there is a growing potential for the analogous application of norms and practices from adjacent domains, such as information society services.[7]

A central topic for consideration in the Declaration, "A media policy for tomorrow," is "the adaptation of the regulatory framework for the media in the light of the ongoing changes".[8]

There have been other recent examples whereby the COE has demonstrated its consciousness of the need for greater regulatory flexibility in the online world, such as its two-pronged approach to cyber matters. This approach is characterized by the Convention on Cybercrime[9] (which represents the Council's traditional standard-setting approach) and the Recommendation on self-regulation concerning cyber content[10]. Meanwhile, in the more traditionally-defined electronic mass media ["audiovisual" in original text] sector, the Standing Committee on Transfrontier Television of the COE recently issued a Statement on Human Dignity and the Fundamental Rights of Others.[11] The Statement urges regulatory authorities and broadcasters, *inter alia*, to seek "consensual co-regulatory or self-regulatory solutions" to deal with programs which might contravene human integrity or dignity.

II
EUROPEAN UNION

While the policy debate within the European Union (EU) institutions on the feasibility of co-regulation as a model for governance in certain sectors has been documented elsewhere,[12] a cursory investigation of the actual real potential - under existing EU law - for the adoption of co-regulatory mechanisms in the audiovisual sector is perhaps timely. Some of this potential has already been tapped. For example, Article 16 of the Directive on electronic commerce[13] and

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

[8] *A Media Policy for Tomorrow*, 6th European Ministerial Conference on Mass Media Policy (Cracow, June 15-16, 2000).

[9] ETS No. 185. *See further* IRIS 2001-10:3.

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

[11] Statement (2002)1 on Human Dignity and the Fundamental Rights of Others, Standing Committee on Transfrontier Television of the COE, Sept. 12-13, 2002, available at http://www.humanrights.coe.int/media/. *See further* IRIS 2002-9:5.

[12] C. Palzer, *supra* n.2, pp. 2-4.

[13] Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic

Article 27 of the Data Protection Directive,[14] express the clear preference for Member States and the Commission to encourage increased reliance upon codes of conduct as a means of contributing to the proper implementation of EU law. This new tendency to think outside of traditional regulatory squares is also taking effect at the national level. It is becoming increasingly common for the electronic mass media legislation of States to make reference to codes or to a mixture of legislative rules and co-regulatory rules recognized by the State.

A more far-reaching question, however, is whether EU law can be validly and entirely transposed by self- or co-regulatory instruments. To answer this question, a suitable point of departure is Article 2(1) of the "Television without Frontiers" Directive, which enjoins each Member State to ensure compliance "with the rules of the system of law" applicable to broadcasting intended for the public in that Member State.[15] What are the rules referred to here? May industry-devised codes be considered part of the system of law of a Member State, for the purposes of determining whether the Directive has been properly implemented? Article 3 of the Directive prompts similar questions about the nature of the measures chosen at the national level for its implementation. The consideration of whether co-regulatory measures would be a suitable mechanism for transposing the Directive hinges on the phrases, "appropriate procedures," "competent judicial or other authorities," and "effective compliance" in Article 3(3).

As the ultimate arbiter on matters of EU law, the Court of Justice of the European Communities (ECJ) determines the answers to these questions. The existing – and growing – jurisprudence of the Court on the issue of the proper transposition of EC Directives has already provided some clarification in this regard. Specificity, precision and clarity should characterize national implementing measures. The Court held in *Commission v. Netherlands*[16] that "[i]n order to secure the full implementation of directives in law and not only in fact, Member States must establish a specific legal framework in the area in question."[17] In *Commission v. Germany*,[18] the Court in effect rejected that

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commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17 July 2000, p.1.

[14] Directive 95/46/EC of the European Parliament and of the Council of Oct. 24, 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Nov. 23, 1995 O.J. (L 281) 31.

[15] EC Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, adopted on Oct. 3, 1989, Oct. 17, 1989 O.J. (L 298) 23 and amended by Directive 97/36/EC of the European Parliament and of the Council, adopted on June 30, 1997, July 30, 1997 O.J. (L 202) 60.

[16] Commission of the European Communities v. Kingdom of the Netherlands, Judgment of the E.C.J. of March 15, 1990, Case C-339/87.

[17] *Id.*, ¶25.

particular example of the implementation of an EC Directive by administrative measures as inadequate. It held that: "the fact that a practice is in conformity with the requirements of a directive in the matter of protection may not constitute a reason for not transposing that directive into national law by provisions capable of creating a situation which is sufficiently precise, clear and transparent to enable individuals to ascertain their rights and obligations."[19] More importantly for present purposes, the Court also referred to its earlier case-law, reiterating that: "the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose, provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts."[20]

Any consideration of the degree of freedom for Member States to delegate rule-making powers to self-regulatory bodies ought to be viewed in light of these -- and other[21] -- pronouncements of the Court. However, it must not be overlooked that both of the mentioned cases examined specific modes of transposition, or that the quoted statements from the Court do not necessarily preclude the possibility of legitimately adopting co-regulatory measures in order to transpose a Directive. As ever, all would depend on the specific modalities of the co-regulatory structures, scope and status.

A number of other pertinent questions could be posed at this juncture, concerning the level at which co-regulatory mechanisms should be established and the extent to which the perceived need for consistency, uniformity of standards and application is insisted upon in existing legal orders. These questions can perhaps be answered collectively, while remembering that in the context of co-regulation, different issues can be dealt with optimally at different levels. In terms of fundamental rights, a set of non-negotiable standards must be upheld, and therefore the international instruments in which they are enumerated must be given uniform application. *See infra*. Other considerations requiring uniformity of application include those identified as being crucial for the functioning of the internal market -- e.g. certain aspects of advertising, media concentration, competition law,[22] etc. While different value schemes are in operation here, both can lay strong claim to positions of centrality in the existing

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[18] Commission of the European Communities v. Federal Republic of Germany, Judgment of the E.C.J. of May 30, 1991, Case C-361/88.
[19] *Id.*, ¶24.
[20] *Id.*, ¶15.
[21] It is beyond the scope of this article to analyze the relevant jurisprudence in detail.
[22] In a worst-case scenario, self- or co-regulation, as essentially private forms of organization, could lead to the development of cartels which might ignore principles developed elsewhere for the protection of open markets.

European legal order. Other issues lend themselves more easily to consideration and application at the national level. As regards morals and decency, for instance, the European Court of Human Rights has always tended to show utmost deference to local and regional specificities and to accommodate these to the greatest extent possible.[23] This begs a further question about the extent to which morals and decency -- and by extension, ethics -- should be included in a co-regulatory system. *See infra.*

III
POSSIBLE AMBIT OF CO-REGULATION

There exists a general consensus that co-regulation is unsuited to the safeguarding of fundamental rights.[24] This consensus rests on a particular understanding of international law which holds that the duty to safeguard human rights lies exclusively with States. At the national level, constitutional guarantees of freedom of expression and information are generally designed (like Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms – ECHR) to minimize the potential for restricting this freedom, save for in certain defined circumstances. One example of this is the German *Grundgesetz* (GG, the German Federal Basic Law).[25] Article 5(1) expressly provides for freedom of the press and for freedom of reporting by means of broadcasts and films. Pursuant to Article 5(2) GG, any limitation on these freedoms must be statutory: either of a general nature or, in particular, for the protection of youth and the right to personal honor. *See infra.* Also of relevance is Article 19(4), which stipulates that recourse to the court system must be available to all individuals alleging violations of their human rights by a government agency ["public authority"]. This illustrates how a co-regulatory system could have to be deferential to an overarching court system and also that (national) constitutional provisions would merit special consideration in the context of any proposals to implement the Directive by co-regulatory means. See *supra.*

Whatever about domestic constitutional norms helping to trace the possible contours for co-regulation of the media, the impact of the aforementioned obligations of States resulting from international (human rights) treaties should not be understated. The fact that States are ultimately responsible for guaranteeing human rights suggests the apparent legal impossibility of delegating this duty to private (regulatory) bodies. The word "apparent" is crucial here, for much would depend on the exact modalities of the

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[23] Müller v. Switzerland, Judgment of the Eur. Ct. H.R. of May 24, 1988, Series A, No. 133; Otto-Preminger-Institut v. Austria, Judgment of the Eur. Ct. H.R. of Sept. 20, 1994, *Series A, No. 295-A*, etc.

[24] *See* C. Palzer, *supra* n.2; Mandelkern Group on Better Regulation Final Report, Nov. 13, 2001; European Governance: A White Paper, Commission of the European Communities, July 25, 2001, COM(2001) 428 final.

[25] Available at: http://www.oefre.unibe.ch/law/the_basic_law.pdf.

delegation. To entrust a voluntary self-regulatory mechanism with responsibility for defending human rights does not relieve the State of its duty to do so, even if the self-regulatory mechanisms prove to be effective. A co-regulatory body contains more scope for effectively honoring State obligations, however, notwithstanding the caveat that ultimate responsibility remains with the State. This potential is strengthened by proper mechanisms for reviewing decisions of the co-regulatory body, appeals procedures, etc. Legislation and recourse to courts established by law could provide the necessary structures to ensure that States satisfy their international obligations in this regard.

The adoption of co-regulatory systems would entail significant role changes for the various parties involved. Law-making and enforcement would no longer be the exclusive province of public authorities, as has traditionally been the case. Simultaneously, professionals would be brought within a new regulatory fold – the parameters of which they would help to set. Resulting regulatory norms would be a fusion of the two old dispensations and their application would be invigorated on both sides on account of relevant expertise being channeled into the attainment of common objectives.

IV
KEY FEATURES

Before discussing a selection of desirable key characteristics of co-regulatory systems, there is a need for preliminary reflection on the process values involved. In other words, would any scrutiny of the procedures in question reveal them to be principled and firmly grounded in the rules of natural justice? In essence, this represents concern for *modi operandi* and not simply objectives and results. Participation, accountability, rule- and decision-making procedures, information and review mechanisms etc. are therefore all of cardinal importance.

The goal of attaining full or at least equitable participation for all members of society prompts concerns about representation (*i.e.*, either under- or over-representation of certain interest groups). Balance is required in terms of the gender, ethnic and age profiles of the individuals involved. It is also important to ensure an appropriate blend of sectoral and social interest groups in the co-regulatory process. Representation should lead to meaningful participation in the whole range of co-regulatory activities. Broad-based representation should be sincere and not merely symbolic.

As can be inferred from the term itself, co-regulation ought to involve collegial responsibility in all of its aspects. Although benefiting from the synergic input of various relevant actors, the system should enjoy insulation from undue interference by political and economic forces, as well as by pressure groups and industry players. This insulation can be secured by adequate financing (either from independent sources or in an unconditional manner from partisan sources such as the State or industry actors). It is also contingent on strong political and

industry commitment to its purpose and practice. Above all, there should not be involvement of the State by stealth or any puppetry by nominally independent public authorities.

A co-regulatory system would have to enjoy the confidence of all parties involved: professionals, State representatives (direct or at one remove) and members of the public. To win the support of professionals, their input into the formulation of codes and practices must be guaranteed, and these must be reflective of practical professional experience. Similarly, the State would usually be reluctant for its former regulatory role to be completely usurped by the other parties in a co-regulatory arrangement. Its continued involvement would have to be vouchsafed, albeit in a redefined way. In order to command the confidence of the public, the co-regulatory body must be sensitive to citizens' interests, always aiming to improve standards while upholding existing ones. All procedures concerning the public, especially information distribution, querying, complaints and appeals mechanisms, should be flexible, expeditious, and readily accessible to ordinary members of the public. All of these operational criteria should hold equally true in a transfrontier context, the importance of which will be amply illustrated in the discussion of advertising, *infra*. The ability of co-regulatory bodies to deal with issues of an international character should be considered an integral part of their functions.

The effectiveness of existing self-regulatory models rests in no small measure on the effectiveness of their sanctions. Sanctions must be carefully devised and systematically enforced. They must be quantitatively and qualitatively meaningful. This can involve myriad combinations and permutations: warnings; public condemnations; administrative penalties; fines which command deterrent and/or punitive effect, etc. The administration of such a detailed and effective sanctioning regime necessarily presupposes the existence of a well-functioning, coherent, well-organized self-regulatory model.

The above, non-exhaustive list of desired traits could perhaps feed into a blueprint for co-regulation. However, the difficulty of first determining and then implementing so-called "best standards" at the national level should not be overlooked. Co-regulation is a term which has considerable political resonance. In some countries, it can be interpreted as signifying the light touch approach to regulation which is a feature of the economic liberalism being embraced by many governments in Europe at the moment, or more radically, as an initial step towards deregulation. In other countries, it may be perceived as a charade by the State, which would ostensibly convey the impression of an inclusive approach to law-making, but in reality ensure a covert continuation of the State-dominated *status quo*. The emotive quotient of the term is decidedly influenced by the political and cultural situation prevailing in a given state. Great care should therefore be taken to allow the organic growth of co-regulatory standards, in harmony with the specificities of individual States; a mere "cut-and-paste" exercise regarding standards and guidelines will be doomed to failure if it does

not take full account of the environment in which it is intended to operate.

V
PARTICULAR ISSUES

A. Independence of Journalists

There can be no doubt whatsoever as to the incredible power wielded by the mass media. It is from this background that notions of media and broadcasting freedoms have emerged; thus making a convincing claim for the institutional status that befits their role.[26] A corollary of the power of the media is that the judiciary in many national and international jurisdictions shows itself to be deferential to the notion of media autonomy and self-regulation. The extensive jurisprudence of the European Court of Human Rights is the prime example of this deference.[27]

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

While the ethical substratum of journalism is particularly suited to self-regulation,[29] its scope must nevertheless not be exaggerated. The major

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

[27] See, for example, *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A, No. 298; *Thorgeirson v. Iceland,* Judgment of the European Court of Human Rights of 25 June 1992, Series A, No.239; *Oberschlick v. Austria,* Judgment of the European Court of Human Rights of 23 May 1991, Series A, No.204; *Bladet Tromso & Stensaas v. Norway*, Judgment of the European Court of Human Rights of 20 May 1999, Reports of Judgments and Decisions, 1999 and *Unabhängige Initiative Informationsvielfalt v. Austria,* Judgment of the European Court of Human Rights of 26 February 2002.

[28] See also, D. Flint, "Media Self-Regulation", in T. Campbell and W. Sadurski, Eds., *Freedom of Communication* (England, Dartmouth Publishing Company, 1994), pp. 281-296 *at* 285.

[29] See Council of Europe Parliamentary Assembly: Resolution 1003 (1993) on the ethics

drawback of the purest conception of self-regulation, *i.e.*, regulation that is limited to in-house vetting standards and mechanisms, is its lack of external accountability. No matter how ideologically-primed the in-house code of ethics of any given broadcasting entity and no matter how sophisticated the manner of its implementation, both remain essentially in-house concerns, defined by their subjectivity. Such internal (if not internalized) codes are liable to be "shaped under the influence of the owners, sometimes even enforced, with journalists having no option to conform".[30] Furthermore, provisions on conflicts of interest and other ethical matters can constitute an integral part of employment contracts. However, such in-house safeguards and code of ethics and conduct are always open to suspicion and questioning: their very nature deprives them of the moral authority of codes negotiated and endorsed by broad industry representation.

B. Hate Speech

The potential for a co-regulatory approach to "hate speech" is particularly interesting, since it is an issue with fundamental rights ramifications, but one which invariably figures prominently in media codes of ethics, whatever the circumstances of their elaboration. "Hate speech" is a term which refers to a whole spectrum of negative discourse stretching from hate and incitement to hatred; to abuse, vilification, insults and offensive words and epithets; and arguably also to extreme examples of prejudice and bias.[31] In short, virtually all racist and related declensions of noxious, identity-assailing expression could be brought within the wide embrace of the term. "Hate speech," as such, is not defined in any international conventions,[32] although a number of provisions do act as barometers for the extremes of tolerable expression.

By comparison, the United States has no codes or government involvement on any level regarding regulation of hate speech. At one point in time however, the Federal Communications Commission did impose rules creating a right of reply in broadcast media. Considered in light of the scarcity of spectrum, public interest and diversity of viewpoints, the Fairness Doctrine required Commission licensees to cover "controversial issues of public importance" and provide a reasonable opportunity to present contrasting viewpoints on such issues. This doctrine was rejected by the Commission in 1985 and officially repealed in 1987 on the ground that the rule chilled speech.

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of journalism (1993), available at: http://assembly.coe.int/Documents/AdoptedText/TA93/ERES1003.HTM (last visited Nov. 7, 2003).

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

[31] J. Jacobs & K. Potter, *Hate Crimes: Criminal Law and Identity Politics* 11 (1998).

[32] See, however, the explanation of 'Hate Speech' contained in the Appendix to COE Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech", adopted on 30 October 1997.

Additionally, with respect to libel and defamation, the U.S. Supreme Court has held that there are four requirements of a successful claim for libel of a public official. The plaintiff must be a public official or running for public office. The plaintiff must prove their case by clear and convincing evidence. The plaintiff must prove falsity of the statement. And the plaintiff must prove that the defendant knew the statement was false or acted with reckless disregard of the truth.[33]

The international provisions include the express checks and balances considered to be an integral part of the right to freedom of opinion, information and expression.[34] At the European level, these are essentially Articles 10(2) and 17 ECHR. The latter article, entitled "Prohibition of abuse of rights," is an in-built safety mechanism of the Convention, which was designed in order to prevent provisions of the Convention from being invoked in favor of activities contrary to its text or spirit. This is the rock on which most cases involving racist speech or hate speech tend to founder: they are consistently adjudged to be manifestly unfounded.[35] An examination of existing jurisprudence reveals that despite a traditional deference to the principle of journalistic autonomy, international adjudicative bodies are clearly reluctant to compromise on their consistent refusal to grant legal protection to hate speech.[36]

At the national level, largely in reflection of the past, recent past or contemporary experiences of States, the dissemination of hate speech generally tends to be classed as a criminal offence. This would, *prima facie*, leave little scope for co-regulatory initiatives in the media sector (which is invariably subject to the overarching provisions of criminal law) to influence legal/regulatory approaches to (sanctioning) hate speech. Offences under criminal law constitute a *de minimis* threshold. As such, the putative role to be played by co-regulation as regards hate speech could perhaps be to raise the threshold above that of ordinary criminal law in order to insist on higher standards in the audiovisual or journalistic sectors.

However, such a role could prove to be controversial in the finer details of its implementation. The first consideration here could be the wariness in certain

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

[34] For example, Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR), Article 20, ICCPR (which ought to be read in conjunction with Article 19) and Articles 4 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

[35] See, for example: *Glimmerveen & Hagenbeek v. The Netherlands,* Appn. Nos. 8348/78 & 8406/78, 18 DR 187; *T. v. Belgium,* DR 34 (1983), p. 158; *H., W., P. and K. v. Austria,* Appn. No. 12774/87, 62 DR (1989) 216, and *Kühnen v. FRG,* Appn. No. 12194/86, 56 DR 205 (1988). See further, T. McGonagle, "Wresting (Racial) Equality from Tolerance of Hate Speech", 23 *Dublin University Law Journal* (ns) 21, 21-54 (2001).

[36] See further, *id.,* and in particular, *Jersild v. Denmark*, *supra* n. 27

human rights circles about endorsing any further restrictions on the right to freedom of expression.[37] The obvious subtext here is that an honest adherence to existing standards would preclude the need for the adoption of additional regulation of any description. The creation of a more sanitized environment for public discourse could, in theory at least, run the risk of whittling away the rougher, outer, most meaningful edges of the right to freedom of expression. It could trammel the protection consistently accorded to provocative journalism by the European Court of Human Rights, at least as regards racist speech.

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

By comparison, the United States has no similar statutes nor allows for such governmental action. The U.S. Supreme Court has held that there can be no recovery in a suit based on group defamation.[38] Conversely, however, the Court has stated that the state may proscribe advocacy of the use of force or of law violation only where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[39] In Brandenburg, the court nonetheless struck down the statute at issue as it found that the statute punished advocacy and used criminal punishment to forbid the assembly with those who advocate such actions.[40] The court distinguished between that speech which teaches of the morality of using force or violence and that speech that actually prepares a group to take violent action and see it through.[41] Looking further back in the Court's jurisprudence relating to hate speech, the Court in *Chaplinsky v. State of New Hampshire* held that although all are entitled to the protections of free speech, that right is not absolute at all times

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

[38] *See, e.g., Rosenblatt v. Baer*, 383 U.S. 75 (1966).

[39] Brandenburg v. Ohio, 395 U.S. 444, 446 (1969).

[40] *Id.* at 449.

[41] *Id.*

and under all circumstances.[42] The Court upheld here a state statute limiting, inter alia, rights where fighting words are part of such speech. The Court defined these as words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[43] The court affirmed the criminalization of Chaplinsky's speech addressing another in public as "a god damned racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Facists."[44]

C. Protection of Minors

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

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

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

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[42] 315 U.S. 568, 571 (1919).
[43] *Id.* at 572.
[44] *Id.* at 569. The preceding two paragraphs and footnotes were inserted by the *Media Law & Policy* Executive Board at New York Law School, dated.
[46] See IRIS 2002-8: 6.

In the television broadcasting sector, the *Freiwillige Selbstkontrolle Fernsehen* (Voluntary Self-Regulatory Authority for Television – FSF) was established to pursue largely the same role and objectives as the FSK in the film sector. Although founded by broadcasters themselves, only one-third of the organization's governing body is nominated by broadcasters, while two-thirds are generally recognized experts drawn from a diversity of backgrounds. In contrast to the FSK, whose classification work is sanctioned by the responsible regional authorities, the FSF lacks a comparable coordination of its work with the *Landesmedienanstalten*, the regional media authorities which ensure compliance with the relevant legislation. Accordingly, the duplication of roles and responsibilities is clearly an issue and has somewhat hampered the development of consistency in approaches to, and results of, classification. A recent example of such inconsistency between the approach of the FSF and the *Gemeinsame Stelle Jugendschutz und Programm der Landesmedienanstalten* (Joint Body for Youth Protection and Programmes of the Regional Media Authorities) concerned the time at which the Steven Spielberg movie, 'Saving Private Ryan', could be broadcast.[46]

A new interstate agreement on the protection of minors in the media was adopted in September and is expected to enter into force in April 2003.[47] It proposes that the regulation of all electronic communications media will fall within the ambit of a new body, the *Kommission für den Jugendmedienschutz* (Commission for the Protection of Minors in the Media – KJM). Self-regulatory bodies will implement the regulations dealing with the protection of minors, under the auspices of the KJM. This should eliminate the current practice of double control involving the FSF (*ex ante*) and the regional media authorities (*ex post facto*). In addition, the KJM will only be able to overturn decisions of a self-regulatory authority if it fails to measure up to professional standards.

In the Netherlands, the situation is more straightforward. The *Nederlands Instituut voor de Classificatie van Audiovisuele Media* (Dutch Institute for the Classification of Audiovisual Media, NICAM) was established in 1999.[48] It could be classed as a co-regulatory initiative for the entire audiovisual sector. NICAM is responsible for the implementation of *Kijkwijzer*, a uniform classification system for television, video, film and games. The great advantage of the uniformity of the system is that the clear explanation of the classifications applies across the board in the audiovisual media. Consistency in the information provided increases the public's familiarity with the six content descriptors (violence; fear (raising feelings of fear); sex; drug/alcohol abuse; language and discrimination) and with the age categories (all ages; MG6 (essentially PG); 12 years and 16 years). Accordingly, this increases the use that can be made of the system. Crucial to this strategy is the prominence that these indicators manage

[47] *Staatsvertag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien – Jugendmedienschutz-Staatsvertrag- JMStV*, Draft of 9 August 2002.
[48] For further information, see: http://www.nicam.cc or http://www.kijkwijzer.nl.

to achieve in the public eye.

The *Kijkwijzer* classification system was devised by independent experts and coders who are given special training by NICAM. A product is usually classified by one coder, who may have recourse to a (three-member) coder committee for advice, if necessary. Although each mass media "audiovisual" in original text "product" is in theory classified for life (in the interest of consistency), the system strives to be as practical and flexible as possible, with the result that if and when new circumstances arise, a renewal of classification can be requested. The complaints system is accessible and lodging complaints is uncomplicated; again a uniform system applies to all sections of the audiovisual industry. Effective sanctions are imposed by an independent Complaints Committee[49] and these range from warnings to fines.

Despite the fact that *Kijkwijzer* is the progeny of enabling legislation in force since February 2001,[50] operational independence is retained by NICAM, subject to the fulfillment of a number of criteria set out in Section 53 of the *Mediawet* (Dutch Media Act[51]). State involvement is limited: it partly funds NICAM's activities along with the member [audiovisual[organisations (in an approximate ratio 3:1 (respectively)). As regards monitoring, the *Commissariaat voor de Media* (Dutch Media Authority)[52] gives an opinion on the overall functioning of NICAM in its annual report and the Government has commissioned an independent research agency to carry out an evaluation of the effectiveness of the system by the end of 2002.

The description of the above systems for the protection of minors in the audiovisual sector reveals a number of the desired characteristics enumerated *supra*. Whatever the appellation used to describe the two models, the documented experiences to date have demonstrated that these key criteria would truly be the axes on which co-regulatory mechanisms would turn.

The United States has seen mixed reaction to legislation aimed at protecting minors. The motion picture industry, for example, has successfully employed a system of self-regulation overseen by the Motion Picture Association of America. In television, the United States has seen the implementation of the V-chip, a move which was pushed by the Telecommunications Act of 1996. With respect to broadcasting, the courts have found that the government has a compelling interest in limiting indecent broadcasting during certain times of the

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[49] An Appeals Committee also exists.

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

[51] As last amended by the Act of 14 December 2000, *ibid.*, Regelgeving, available at http://www.cvdm.nl/pages/regelgeving.asp?m=w& (last visited Nov. 11, 2003). (NL) and The Media Act (2001), available at: http://www.ivir.nl/legislation/nl/media_act.pdf (last visited Nov. 11, 2003) (EN).

[52] See further: http://www.cvdm.nl

day. The FCC originally had determined that a ban on indecent broadcasting was in the public interest when children were likely to be amongst the viewers. It then determined that for commercial stations, a ban on such broadcasting was warranted between midnight and 6:00 am. But for public stations, many of which went off the air at midnight, the Commission made an exception and allowed indecent broadcasts to be aired starting at 10:00 pm. Finding that the more restrictive ban was unconstitutional, the D.C. Circuit court ordered that the less restrictive ban of 6:00 am to 10:00 pm was constitutional.

However, when Congress attempted to control speech in the name of protecting minors online, the Supreme Court largely invalidated those provisions of the Act. Congress, in 1996, enacted as part of the Telecommunications Act the Communications Decency Act of 1996. The CDA criminally prohibited the knowing transmission, by means of a telecommunications device, of "obscene or indecent" communications to any recipient under 18 years of age or to display in a manner available to a person under 18 years of age communications that, in context, depict or describe, in terms "patently offensive" as measured by contemporary community standards, sexual or excretory activities or organs. The court held that these restrictions violated the first amendment as they were content based and not narrowly tailored. The Court further found that there was no basis for determining the level of First Amendment scrutiny to be given online as the Internet was largely uncharted.[53]

D. Advertising

In many countries, the advertising sector can boast a relatively long history of successful self-regulation. The self-regulation of advertising appears to fulfill many of the desired criteria for co-regulation enumerated *supra*. Its interest, for present purposes, is the possible analogous application of some of its features to a co-regulatory scheme in the audiovisual domain.

One of the driving forces in the self-regulation of advertising has been a consensus within the industry on basic values and how to uphold them. There is a clear realization that consumer confidence in the entire advertising industry would suffer if advertising that is dishonest, misleading or offensive were allowed to go unchecked. It is thus in all players' interests that the high tide of standards would raise all boats.

Self-regulation in the advertising sector plays a very distinct, if somewhat complementary, role to that of a pertinent legislation, which tends to only concern itself with broader principles. Recourse to the law is only relied upon as an avenue of last resort, when the internal dynamics of the self-regulatory structures fail to resolve a matter. These structures prioritize the provision to consumers of

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

quick, accessible, uncomplicated and cost-free means of lodging and pursuing complaints. Compliance with the elaborated standards by advertisers is not usually a problem, given the broad support for the system, both by advertisers and constituent parts of the industry. This points to an additional strength of self-regulation in the advertising sector, *i.e.*, it spans all the different levels of the advertising process. This is particularly relevant for the purposes of effective enforcement of sanctions, which can therefore include the withdrawal of advertising space or the refusal to provide such space in the first place.

Predictably, self-regulatory systems in different States tend to have their own specific characteristics. Nevertheless, some principles remain immutable and common to all such systems: consumer-oriented; ease of accessibility for members of the public; independent in their composition and the discharge of their functions (and seen to be independent, to boot) transparent in their operations; adequate financing by the industry, etc. The European Advertising Standards Alliance (EASA) builds on these points of commonality[54] and on the shared goals of national self-regulatory bodies and promotes their development at the European level. In this context, it adopted a document entitled "Self-regulation – A Statement of Common Principles and Operating Standards of Best Practice"[55] on 13 June 2002, which contains much substance that could be tailored for incorporation into a similar set standards for co-regulation.

The transfrontier dimension to advertising is of cardinal importance and would have to be addressed within a co-regulatory framework, just as it had to be addressed in self-regulatory circles. EASA's system for handling complaints with a cross-border dimension sets out to offer complainants the same redress that is available to potential complainants in the country in which the media containing the advertisement originally appeared. Consistent with this 'country of origin' principle, advertisements are required to comply with the applicable rules in the country in which the advertisement is originally disseminated. The Cross-Border Complaints System relies on the network of self-regulatory bodies which are members of EASA. Complaints are dealt with through cooperation between these self-regulatory bodies and through their adherence to the principle of "mutual recognition", which allows for certain differences of approach by the self-regulatory bodies. The EASA Secretariat monitors developments in these cross-border cases closely. Again, many of these procedures could prove of interest for co-regulatory regimes in the audiovisual sector as they would inevitably be confronted by similar issues.

In the United States there are many regulations affecting advertising, as commercial speech has often been afforded lesser protection than other forms of speech. Section 6 of the Public Health Cigarette Smoking Act of 1969, for

[54] Another point of commonality worth mentioning is that national codes of advertising practice are often based on the codes of the International Chamber of Commerce.
[55] Common Principles (2002), available at: http://www.easa-alliance.org/about_easa/en/common_principles.html (last visited Nov. 11, 2003).

example, enacted a broad ban on all advertising of cigarettes on any medium of electronic communication under the jurisdiction of the Federal Communications Commission. Tobacco advertisements were afforded lesser speech protections. This prohibition was held to be constitutional by Capitol Broadcasting Co. v. Mitchell. By comparison however, the government has never had a ban on hard liquor advertising on electronic media. Nonetheless, there was a longstanding voluntary ban on such ads, a self-regulatory action taken by the Distilled Spirits Council of the U.S. This ban, which had been in place since 1934, was departed from in late 1996. Broadcasters did remain reluctant to take such ads, but beginning with NBC eventually came to include them in their broadcasts.

The Federal Trade Commission, additionally, has regulatory jurisdiction over false advertisements. Federal law makes it unlawful for anyone to "disseminate, or cause to be disseminated any false advertisement by United States mail, or in having an effect upon commerce, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of foods, drugs, devices, services, or cosmetics." Their power to control such ads includes injunctive remedies as well as financial penalties. In addition, the American Association of Advertising Agencies promulgates its own self-regulatory guidelines for maintaining business standards within the advertising industry.[56]

E. Technical Standards

The choice and legal endorsement of technical standards for television broadcasting has always been highly politicized and, to a greater or lesser extent, market-driven. Markets tend to develop *de facto* standards without regulatory intervention: standards are thrust into the marketplace; are carried along by commercial currents and evolve accordingly. However, the legal sponsorship of standards with a view to their enforced implementation is subject to intense political lobbying.[57] It is not unduly skeptical to argue that in the absence of a shared sense of purpose or a common objective (as arguably exists in journalism and in advertising), the altruistic premises of co-regulation might not prevail over the narrow, commercial interests of the various parties involved. This is why calls for the establishment and legal endorsement of technological standards could echo convincingly.[58]

Technical standards are important for a number of reasons. Reliance on

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

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

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

diverging standards can jeopardize the interoperability of services/systems and thus become a potential impediment to the enjoyment of the right to freedom of information (including the right to access information), as guaranteed by Article 10 ECHR. In commercial terms, different standards can become barriers to trade (the free flow of services) as non-interoperability prevents consumers from switching to competing services. It can also allow service providers to act as gatekeepers and thereby consolidate their own market position by controlling the value chain of broadcasting. Without interoperability solutions, there is therefore a danger of market foreclosure. These ethical, legal and commercial considerations lead to labyrinth others and it can safely be said that the control of technical bottlenecks is at the very core of contemporary competition and information policy.[59]

There has been a traditional reluctance on the part of regulators to intervene in matters of standardization for fear of discouraging investment in various novel forms of broadcasting and as a result of pressure from market players.[60] Instances of such intervention at the EU level have not always been successful. In the mid-1980s, the quest for a uniform European standard for satellite television led to the wide endorsement of the MAC standard, as evidenced by Directive 86/529/EEC[61] (making MAC the mandatory standard for broadcasting satellites in Europe). This Directive, however, never made any real impact. A similar fate lay in store for HD-MAC, the high-definition television standard favored by the EU in, *inter alia,* Council Directive 92/38/EEC on the adoption of standards for satellite broadcasting of television signals.[62] In this case, the wind was taken from the sails of HD-MAC by the advent of digital television. The objective of Directive 95/47/EC on the use of standards for the transmission of television signals[63] is to promote and support the accelerated development of television services in the wide-screen 16:9 format and using 625 or 1250 lines. Its Preamble provides evidence that it emerged from the same conceptual crucible as the two aforementioned standardizing Directives.

Current approaches to standardization by the EU are perhaps best

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[59] See generally, N. Helberger, *op. cit.*

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

[61] Council Directive of 3 November 1986 on the adoption of common technical specifications of the MAC/packet family of standards for direct satellite television broadcasting (86/529/EEC), available at: http://europa.eu.int/ISPO/infosoc/legreg/docs/86529eec.html (last visited Nov. 11, 2003).

[62] Available at: http://europa.eu.int/ISPO/infosoc/legreg/docs/9238eec.html

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

exemplified by the Framework Directive,[64] which promotes the idea of technical standardization with a view to achieving harmonization/interoperability between standards. In the same vein, the underlying thinking to current EU approaches is perhaps best synopsized by Recitals 30 and 31 of the Preamble to the Framework Directive, with the former stating: "Standardisation should remain primarily a market-driven process. However there may still be situations where it is appropriate to require compliance with specified standards at Community level to ensure interoperability in the single market. [...]."[65]

In Article 17 of the Framework Directive, the European Commission undertakes to draw up "a list of standards and/or specifications to serve as a basis for encouraging the harmonised provision of electronic communications networks, electronic communications services and associated facilities and services". However, it reserves the right to request that the relevant European standards organizations draw up these standards. It further reserves the right to render compulsory the implementation of the aforementioned standards and/or specifications where the same have not been adequately implemented from the point of view of interoperability between Member States. Article 18 requires Member States to encourage the use of - and compliance with - open application program interfaces (APIs), again in the interests of interoperability. In this Article, the Commission also reserves the right to render the relevant standards compulsory (in accordance with Article 17), if interoperability and freedom of choice for users have not been adequately achieved in one or more Member States within one year after 25 July 2003.[66]

Having examined the *status quo* at the EU level, it is now possible to consider how a co-regulatory framework might divide responsibility for the elaboration and promotion of technical standards favoring interoperability. Would or should such a task be the prerogative of market players (with some State involvement), subject to the clear and previously stated proviso, that should they fail to agree on the relevant standards, regulators would proactively intervene and assume this responsibility themselves? Would such a carrot-and-stick approach be appropriate? Another pertinent question concerns the point at which such regulatory intervention could or should take place: *ex ante* measures could prove necessary as competition law, for example, is only applicable once there is clear evidence of abuse of dominant position and would thus be unsuited to the goal of securing interoperability. In any event, it seems undisputed that

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

[65] See also in this connection, Recital 9 of the Preamble to the Access Directive. See further, N. Helberger, *supra* at 46.

[66] This is the date of application stipulated in Article 28(1).

interoperability would be one of the best ways of safeguarding citizens' right to freedom of information and consumers' right to protection and freedom of choice. These objectives should remain the lodestars of the process.

Conclusion

While the concept of co-regulation remains in the nursery, its future growth does seem assured. This projected growth will take place within the perimeter fences of existing international, European and national constitutional and legal orders. It will be stimulated by the interaction of all interested parties with a view to deciding upon the key structural and procedural characteristics that will ensure the effectiveness of co-regulation in a variety of circumstances. Foremost amongst these characteristics are equitable participation; operational autonomy; effective monitoring and compliance mechanisms; flexibility and responsiveness of complaints and appeals systems, etc. As illustrated above, co-regulation is very capable of playing different roles, depending on the context to which it is applied (e.g. journalism, the protection of minors and human dignity, advertising and technical standards). Whatever the versatility of the notion of co-regulation in theory, its suitability in practice will ultimately be determined by a multitude of political and other climatic considerations.