

Co-Regulation and the Audiovisual Media Services Directive (AVD)

This paper brings together elements from various sources of Community Law and refers to the legislative proposal for an Audiovisual Media Services Directive COM (2005) 646 final, especially the explanatory memorandum, as well as the related impact assessment and the relevant press releases. These documents are available on the Commission's website.¹

1. ARTICLE 249 OF THE TREATY

Article 249 [I-33]

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

2. INTER INSTITUTIONAL AGREEMENT (IIA) ON BETTER LAWMAKING

2.1. Point 22 – definition of self-regulation

22. Self-regulation is defined as the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements).

As a general rule, this type of voluntary initiative does not imply that the Institutions have adopted any particular stance, in particular where such initiatives are undertaken in areas which are not covered by the Treaties or in which the Union has not hitherto legislated. As one of its responsibilities, the Commission will scrutinise self-regulation practices in order to verify that they comply with the provisions of the EC Treaty.

¹ http://europa.eu.int/comm/avpolicy/regul/regul_en.htm#4

- Resort to self-regulation has been admitted rather as an ALTERNATIVE option to adopting legislation, but not a direct instrument to transpose legal obligations. Nevertheless, it may be a means of implementing those obligations on the ground if the state uses an entrustment mechanism that is sufficiently strong (e.g. failure of self-regulation will lead to regulatory measures).

2.2. Point 18 – definition of co-regulation

18. Co-regulation means the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations).

- The IIA addressed cases where the directive itself directly entrusts the attainment of objectives to parties in the field – this is **not the case with the AVD which encourages, but does not oblige, Member States have recourse to co-regulatory regimes in the fields coordinated by the Directive.**

3. AUDIOVISUAL MEDIA SERVICES DIRECTIVE

Art 3(3) AVD

3. Member States shall encourage co-regulatory regimes in the fields coordinated by this Directive. These regimes shall be such that they are broadly accepted by the main stakeholders and provide for effective enforcement.

Recital 25

In its Communication to the Council and the European Parliament on Better Regulation for Growth and Jobs in the European Union² the Commission stressed that a careful analysis on the appropriate regulatory approach, in particular whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self-regulation should be considered. For co-regulation and self-regulation, the Interinstitutional Agreement on Better Law-making³ provides agreed definitions, criteria and procedures. Experience showed that co- and self-regulation instruments implemented in accordance with different legal traditions of

² COM(2005) 97 final

³ OJ C 321, 31.12.2003, p. 1

Member States can play an important role in delivering a high level of consumer protection.

Art 3(3) AVD encourages co-regulatory regimes in the fields coordinated by the Directive. This implies the obligation for Member States to examine whether co-regulation would be an appropriate tool to implement the Directive. Member States freedom of choice of form and method with regard to the implementation of a directive remains unaffected.

4. IMPLEMENTATION

With regard to the implementation of Community Law through co-regulatory instruments extracts from the findings of **the Study on co-regulation measures in the media sector** by the Hans Bredow-Institute are relevant:⁴

- | • *According to art. 249 para. 3 EC, a directive is binding as to the result to be achieved, but leaves to the national authorities the choice of form and methods. Therefore, combinations of state and non-state regulation are not excluded. However, consistent with the jurisdiction of the European Court of Justice (ECJ) there are certain requirements that have to be met:*
 - | ○ *There has to be a full application in a clear and precise manner; it has to be transparent for everybody bound by the regulation as to what it requires. Since many of the assessed systems lack transparency, special attention should be put on this point in future.*
 - | ○ *The directive has to be transposed in an effective and binding manner. This does not mean that a complete transformation in state law is required; the Court has held that, to quote an example, agreements between the state and a private actor may suffice. Therefore, contracting-out types of co-regulation fulfil this requirement without any doubt. However, a binding legal framework is required; leaving the matter to complete self-regulation would not meet this requirement.*
- | • *The non-state-regulatory part of co-regulation might under certain circumstances distort or restrict competition. Well-established companies can – to quote an example – enter into agreements within a co-regulatory framework, which might hinder the market entry of competitors.*
 - | ○ *The ECJ regards some types of agreements as state law and not as private rule making if the scope for private entities is rather limited. This is not the case with co-regulation under our definition. Therefore, art. 81 EC is, as a rule, applicable.*
 - | ○ *However, the ECJ decided that anti-competitive agreements do not infringe art. 81 para. 1 EC if they are part of a broader framework that aims at*

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⁴ Draft Executive Summary – not published yet. See: http://europa.eu.int/comm/avpolicy/info_centre/library/studies/index_en.htm#ongoing

improving, securing or enabling competition in the respective branch of the industry. This might be the case with co-regulatory systems assessed in the study. Furthermore, there is the possibility that the provision may be declared inapplicable under para. 3.

- *In any case, systems constituted by an agreement within the industry are likely to be regarded as anti-competitive if they are not open to competitors.*

The analysis does not provide a complete picture of restrictions to co-regulation under national law. However, it transpires that there are no fundamental restrictions in Member States regarding this alternative form of regulation. Nevertheless, in some Member States there are debates concerning the legal classification of co-regulatory bodies under constitutional law, about safeguarding democratic legitimacy and about matters of competition law.

5. CONCLUSION

Member States, according to the proposal, shall “encourage co-regulatory regimes in the fields coordinated by the Directive”. They are not obliged to have recourse to such regimes. If they do, the regimes must be broadly acceptable by the main stakeholders and provide for effective enforcement. If Member States entrust tasks in achieving the Directives objectives to self-regulatory bodies, the entrustment mechanism must be sufficiently clear and strong so as to ensure that regulatory measures may be used in the event of the failure of the self-regulatory measures to achieve the Directive’s objectives.