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Key Points of a Digital Regulatory Policy

Recommendations to improve the conditions for effective co-regulation in the information society

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Summary of the results of the study

The increasing digitalisation of our societies and the economy not only raises the question which legal framework is needed to accompany this development, but also which instruments are needed to develop this framework and how it can be effectively enforced.

There are differing opinions as regards these questions. While some speak in favour of the classic approaches of state regulation, others argue for increased co- and self-regulation. Advocates of co-regulation and self-regulation often claim that the classic approaches of state regulation have, in the information society in particular, reached their limits due to the high speed of innovation and the cross-border nature of the services on offer. They emphasise the strengths of co-regulation and self-regulation: an increased level of flexibility, greater expertise and greater speed in law-making. Against this, critics of co-regulation and self-regulation claim that such alternative forms of regulation constitute little more than "fig leaves" and 'symbolic policies'.

Against the backdrop of this controversial debate being held about suitable regulatory approaches for the information society, this study has a twofold objective: first of all, it is to serve as a contribution to *define the place* of co-regulation and self-regulation as a regulatory approach in the formation of the information society. Secondly, it aims to identify *minimum requirements* and *framework conditions* which are necessary for the successful implementation of these alternative regulatory approaches.

The study is essentially based on research into questions of governance, national and international experience with co-regulation and self-regulation and also an analysis of the legal literature and case law.

The results of this study can be summarised in four basic topic areas, which at the same time also correspond to the structure of the study:

i) Characteristics of the regulation of the information society and requirements for regulation in this area

In Chapter 2, the characteristics of the regulation of the information society are clarified. Here it is established that the challenges of the information society pose specific challenges to classic approaches to regulation. This is related to the characteristics of the information society, which are difficult to regulate by the 'conventional means' of national state regulation. These include, for example: i) disruptive business models, the changing role of consumers and the high speed of innovation, ii) persistently more divergent and heterogeneous user expectations as well as iii) cross-border offerings and usage of goods and services, which make European and, in certain circumstances, international legislation and law enforcement necessary.

In the past, the legislator often reacted to these characteristics by stipulating relatively abstract and technology-neutral regulations within laws. These for the most part, however, have the disadvantage of being accompanied by grey

zones and legal uncertainties. This is problematic for both users and businesses alike.

This gives rise to the question of whether it would be possible to better respond to the particularities of the information society with different regulatory approaches or with a combination of them.

ii) The importance of different regulatory approaches

Chapter 3 deals with the matter of different regulatory approaches. The analysis reaches the following results:

Firstly, the challenges of the information society can theoretically be met with four model regulatory approaches: classic state regulation, co-regulation, self-regulation and market supervision. These different forms of regulation can be depicted on a continuum between state and market. In the case of co-regulation, various characteristics can be differentiated: state institutions can specify the objectives of regulations, which are to be achieved through co-regulation, in law and monitor adherence to this. In addition, they can also define minimum requirements for setting and enforcing standards and take an active role in co-regulation.

Secondly, there is no single best regulatory approach for all forms of market failure. The strengths and weaknesses analysis of the four regulatory approaches thus demonstrates that each form of regulation has its own specific advantages and disadvantages. Therefore, the study shares a similar view to, for example, the OECD, EU and the German Federal Government that the most reasonable regulatory approach or combination of approaches to take depends on the subject matter of regulation and that this is to be clarified in a regulatory impact analysis.

Thirdly, state regulation constitutes the most reasonable regulatory approach in three cases: when fundamental rights are in grave conflict with each other; when dealing with regulatory challenges across branches and policy fields; and when regulations have to be made in politically controversial areas, then state regulation proves preferable. This is because it enjoys the highest level of democratic legitimacy. Also experience with co- and self-regulation shows that in the above mentioned cases, the likelihood of success of co-regulation is very low.

Fourthly, in all other cases in which state regulation is not necessarily the best approach, co-regulation could provide a reasonable alternative or addition to regulation. Nonetheless, the heated debate about this regulatory approach reveals that this co-regulation approach can only be reasonably applied if *minimum requirements* regarding the specification and enforcement of standards are adhered to.

Fifthly, it is demonstrated that structural obstacles currently stand in the way of a potentially beneficial application of co-regulation in the area of Germany's information society. These include fundamental problems (for example the "free rider" dilemma), inadequate framework conditions (in particular, legal uncertainty), a lack of incentives for businesses to participate in co-regulation, a lack of preparedness in the business world to get involved in co-regulation

and a lack of openness to engage in new regulatory approaches on the part of state actors.

This chapter reaches the preliminary conclusion that alternative regulatory approaches, such as co-regulation, should be given greater consideration than they have been to date. However, a regulated framework must be developed for this purpose. This entails the creation of *minimum requirements for the specification and enforcement of standards* as well as *appropriate framework conditions*. In this regard, the study refers to a *shared double responsibility.* First of all, co-regulation does not claim to replace state regulation. Its task is rather to supplement state regulations in selected and, in particular, in sub-statutory areas and better enforce such regulations in a supplementary manner. Secondly, effective co-regulation requires a framework set by law in order to be effective, legitimate and credible.

iii) Requirements under constitutional law and national and international lessons for co-regulation

Chapter 4 deals with the question of which *minimum requirement*s with regard to the *specification and enforcement of standards* should be applied and which *framework conditions* should be established to create incentives for co-regulation.

As regards minimum requirements, it is argued that the stronger the legal impact of standards to be developed in the context of co-regulation, the more the specification and enforcement of standards has to satisfy the *requirements of constitutional law*.

From constitutional legal requirements and requirements which arise from international and national standards as well as codices such as the *EU Principles for Better Self- and Co-Regulation*, the study derives the following **minimum requirements**:

Minimum requirements regarding the *specification of standards*

1. Objectives that are consistent with statutory requirements and promise an added value
2. Participatory approach which guarantees the involvement of important stakeholders
3. Decision-making procedures which ensure a substantial say for all stakeholders
4. Openness and transparency
5. Financing that does not compromise impartiality

Minimum requirements regarding the *enforcement of standards*

1. Public declaration of the organisations that participate in the co-regulation scheme
2. Monitoring, evaluation and continuous improvement
3. Effective complaints mechanism and dispute resolution
4. Effective sanctions

As regards the establishment of the right **framework conditions**, this study argues that this is contingent on taking a range of suited measures: firstly, state bodies should play an active role in co-regulation. To this end, they can create *positive incentives*, for instance by making a public platform available to multiple stakeholder processes or by partly financing co-regulation activities. In addition, they can create a form of *negative incentive* by threatening state regulation where co-regulation does not deliver the desired results. Nonetheless, state bodies in many countries remain predominantly reluctant towards co-regulation or do not support co-regulation processes actively enough.
Therefore, a "change of culture" is required in state institutions. In order to initiate such a "change of culture", a cross-departmental working group should be founded to evaluate and draw lessons from national and international experiences with co-regulation. Experiences such as those from the Netherlands with the *Social and Economic Council* or from Denmark with the guideline approach of the *Danish Consumer Ombudsman* can be taken as good international examples. The results of this review process should lead to the formation of guidelines for effective co-regulation for European and national co-regulation activities.

Secondly, approaches to solving fundamental problems, in particular the "free rider" dilemma, must be implemented. This includes measures such as ensuring the most comprehensive industry coverage possible, guaranteeing exclusive advantages to companies participating in co-regulation as well as possibilities for differentiation on the market with, for instance, a quality seal system for credible co-regulation following the British example (Consumer Codes Approval Scheme).

Thirdly, further facilitative framework conditions must be created. In particular, this includes *increasing legal certainty through the introduction of an assumption of conformity, effective implementation and enforcement, state recognition and accreditation, the separation of tasks between authorities and also increased voluntary commitment from businesses as regards their social responsibility (CSR)*.

iv) Application of the results in selected areas of law

In Chapter 5, the results of the analysis are applied to selected exemplary areas of law. The most important results here are:

- Data protection law already acknowledges self-regulation at the European as well national level. However, codes of conduct have barely any legal effect. Codes of conduct related to self-monitoring could reduce or render more effectively supervision by state authorities, as for instance has successfully introduced for protection of minors in the German Interstate Treary on protection of minors.

- Also, general clauses concerning unfair competition could be more specified in order to achieve more legal certainty by introducing rebuttable presumptions of complying with unfair competition provisions when complying with a code of conduct. Thus, particularities of certain industrial sectors and of consumer expectations could be better matched.

- In IT security law, legal effects of proposed and recognised technical standards can be substantially strengthened, again – as is already partially applied – as *a prima facie* evidence. Monitoring could be left to a certification procedure.

- If courts had to take *prima facie* evidence into account, then standards on the liability for internet intermediaries, in particular concerning injunctions as well as notice-and-take-down procedures, could also contribute to more legal certainty. Enforcement can be left to instruments of civil law.

- Finally (though not exhausting the relevant issues), standards could also provide information and transparency obligations in e-commerce, thus fostering legal certainty , by stipulating essential characteristics of control points according to type. Par. 5, 1 a) Consumer Rights Directive. Here also, standards provided with a *prima facie* effect could contribute to specifiying undefined legal terms according to industrial sectors without courts losing their ability to exercise final controls.

Recommendations for political action

The results of the study can be summarised in the following recommendations for political action:

1. Co-regulation in the information society should be given greater consideration as a regulatory alternative than it has been to date.
2. Co-regulation requires a regulated framework which should be developed in a horizontal working group involving all competent Directorates and should be anchored in the Directives and Regulations mentioned in the Digital Single Market Strategy (see also under point 5).
3. This framework must take a range of aspects into account:
    a. Minimum requirements for the *development of standards*
    b. Minimum requirements for the *enforcement of standards*
    c. General *framework conditions*

    Here it must be taken into account that the stronger the legal impact of standards developed in the context of co-regulation should be, the more standard development and enforcement of standards has to satisfy requirements of constitutional law.
4. As regards the general *framework conditions*, particular care is to be taken that incentives for co-regulation are increased. This includes in particular:
    a. Economic incentives: for instance a quality seal for credible co-regulation which can be used by companies participating in co-regulation.
    b. Legal incentives in the form of increased legal certainty. This requires recognition of the codices as well as the introduction of a presumption of conformity.

c. A change of culture in both state institutions and businesses. In state bodies, this change must support increasing openness and understanding for the role of co-regulation. Businesses should understand that co-regulation constitutes an instrument with which they can fulfil their commitments to social responsibility (CSR).

5. These framework conditions for effective co-regulation should be taken into account in particular in data protection law, in unfair competition law, in IT security law, in liability of Internet intermediaries and in consumer protection law.

Disclaimer: *This study has first been written in the context of the German discourse on digital regulatory policy. On the basis of an English translation the authors adapted the study to the EU context. However, the study is still mainly based on sources and court decisions from Germany.*

Table of contents

List of abbreviations

B2B	Business-to-Business
BDI	Federation of German Industry
BDSG	Federal Data Protection Act
BEUC	European Consumer Organisation
BFDI	Federal Commissioner for Data Protection and Freedom of Information
BGB	German Civil Code
BGH	Federal Court of Justice
CEN	European Committee for Standardisation
CENELEC	European Committee for Electrotechnical Standardisation
CSR	Corporate Social Responsibility
DIN	German Institute for Standardisation
DRSC	Accounting Standards Committee of Germany
GDPR	General Data Protection Regulation
EU	European Union
EC	European Commission
EESC	European Economic and Social Committee
FEDMA	Federation of European Direct Marketing
FSM	Voluntary self-regulation by multimedia service providers
GGO	Joint Rules of Procedure of the Federal Ministries
HGB	German Commercial Code
ISO	International Organization for Standardization
JMStV	Interstate Treaty on the Protection of Minors from Harmful Media
JuSchG	Youth Protection Act
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading
ProdSG	Product Safety Act
RFID	Radio Frequency Identification
TMG	Telemedia Act
TVG	Collective Agreements Act
UWG	Unfair Competition Act

List of figures

List of tables

1. Introduction

1.1. Background

The digital world offers great potentials for consumers and businesses in terms of new communication channels, cheaper prices and innovative services. At the same time, however it represents a huge challenge to consumers in terms of data protection (who owns the data and what can companies do with it?), data security (how can consumers ensure that their electronic communications are not bugged?) and copyright (what are consumer rights in terms of using, processing and transmitting software, photographs and videos?).

The European Commission has announced that it intends to address these and numerous other questions under its *Digital Single Market Strategy.*[1] From a regulatory perspective, addressing the challenges of digitalization represents a serious challenge to regulators: traditional regulatory approaches (command and control regulation) face limitations due to short innovation cycles and cross-border use of products and services which characterize digital services. Hence also law enforcement is much more difficult than services offered primarily within a single member state.

It therefore comes as no surprise that numerous different regulatory approaches are currently being debated, in order to introduce guidelines for our increasingly digital world. They range from traditional regulatory approaches, for example in the form of the planned General Data Protection Regulation (GDPR),[2] through extended co- and self-regulation[3] to the development of a Digital Code in the sense of a new societal agreement.[4]

This discussion has given rise to heated debates particularly regarding the importance of co- and self-regulation. On the one hand, those in favour of such regulatory approaches argue that 'regulated self-regulation' reacts more quickly and flexibly to the challenges of the digital world, is more innovation-friendly, avoids red tape and market entry barriers and improves enforcement.[5] On the other hand, such approaches are criticised as fig-leaf approaches

[1] *European Commission*, A Digital Single Market Strategy for Europe, Com (2015) 192 final, 06 May 2015. For a similar strategy on the German federal level see: *Federal Government*, Digital Agenda, 2014, available at http://www.digitale-agenda.de/ (last downloaded: 13.04.2015).
[2] *European Commission,* Proposal for a Regulation of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) of 25 January 2012, COM(2012) 11 final.
[3] *SRIW,* Position paper: Opportunities and preconditions for effective self- and co-regulation to promote consumer protection and data protection in the digital world, 2014, available at http://www.sriw.de/images/pdf/Broschueren/140521_SRIW_Positionspapier_Selbst-_und_Ko-Regulierung_v03.pdf (last downloaded: 13.04.2015).
[4] *DIVSI – German Institute for Online Trust and Security*, Does Germany need a Digital Code? Responsibility, platforms and social standards for the Internet, 2014, available at, https://www.divsi.de/wp-content/uploads/2013/08/DIVSI-Braucht-Deutschland-einen-Digitalen-Kodex.pdf (last downloaded: 13.04.2015) and *Kammer*, Rules for the Web, *Süddeutsche Zeitung*, 10 May 2014.
[5] See also section 3.4.1.

which companies want to use to prevent necessary legislative regulation. Criticism is reserved in particular for lackadaisical regulations developed without even involving important stakeholders, which only marginally go beyond the minimum statutory requirements, if at all, and which have no penalties attached for companies that infringe the regulations.[6] Even those in favour of such approaches have noted fundamental challenges for co- and self-regulation: These include vague basic conditions, inflated demands of supervisory authorities, a lack of incentive for companies and a lack of cooperation culture between the various stakeholders.[7]

Despite these differing positions and the fundamental challenges outlined, this issue has become increasingly important at European level and the question of co- and self-regulation is being addressed in the *Community of Practices for Better Self- and Co-regulation* as part of the *Digital Agenda for Europe*.[8] The Community published principles for better co- and self-regulation in September 2014.[9] Secondly, it is being discussed within the framework of the European Economic and Social Committee (EESC).[10] Thirdly, the planned GDPR specifically refers to co- and self-regulation (Article 38 GDPR).

1.2. Objective of and questions addressed by the study

This study has two key objectives: first, to contribute to the *localisation* of co- and self-regulation as regulatory approaches for shaping the information society and, second, to identify *minimum requirements* and *basic conditions* for the successful application of those regulatory approaches. This should enable to establish *key points of a digital regulatory policy* which take account of the characteristics of the digital economy and enable citizens to put their trust in digital products and services.

The following topics and questions are addressed in order to achieve those objectives:

i) Current situation

- What characteristics exist in terms of regulating the challenges of the information society?
- What specific requirements do those characteristics generate in terms of effective regulation of the information society?

[6] See also section 3.4.2.
[7] See also section 3.4.3.
[8] See for example: http://ec.europa.eu/digital-agenda/en/community-practice-better-self-and-co-regulation-0 (last downloaded: 13.04.2015).
[9] *European Commission,* Principles for Better Self- and Co-Regulation, 2014, available at http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=1628 (last downloaded: 13.04.2015).
[10] See for example: http://www.eesc.europa.eu/?i=portal.en.self-and-co-regulation (last downloaded: 13.04.2015).

ii) Value of different regulatory approaches, focussing particularly on co- and self-regulation

- What regulatory approaches can be used to establish guidelines for the information society? What are the different forms of co- and self-regulation?
- What are the pros and cons of each of these regulatory approaches? To what degree should regulatory approaches interact?
- Can criteria be identified for the application of certain regulatory approaches? If so, what are they?

iii) Constitutional requirements and national and international lessons for co- and self-regulation

- What minimum constitutional requirements must co- and self-regulatory approaches fulfil? What minimum requirements should apply to the development, content and implementation of co- and self-regulation?
- What incentives and basic criteria must be put in place for successful application of these approaches?
- What success factors can be identified from national and international experience for the successful application of co- and self-regulation? What role do statutory basic criteria play? What role does the concept of corporate social responsibility (CSR) play?

iv) Transfer of results to selected areas of the law

- What specific regulatory recommendations for the legal framework follow from the results of the analysis?
- To what extent do German and European law contain grounds for excluding or limiting co- and self-regulation in the information society? To what extent do German and European law contain points of references or require specific reform?

1.3. Definitions and method

The current academic and political debate on appropriate and effective regulation is being conducted under the headings ‘better regulation’, ‘modern regulation’ or ‘effective governance’. The debate revolves around the ‘processes, forms and effectiveness of regulation’ and how they are evolving in light of the changing interaction between government and non-governmental organisations and the debate on good regulation, de-bureaucratization and de- and re-regulation.[11] – This debate has gained urgency and importance as a

[11] *Wegrich*, Better Regulation? Defining features of modern regulatory policy – An international comparison, 2009, p. 10-14. See also: *Brok/Dieckmann,* ‘Better Regulation’ in Germany and the EU, Deutsche Bank Research EU-Monitor 2007 (47), available at: https://www.dbresearch.de/PROD/DBR_INTERNET_DE-PROD/PROD0000000000213933/%22Better+Regulation%22+in+Deutschland+und+der+EU+-+Ze.PDF (last downloaded: 13.04.2015) and *Federal Government*, 2014 Better Lawmaking Work Programme, 2014, available at: http://www.bundesregierung.de/Content/DE/Artikel/Buerokratieabbau/2014/04-

result of the financial and sovereign debt crises and global challenges such as global climate change.[12]

It should be noted that the terms ‘co-regulation’ and ‘self-regulation’ have not yet been clearly defined. Self-regulation is seen, for example, as the individual or collective pursuit of private interests with due regard for fundamental freedoms for legitimate self-interest[13] or as an understanding by agents not influenced by the State on the attainment of a particular regulatory objective[14] – which, however, spans a conceivably broad framework. It would appear to be more sensible to define self-regulation as ‘standard setting by private legal entities’.[15] Thus the distinguishing characteristics of self-regulation as understood here are: 1) the adoption of regulations and standards by non-governmental bodies, which 2) are also implemented and enforced on a private basis. This study is based on that fundamental understanding.

The approach taken in this study is based on three sources. First, national and international research into governance, especially co- and self-regulation issues, is evaluated. Second, international and national experience from such governance is analysed based on secondary rather than primary research due to the limited resources available for this study. Thirdly, the German and (to some extend) European legal framework is analysed using jurisprudential methods for grounds for exclusion, reference points and the need for reform.

The study is divided into four main chapters. The second chapter identifies the *Characteristics of regulation of the information society*, based on which the third chapter presents and discusses v*arious forms of governance*. The fourth chapter identifies *constitutional requirements and national and international lessons for co-regulation* and the fifth and final chapter applies the results of the study to selected areas of the law.

06/Anlagen/2014-06-04-arbeitsprogramm%20bessere%20Rechtsetzung.pdf?__blob=publicationFile&v=2 (last downloaded: 13.04.2015).

[12] *OECD*, Recommendation of the Council on Improving the Quality of Government Regulation, 1995, C(95)21/FINAL; *OECD*, OECD Guiding Principles for Regulatory Quality and Performance, 2005; *Lodge/Wegrich,* in: *Lodge/Wegrich/Stanig/Wise (ed.)*, The Governance Report 2014*,* 2014, p. 15, 16.

[13] *Schmidt-Preuß*, VVDStRL 1997, 160, 162 *et seq*.

[14] *Schulz*, in: *Berg/Fisch/Schmitt Glaeser et. al. (Publisher)*, Regulated self-regulation as a concept of influence by the State as guarantor, p. 101, 104; similarly, *Leisner*, in: *Kloepfer (Publisher)*, Self-control in the technical and ecological sector, 1998, p. 151, 152, State as nightwatchman supervising compliance with the ultimate framework.

[15] See *Buck-Heeb/Dieckmann*, Self-regulation in private law, 2010, p.14 *et seq*. with further references and other less advanced attempts at definition.

2. Characteristics of regulation of the information society and regulatory requirements in that sector

In order to localise co- and self-regulation as regulatory approaches for the information society, the characteristics of regulation of the challenges in that sector need to be identified and then used to deduce requirements in terms of the regulatory approaches that should be applied to that sector. This dual objective is pursued in the next two chapters.

2.1. Characteristics of regulation of the information society

The characteristics of the information society pose specific challenges to traditional forms of regulation. That is because certain aspects of the information society are hard to regulate using 'conventional command- and-control approaches'.[16] They include the following aspects, which can be divided into three groups:

i) Disruptive business models, changes to consumer roles and rapid innovation mean that proper responses to market changes and guidelines need to be defined under tight time pressure

- **Our world and business models are undergoing extensive change:** Digitalisation is facilitating new business and distribution models in various sectors, such as communications, consumption, health, education and innovation, creating goods and services that have never existed in this form.

  Many of these business models are based on a new 'currency': Personal data are the 'price' that consumers must increasingly pay in order to use these goods and services. Companies can use such data to identify user and habit profiles which are taking on hitherto unknown proportions. There is however disagreement as to how to best regulate these disruptive business models.[17]

- **The role of consumers is changing from passive consumers to prosumers. There is disagreement as to what the rules of play in these new markets should be:** While consumers in the 'analogue world' tended to consume goods and services, in the 'digital world' they use platforms to share *their* content or to offer *their* goods and services, thus becoming *prosumers* in a *sharing economy*. Thus more and more consumers are making their homes, vehicles or tools available on exchanges. As the conflicts between analogue and digital providers

[16] 'The web is hard to regulate with conventional means'; Interview with Till Kreutzer on *medienpolitik.net,* available at: http://www.medienpolitik.net/2014/05/das-netz-lasst-sich-mit-herkommlichen-mitteln-schwer-regulieren/ (last downloaded: 13.04.2015).

[17] *DIVSI – German Institute for Online Trust and Security*, DIVSO U25 Study: Children, adolescents and young adults in the digital world, 2014, p. 8, 10, available at: https://www.divsi.de/wp-content/uploads/2014/02/DIVSI-U25-Studie.pdf (last downloaded: 13.04.2015).

with services such as *Airbnb* and *Uber* illustrate, there is disagreement over the rules of play for this form of collaborative provision, in which consumers act as prosumers, and they are still underdeveloped.[18]

- **Ever-shorter innovation cycles are making it hard to develop the rules of play in real time:** The speed of innovation and the speed at which new technologies are disseminated have increased continually over recent decades. While it was 18 years before every other household in the US owned a PC, it was only 6 years before every other household in the US owned an MP3 player.[19] This means that regulation faces the challenge of avoiding 'playing catch up' with developments and the challenge of adopting regulations quickly enough so that they are still relevant when they enter into force.

ii) Consumer expectations of digital products and services are changing – different and heterogeneous user expectations are emerging

- Mobile handsets mean that many consumers, especially children, adolescents and young adults, no longer go online; they are permanently online and their sense of what is right and wrong is changing. The benchmark which is increasingly being applied is no longer what is permitted by law, but what 'everyone else is doing'.[20] Expectations in terms of protection of privacy are also changing. For example, adolescents and young adults have almost no reservations about personalised advertising. On the contrary, they consider that it has clear advantages.[21] These changing expectations pose a challenge for politicians to adopt regulations that are acceptable to very different consumer groups.

iii) Cross-border provision and use of products and services mean that European/international law-making and enforcement are needed

- **Cross-border provision and use of products and services mean that European/international solutions are needed:** Numerous digital products and services used by consumers are not provided within a Member State; they are provided across borders from other EU Member States or, in particular, the United States of America (USA). Therefore regulations for digital products and services need to be developed that are valid beyond national borders. That means that European and international standards should be put in place.[22] – Where separate national regulations are adopted, there is a risk that companies will face additional compliance costs which will ultimately be

[18] *Haucap*, Economic Services 2015, 91.
[19] *Thierer/Eskelsen*, Media Metrics: The True State of the Modern Media Marketplace, 2008, available at: http://www.pff.org/mediametrics/Media%20Metrics%20%5BVersion%201.0%5D.pdf (last downloaded: 13.04.2015).
[20] *DIVSI – German Institute for Online Trust and Security*, DIVSO U25 Study: Children, adolescents and young adults in the digital world, 2014, p. 68-69, 138-139, available at: https://www.divsi.de/wp-content/uploads/2014/02/DIVSI-U25-Studie.pdf (last downloaded: 13.04.2015).
[21] *Ibid, p*. 121.
[22] *von Braunmühl*, in: Baums/Scott *(Publisher.)*, Compendium of Digital Location Policy. From 1x1 to 3x3, 2013, p. 80, 81; *Federal Government*, Digital Agenda, 2014, available at: http://www.digitale-agenda.de/ (last downloaded: 13.04.2015).

passed on to users. Furthermore, those companies may be at a competitive disadvantage compared to foreign companies that need not comply with the regulations. Hence there is is a danger of unlevel playing-fields.

- **Cross-border enforcement is necessary, otherwise rights will exist on paper only:** A question which is closely related to the previous point is how national law can be enforced throughout the EU or even internationally. In the past there have been increasing numbers of cases in which national law could not be enforced throughout the EU and some providers deliberately exploited the different enforcement levels in EU Member States to their advantage. The marketplace principle included in the planned GDPR should improve cross-border enforcement. Nonetheless, cross-border enforcement will continue to be a challenge even after the marketplace principle has been introduced.[23]

2.2. Requirements of regulatory approaches in the information society

In recent years the legislature has attempted to react to these challenges in the fields of data protection, IT security, liability and consumer protection primarily with government regulation, often adopting abstract regulations in order to guarantee technological neutrality. However, these are often vitiated by legal uncertainty, as grey areas arise in which no-one knows what is right. Legal uncertainty is a problem both for users, who do not know exactly what their rights are, and for companies.

The key issue is therefore whether the peculiarities of the information society can be better addressed using other or a combination of different regulatory approaches. Any such approach would need to fulfil a number of requirements, as summarised in Table 1 below.

Peculiarities of the information society	Resultant requirements of regulatory approaches
i) Disruptive business models, changes to consumer roles and rapid innovation	1) Regulations must be flexible and able to adapt to fast-changing circumstances. 2) Regulations must enter into force as quickly as possible, so that they are still relevant and have not been overtaken by events. 3) Regulations must take account of the changing role of consumers.
ii) Consumer expectations of digital products and services are changing	4) A high degree of involvement of the various stakeholders is needed, in order to include their expectations and guarantee legitimacy.

[23] 'User autonomy should not disappear', Interview with Johannes Caspar, in: *DIVSI – German Institute for Online Trust and Security,* Does Germany need a Digital Code? Responsibility, platforms and social standards for the Internet, 2014, p. 78, available at: https://www.divsi.de/wp-content/uploads/2013/08/DIVSI-Braucht-Deutschland-einen-Digitalen-Kodex.pdf (last downloaded: 13.04.2015).

Peculiarities of the information society	Resultant requirements of regulatory approaches
iii) Cross-border provision and use of products and services	5) Regulations must, if possible, be developed at EU level and be valid throughout the EU. 6) An enforcement regime must cover the entire EU.

Table 1: Peculiarities of the information society and resultant requirements

3. Value of different regulatory approaches

This third chapter discusses the different potential regulatory approaches for regulating the information society, highlights their pros and cons and lays down criteria that should govern the application of each individual approach. It argues that *the* ideal approach to any one regulatory challenge does not exist. Rather the most appropriate approach to each challenge needs to be identified or different approaches need to be combined depending on the nature of the regulatory challenge at hand.[24]

3.1. Four different types of regulatory approaches

Looking at the current public debate on regulation of the information society, what is striking is that different regulatory approaches are being discussed. For example, the German Federal Government's Digital Agenda and the debate surrounding it address an 'international law of the Net', the planned GDPR, co-regulation and discursive or participatory measures for a new societal contract.[25]

These different approaches can be mapped on an ideal type continuum between the State and the market and grouped under the following four basic types of regulatory approach:[26]

State regulation: State regulation takes the form of traditional 'command and control' regulation, with regulation by the constitutional bodies of the state (legislature, executive and judiciary) or institutions bound by the instructions of the state (especially authorities such as the Cartel and Competition Authorities or Network authorities). Regulations adopted by these bodies are binding on the public and all other operators. State regulation may be adopted at international, European, national or regional level. An 'international law of the Net' and the planned GDPR come under this type of regulation.

Co-regulation: Co-regulation means a cooperative form of regulation in which private operators self-regulate within a statutory framework or on a legal

[24] See *Buck-Heeb/Dieckmann*, Self-regulation in private law, 2010, p. 30.
[25] *Federal Government*, Digital Agenda, 2014, p. 14, 15, 32, 36, available at: http://www.digitale-agenda.de/ (last downloaded: 13.04.2015); *SRIW,* Position paper: Opportunities and preconditions for effective self- and co-regulation to promote consumer protection and data protection in the digital world, 2014, available at: http://www.sriw.de/images/pdf/Broschueren/140521_SRIW_Positionspapier_Selbst-_und_Ko-Regulierung_v03.pdf (last downloaded: 13.04.2015) and *DIVSI – German Institute for Online Trust and Security*, Does Germany need a Digital Code? Responsibility, platforms and social standards for the Internet, 2014, available at: https://www.divsi.de/wp-content/uploads/2013/08/DIVSI-Braucht-Deutschland-einen-Digitalen-Kodex.pdf (last downloaded: 13.04.2015).
[26] *Latzer/Just/Saurwein/Slominski*, Self- and co-regulation in the mediamatics sector – Alternative forms of regulation between State and market, 2002, section 2.1; see also: *Wegrich*, Better Regulation? Defining features of a modern regulatory policy – An international comparison, 2009, p. 20 *et seq* and *Ofcom*, Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation, 2008, available at: http://stakeholders.ofcom.org.uk/binaries/consultations/coregulation/statement/statement.pdf (last downloaded: 13.04.2015).

basis.[27] The private standards formulated by self-regulation are often dovetailed with State regulation and its implementation, e.g. under a State act of recognition. This type of regulation is referred to synonymously as regulated self-regulation or co-regulation.

Examples of co-regulation in Germany and the EU

At European level, this instrument is applied through technical standards. Under its 'New Approach', the EU confines itself in its directives to defining essential product requirements. Detailed regulations are then established in private standardisation processes. Application of those standards is generally voluntary. Companies have an effective incentive to apply standards as, from a legal point of view, it can be refutably assumed (*prima facie* evidence) that compliance with standards also means that the EU directive in question has been fulfilled.[28] That is because both the national supervisory authorities and the national courts are to a great extent bound by these harmonising standards.[29]

Examples of co-regulation in Germany are the system of chambers and professional associations and collective bargaining legislation.[30] If the term co-regulation is understood broadly, even the technical standards formulated outside the harmonised product safety law can be counted as co-regulation. That is because they are often understood in case-law as quasi-specification of the standard due care in trade (Section 276 of the Civil Code), which is often used in the law of tort, especially in connection with manufacturer's liability[31].[32] However, they are not binding on the courts; they merely serve as indicators/*prima facie*

[27] *OECD*, Report: Alternatives to Traditional Regulation, 2009, p. 35; *Schulz/Held*, Regulated self-regulation as a form of modern governance – Commissioned by the Federal Commissioner for Culture and Media Affairs, 2002, p. A-4 *et seq*., available at: https://www.hans-bredow-institut.de/webfm_send/53 (last downloaded: 13.04.2015).

[28] European Economic and Social Committee, *The Current State of Co-Regulation and Self-Regulation in the Single Market*, EESC Pamphlet Series, 2005, p. 21, available at: http://www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf (last downloaded: 13.04.2015); *Franzius,* Governance through 'better' use of instruments: the idea of co-regulation in the Commission's White Paper on Governance, 2002, p. 8-11, available at:http://www.europawissenschaften-berlin.de/media/pdf/Publikationen/Koregulierung.pdf (last downloaded: 13.04.2015); *Zubke-von Thünen,* Technical standardisation in Europe, 1999, p. 800 *et seq*.

[29] *Röthel*, JZ 2007, 755, 759; *Spindler*, Corporate organisation requirements, 2011, p. 160 f.; *Buck-Heeb/Dieckmann*, Self-regulation in private law, 2010, p. 170 *et seq*. even consider binding of the civil courts, which is misguided given the public law character of standardisation within the framework of product safety as a minimum standard.

[30] *OECD*, Report: Alternatives to Traditional Regulation, 2009, p. 37; for an EU-wide overview, see also: European Economic and Social Committee, *The Current State of Co-Regulation and Self-Regulation in the Single Market*, EESC Pamphlet Series, 2005, p. 13-17, available at: http://www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf (last downloaded: 13.04.2015); *Reip,* Self-regulation on the Internet, considering in particular standard setting and the domain name system, 2002, p. 20 *et seq*., available at: http://www.db-thueringen.de/servlets/DerivateServlet/Derivate-1372 (last downloaded: 13.04.2015).

[31] Federal Court of Justice Civil Judgments 114, 273, 276 = NJW 1991, 2021, 2022; Federal Court of Justice Civil Judgments 103, 338, 341 *et seq*. = NJW 1988, 2667, 2668; Federal Court of Justice NJW 2008, 3778.

[32] In greater detail in *Spindler,* in: BeckOKBGB, Section 823, paragraph 279; 488.

evidence of due care and the obligations which must be fulfilled within the framework of the state of the art.[33]

Other private standards are often adopted by the courts, for example the regulations of the International Ski Federation in sports (tort) law, which civil case-law sees as specification of due care (Section 276 of the Civil Code).[34] However, unlike DIN standards, the legal basis is still unclear in terms of its application in fact, as it cannot be seen as customary law since the FIS regulations were also changed.[35]

On the other hand, compliance with a technical standard only indicates that the safety standard is also guaranteed if the technical standard takes sufficient account of the risk in question, for example by including relevant consumers at particular risk.[36] Similarly, compliance with a standard does not provide protection from complaints of illegality if the technical standard does not correspond to the state of the art, especially if the technical regulation was wrong or inadequate.[37]

Moreover, the use of technical regulations in public law as a reflection of the generally recognised rules of the art (clearly, for example, in Section 6(1) of the old version of the Product Safety Act) or state of the art (Section 7(1) of the old version of the Product Safety Act).[38]

Another example is accounting law in the field of (international) consolidated accounting: Since 1998 the German Accounting Standards Committee (DRSC) has carried out important work within the framework of Section 342 of the Commercial Code by issuing recommendations similar to DIN standards on the application of consolidated accounting methods under a standardisation contract with the Federal Republic of Germany. The criticism often voiced here is that the DRSC has no democratic legitimacy to issue binding rules.[39] Regarding the rules issued by the DRSC/DSR,[40] there is a refutable presumption in accordance with

[33] See Federal Court of Justice on insurance law VersR 1984, 270 – Flachmeissel; see also Federal Court of Justice Civil Judgments 103, 338, 341 *et seq.*; Federal Court of Justice Civil Judgments 114, 273, 277; Federal Court of Justice NJW 1997, 582, 583; *Marburger*, Insurance Law, 1983, 597, 602 *et seq.*; for additional evidence see *Spindler* in: BeckOKBGB Section 823, paragraph 488.

[34] Federal Court of Justice Civil judgments 58, 40, 42 *et seq.*; Federal Court of Justice Civil Judgments NJW 1985, 620, 621; for further evidence see *Spindler*, in: BeckOKBGB, Section 823, paragraph 396; on the question of *Lex Sportiva* see also *Röthel*, JZ 2007, 755, 757.

[35] See *Heermann/Götze*, NJW 2003, 3253, 3253 *et seq.*

[36] See Federal Court of Justice NJW 1987, 372 – Zinkspray for technical rules for pressure gases TRG 300, May 1978; Zweibrücken Higher Regional Court NJW 1977, 111 *et seq.*

[37] Federal Court of Justice NJW 1987, 372, 373 – Zinkspray; Federal Court of Justice NJW 1984, 801 – Ice hockey stadium.

[38] In detail in *Röthel*, Standard specification in private law, 2004, p. 269 *et seq.*; on the use of technical rules in the Water Management Act, see *Sanden,* in: BeckOK Environmental Law, Water Management Act Section 62, paragraph 34; *Gössl,* in: *Sieder/Zeitler*, Water Management Act Section 62, paragraph 141; for details on the relationship between the 'state of the art' and 'generally recognised rules of the art', see *Seibel,* NJW 2013, 3000.

[39] *Hommelhoff/Schwab*, BFuP 1998, 38 *et seq.*; *Ebke/Paal*, in: Müko, Commercial Code Section 342, paragraph 4, with additional citations.

[40] For details of the procedure, see *Buck-Heeb/Dieckmann*, Self-regulation in private law, 2010, p. 129 *et seq*. with further citations.

Section 342(2) of the Commercial Code that they reflect the principles of proper bookkeeping.[41] In a comparable although not identical way, the EU International Accounting Standards Regulation[42] incorporates the rules defined from time to time by the International Accounting Standards Board into EU law. However, that is done under a formal act of acceptance by the EU Commission in the form of special regulations (endorsement) under the comitology procedure.[43]

As these examples illustrate, a distinction can be made between various types of co-regulation. For example, state institutions can specify the regulatory objectives of co-regulation by law and control compliance with them. They can also define minimum requirements for standard-setting and enforcement and also assist directly in co-regulation.[44] That means that the extent of state influence over co-regulation may take different forms. For example, private operators could lay down rules for themselves and control compliance with them themselves (based on law) or 'merely' control compliance with statutory standards.[45]

All these forms of co-regulation have one thing in common: the fundamental characteristic of this regulatory approach is that 'binding law-making and regulatory activities by the State are combined with measures by the main stakeholders using their practical experience'.[46] This distinguishes co-regulation from self-regulation and explains why co-regulation is also referred to as *regulated* self-regulation. Co-regulation should not therefore be confused with de-regulation. Co-regulation is another form of regulation.[47]

Self-regulation: Self-regulation is recognisable by the fact that a private organisation (such as an individual enterprise) or a group (such as an industrial association) develops its own code of conduct, voluntarily subscribes to it, independently monitors compliance with it and takes action when it is infringed. Unlike co-regulation, self-regulation is not based on an explicit legal basis and may be applied without any particular legal framework for action. Similarly, the standards formulated are not endorsed by a government authority or court.

Market regulation: Control is left to the market. The starting point for this regulatory approach is the assumption that consumers in a market economy

[41] See *Hellermann,* NZG 2000, 1097, 1098 *et seq*.; *Ebke*, ZIP 1999, 1193, 1202 *et seq*.; see also *Förschle*, in: Beck Bil-Komm., Commercial Code Section 342, paragraph 19.
[42] Regulation (EC) No 1606/2002 of 19 July 2002 on the application of international accounting standards (OJ L 243 of 11.09.2002, p. 1 *et seq.*).
[43] See *Köndgen*, AcP 2006, 478, 492; *Buck-Heeb/Dieckmann*, Self-regulation in private law, 2010, p. 140 *et seq*. with further citations.
[44] *Krüger*, Internet Governance: A challenge for liberal democracies?, 2014, p. 61; *Schulz*/*Held*, Regulated self-regulation as a form of modern governance – Commissioned by the Federal Commissioner for Culture and Media Affairs, 2002, p. A-4 et seq., available at: https://www.hans-bredow-institut.de/webfm_send/53 (last downloaded: 13.04.2015), p. A-10, 11; *Latzer*/*Saurwein* in: *Schulz /Held (ed.)*, More trust in content, 2008, p. 96-106.
[45] *Schulz/Held*, Regulated self-regulation as a form of modern governance – Commissioned by the Federal Commissioner for Culture and Media Affairs, 2002, p. A-5, available at: https://www.hans-bredow-institut.de/webfm_send/53 (last downloaded: 13.04.2015).
[46] *Hinterplattner*, Internet Governance, 2007, p. 26, available at http://issuu.com/quadres/docs/hinterplattner_diplomarbeit_final_korr (last downloaded: 13.04.2015).
[47] European Economic and Social Committee, *European Self- and Co-Regulation*, 2013, p. 2 available at: http://www.eesc.europa.eu/resources/docs/auto_coregulation_en--2.pdf (last downloaded: 13.04.2015).

have access to competing products and services and can therefore choose those which best meet their preferences. Consumers can exercise their powers by buying a particular product, cutting consumption or switching provider. In this way, acceptable conduct by companies is rewarded and unacceptable conduct is penalised and unwanted goods and services are squeezed out of the market.

Figure 1 below illustrates these four regulatory approaches along the State/market continuum.

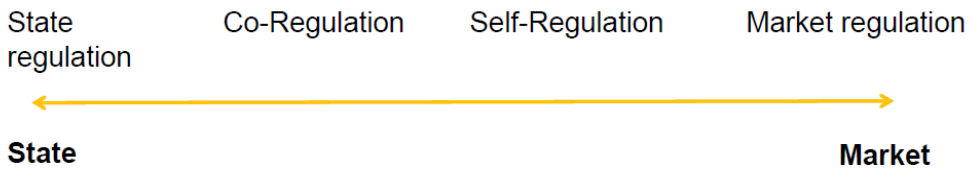

Figure1: Different regulatory approaches along the State/market continuum

As this continuum suggests, the dividing lines between the approaches are blurred and different approaches can be combined. One example is the German Corporate Governance Code in the field of listed company law, which is a mechanism which sits somewhere between State-influenced self-regulation and market regulation.[48] The committee that prepares the Code is convened by the Federal Ministry of Justice, although there is no legal basis for it. However, the Code has an indirect effect in that listed companies are required under Section 161 of the Public Limited Companies Act to explain if they are complying with the rules of the Code and if not why not ('comply or explain'). This should ensure that voluntary rules are honoured by the capital market, thereby exerting 'soft' pressure to apply the Code.

This is not private self-regulation, as the State exercises a certain degree of supervision over the convening of the committee and publication of the Code in official gazettes, even if there is no explicit legal basis for this. It is therefore hardly surprising that it attracts criticism on constitutional grounds.[49]

3.2. Strengths and weaknesses of different approaches

The existence of these different regulatory approaches raises questions in terms of the strengths and weaknesses of each. The main strengths of *state regulation* are that state regulation enjoys the highest level of democratic legitimacy and is as a rule appropriate for addressing subject matters for regulation that extend beyond one sector and are disputed politically. Also, it

[48] See also *Buck-Heeb/Dieckmann,* Self-regulation in private law*,* 2010, p. 97 *et seq*; *Seidel,* ZIP 2004, 285, 289; compare with *Köndgen,* AcP 2006, 478, 496: Rule-making in the shadow of law.
[49] See, among many others, *Spindler,* in: Schmidt/Lutter, Public Limited Companies Act Section 161, paragraphs 11 *et seq*. with further citations; for constitutionality, see Munich Higher Regional Court, WM 2008, 645, 648.

has a system of penalties (especially via supervisory authorities and legal channels).

However, critics of state regulation point out that it also has serious weaknesses, such as the fact that the slow and tedious democratic decision-making process results in politics playing catch up with problems or issuing regulations that are already outmoded when they enter into force. As a result of knowledge and competence deficits among government decision makers, the regulations adopted may 'bypass the real problem' or have what are sometimes serious (unintended) side effects. It is often only possible to issue the necessary sectoral regulations to a limited extent via state regulation. Moreover, own initiatives, innovation and a sense of responsibility among those subject to regulation are inhibited and imperative control triggers resistance.[50]

Supporters of *co-* and *self-regulation* list as fundamental strengths of these approaches that they allow a more flexible reaction to changing requirements and that more appropriate and thus expedient regulations can be adopted. Also, these regulatory approaches can be 'tried' and tested in individual sectors. As greater account is taken of stakeholder interests and competences, more appropriate solutions can be found. This encourages own initiatives and thus cooperation between those subject to regulation, which are fundamental characteristics of a free, liberal, competitive social market economy.

However, critics argue that such approaches 'privatise the law', in that private operators lay down their own 'rules of play' and that economic interests marginalise public concerns. They also argue that these approaches are simply used by economic operators as a 'fig leaf' and as 'symbolic policy' to prevent sensible regulation.

Supporters of *market regulation* consider that this is the best way of defending the defining features of a free/liberal basic order, whereas state regulation would interfere in the free interplay of supply and demand.

Critics of *market regulation* cite four essential weaknesses of this approach. First, a lack of competition (e.g. in monopoly or oligopoly markets) can limit the free interplay between supply and demand, in which case consumers have no or inadequate access to alternative options. Second, that free interplay requires consumers to have access to proper information on goods and services. As information economics illustrate, that is often not the case.[51] Thirdly, consumers find it hard to change providers, for example as a result of long-term contracts or lack of interoperability (lock-in effect). Fourthly, even on markets with professional market participants, such as the financial and capital markets, whether or not regulation is actually experienced as a pricing factor is a debatable point; if, however, it plays no role, the intended effect falls flat. For example, whether the anticipated market reactions to the Corporate

[50] *Schulz/Held*, Regulated self-regulation as a form of modern governance – Commissioned by the Federal Commissioner for Culture and Media Affairs, 2002, p. A-8, available at: https://www.hans-bredow-institut.de/webfm_send/53 (last downloaded: 13.04.2015); *Reip,* Self-regulation on the Internet, considering in particular standard setting and the domain name system, 2002, p. 35, 36.

[51] *Akerlof*, Quarterly Journal of Economics 1970, 488; *Hagen/Wey*, Quarterly Journal of Economic Research 2009, 230; *Oehler/Reisch,* Behavioral Economics – A new basis for consumer policy? 2008.

Governance Code (see 3.1 above) actually materialised is a debatable point; according to empirical surveys, there is doubt as to whether this mechanism functions at all.[52]

The results of this discussion are summarised in the following table:

	Strengths	Weaknesses
Regulations	- High democratic legitimacy - Ability for cross-sector regulation - Ability to regulate politically contested issues - Existence of a penalty system	- Long tedious decision-making process - Inferior regulation due to lack of expertise - Insufficient facility to adopt sectoral regulations in the form of laws - Own initiatives by stakeholders are inhibited - Resistance triggered among those subject to regulation
Co- and self-regulation	- Ability to adopt specific regulations for individual sectors - Flexibility and speed - Ability to 'test' regulations - More appropriate solutions - Own initiatives and cooperation encouraged	- 'Privatisation of the law' - Economic interests dominant public interests - 'Fig leaf' approaches and risk of preventing sensible laws
Market regulation	- Least possible interference in interplay between supply and demand - Basic features of free/liberal basic order conserved	- Consumers often have no alternative options - Power and information asymmetry prevent interaction on a 'level playing field' - Consumers are locked into contracts - Market regulation fails if regulation is not perceived as a pricing factor

Table 2: Strengths and weaknesses of different regulatory approaches

Moreover, what all these regulatory approaches have in common is that they face the challenge of having to react to globalisation and its by-products. These include in particular the risks caused by forum shopping. This is where operators look for the countries with the lowest taxes, the lowest (environmental or consumer protection) standards or the lowest enforcement record. In doing so, they both avoid and weaken national regulations (race to the bottom).

It is clear from the above explanation that *the* ideal regulatory approach for all forms of regulated circumstances does not exist. On the contrary, the most appropriate regulatory approach needs to be selected, depending on the subject matter to be regulated or different approaches need to be combined in a sensible manner.

This preliminary finding is also shared by international, European and national operators: in its *Recommendation of the Council on Regulatory Policy and Governance*, the OECD argues that OECD Member States should take account of alternatives to traditional 'command and control' approaches within the framework of follow-up evaluations of the law, estimate the pros and cons and then select the most expedient approach.[53] The European Commission explains that it considers it good legislative management within the framework of its Regulatory Fitness and Performance Programme (REFIT) 'to withdraw

[52] *Bernhardt*, BB 2008, 1686, 1690; *Nowak/Rott/Mahr,* ZGR 2005, 252, 279.

[53] *OECD*, Recommendations of the Council on Regulatory Policy and Governance, 2012, p. 4, 26. See also: *OECD*, Report: Alternatives to Traditional Regulation, 2009, p. 15.

proposals that do not advance in the legislative process, in order to allow for a fresh start or for *alternative ways* of to achieve the intended legislative purpose'.[54]

3.3. Criteria for the application of different regulatory approaches

Based on the discussion of the strengths and weaknesses of various regulatory approaches, we need to consider which approach should be applied. Academic discussion suggests that state regulation is the most appropriate regulatory approach in three cases:[55]

1. The first criterion is the question whether the challenge that should be regulated is characterised by the fact that fundamental rights are in grave conflict with each other. As democratic decision-making processes, which are conducted by the constitutional bodies, have the maximum possible legitimacy, state regulation is the appropriate regulatory approach in such cases.[56]
2. The second criterion is the question of whether or not this is a cross-policy challenge which needs to be addressed. If the subject matter spans more than one sector or policy field, there is a good argument for state regulation. As co- and self-regulation mostly only function within one industry or sector, they are precluded for that reason alone.
3. The third criterion is whether the issue to be regulated is a politically contested one. Here too state regulation is the most suitable instrument, as any decision will again require a high degree of legitimacy.[57]

Figure 2 summarises these considerations.

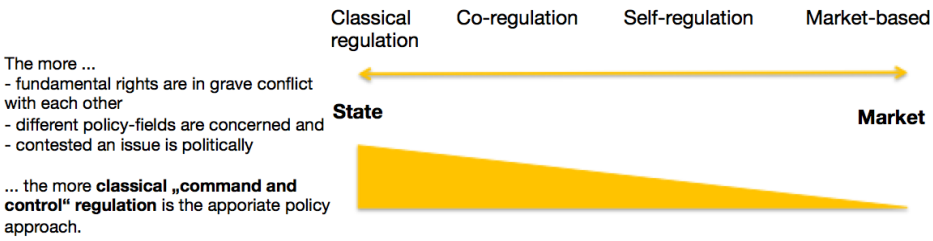

Figure 2: Criteria for the application of State regulation

[54] *EU Commission*, Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook, 2014, (COM(2014) 368 final), p. 11. Emphasis added.
[55] See also: *EU Commission*, European Governance - A White Paper, 2001, (COM(2001) 428 final), p. 21.
[56] See also: *OECD*, Recommendations of the Council on Regulatory Policy and Governance, 2012, p. 4. *Metz*, Consumers and Law, 2012, 85; European Economic and Social Committee, *The Current State of Co-Regulation and Self-Regulation in the Single Market,* EESC Pamphlet Series, 2005, p. 23, available at http://www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf (last downloaded: 13.04.2015).
[57] *Franzius,* Governance through 'better' use of instruments: The idea of co-regulation in the Commission's White Paper on Governance, 2002, p. 3, 4, available at: http://www.europawissenschaften-berlin.de/media/pdf/Publikationen/Koregulierung.pdf (last downloaded: 13.04.2015).

By contradistinction, these considerations suggest that in cases in which fundamental rights are not in grave conflict with each other or in which the issues to be regulated are sector-*specific* and not hotly contested politically, state regulation is not necessarily the best regulatory approach. This is particularly the case where abstract statutory rules need to be specified sector by sector.

Examples of this are requirements that might simplify and create a better understanding of companies' data protection policies, procedures to anonymise or pseudonymise data or regulations specifying abstract principles such as 'privacy by design' and 'privacy by default',[58] for example in the mobility sector or for wearables. This might also apply to industry-specific requirements in terms of transparency in e-commerce (button solution).[59]

3.4. Opportunities, risks and challenges of co- and self-regulation

Co- and self-regulatory approaches might theoretically be sensible regulatory approaches in cases in which state regulation is not the obvious solution for the reasons listed in section 3.3. It therefore comes as no surprise that numerous political, corporate and economic operators have concluded in connection with regulatory approaches for the information society that traditional regulatory approaches need to be supplemented in this sector by alternative approaches.[60] They also call, among other things, for a more important role for co- and self-regulation.[61]

Whereas, therefore, there is much to be said for making more use of co- and self-regulatory approaches in combination with traditional state control in the information society, on the one hand, this attracts criticism on the other.

Therefore, the aim of this section is to analyse the pros and cons and fundamental challenges of these approaches and, from that, to extract key questions which will be investigated in greater detail in the 4th chapter based on national and international experience.

3.4.1. Arguments for co- and self-regulation

Supporters of co- and self-regulation argue that traditional state regulation comes up against limits for the reasons listed in sections 2.1 and 3.2, especially in the information society. That is because it is precisely in that sector that speed and expertise are needed in order to be able to react flexibly and properly to new challenges without generating any unwanted side effects.

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[58] See abstract specifications in Articles 23 *et seq*. of the planned GDPR.

[59] See *Spindler/Thorun/Blom*, MMR 2015, 3, 6.

[60] *DIVSI – German Institute for Online Trust and Security*, Does Germany need a Digital Code? Responsibility, platforms and social standards for the Internet, 2014, p. 46, available at:https://www.divsi.de/wp-content/uploads/2013/08/DIVSI-Braucht-Deutschland-einen-Digitalen-Kodex.pdf (last downloaded: 13.04.2015); *Hirsch*, Seattle University Law Review 2011, 34(2), 439, 479.

[61] For a presentation of the various regulatory schools of thought (cyberlibertarian school, cyberpaternalism und network communitarian school), see: *Murray*, in: *Levi-Faur (Ed.),* Handbook on the Politics of Regulation, 2011, p. 267 ff.

Supporters therefore put forward the following arguments for co- and self-regulation:[62]

- High level of flexibility and adaptability, for example to changing market conditions.
- Unlike statutory 'one size fits all' solutions, they allow specific market conditions to be analysed and specific rules to be found.
- A high level of legal certainty for enterprises and consumers, as abstract legal requirements can be specified within a code of conduct.
- Potentially lower compliance and administrative costs for enterprise. Also young start-ups avoid market entry barriers.
- As self-regulation is the stakeholder's responsibility, regulations are based on a high level of expertise, thereby reducing the risk of generating unwanted side effects and increasing the standard of regulation.
- This instrument can be regarded as a 'testing ground' for regulatory approaches which can be transposed in legal regulations by politicians at a later date, thereby avoiding legislative 'quick fixes'.[63]
- Own initiatives are encouraged, acceptance of regulations is increased among the actors involved and the basic free/liberal order is strengthened. Also, market actors engaged in cross-border activities can be involved. This may help to address the challenges of law-making and enforcement in cross-border trade.
- Traditional enforcement instruments (such as official market supervision or class actions) can be supplemented by voluntary self-control.
- Even third-country providers can be 'forced' to comply with higher standards.

It is also argued that state regulation is not a 'one-way street' in which public bodies might regulate completely how the objects of regulation behave. On the contrary, the objects of regulation can also become pro-active subjects, for example by avoiding State regulation and looking for loopholes or by lobbying against a regulatory initiative.[64] *Schulz/Held* illustrate that, for this reason, state regulation is not 'more effective the stricter the regulation'.[65]

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[62] See for example: *OECD*, Report: Alternatives to Traditional Regulation, 2009, p. 6. and *SRIW,* Position paper: Opportunities and preconditions for effective self- and co-regulation to promote consumer protection and data protection in the digital world, 2014, p. 1, 2, available at http://www.sriw.de/images/pdf/Broschueren/140521_SRIW_Positionspapier_Selbst-_und_Ko-Regulierung_v03.pdf (last downloaded: 13.04.2015); from a legal theory perspective, see summary in *Buck-Heeb/Dieckmann,* Self-regulation in private law, 2010*, p*. 217 *et seq*. with further citations; *Schuppert*, in: *Berg/Fisch/Schmitt Glaeser et al*, Regulated self-regulation as a concept of influence by the State as guarantor, 2001, p. 201 *et seq*.; *Thoma*, Regulated self-regulation in regulatory administrative law, 2008, p. 70 *et seq*.; *Puppis/Künzler/Schade/Donges et al,* Self-regulation and self-organisation, p. 58 *et seq*.

[63] *Metz*, Consumers and law, 2012, 85, 86; See also: European Economic and Social Committee, *European Self- and Co-Regulation*, 2014, p. 17 available at: http://www.eesc.europa.eu/resources/docs/auto_coregulation_en--2.pdf (last downloaded: 13.04.2015).

[64] *Schulz/Held*, Regulated self-regulation as a form of modern governance – Commissioned by the Federal Commissioner for Culture and Media Affairs, 2002, p. A-10, available at: https://www.hans-bredow-institut.de/webfm_send/53 (last downloaded: 13.04.2015).

[65] *Ibid*, p. A-9.

Positive examples cited by supporters of co- and self-regulation include:[66]

- the established system of chambers and occupational cooperatives in Germany;
- Voluntary Multimedia Self-Control (FSM) in connection with the protection of minors from harmful media;
- the Centre for Protection against Unfair Competition as an enforcement instrument used by the economy to penalise infringements of the Unfair Competition Act;
- The Geodata Services data protection code;
- The European PIA Framework for RFID applications and
- the Online Advertising Data Protection Council.

3.4.2. Arguments against co- and self-regulation

However, co- and self-regulation also have their critics. The following aspects of these approaches are criticised:[67]

- The most fundamental criticisms of co- and self-regulatory approaches are that there is a danger of 'privatisation of the law', as co- and self-regulation would circumvent democratic processes, that, as co- and self-regulation would mainly be set-up by financially powerful economic interests, social interests would be marginalised and that these operators would lay down their own 'rules of play'.[68]
- Co- and self-regulation are often less transparent and open. Thus important stakeholders are often overlooked when standards are set.
- As co- and self-regulation tend not to include all operators in a particular industry, full coverage of that industry is not achieved. As a result, the effectiveness of co- and self-regulation for consumers fails or is limited and this causes distortion of competition ('free rider' problems[69]). That is because enterprises that subject themselves to self-regulation have a comparative disadvantage (higher compliance costs or product design, advertising and marketing restrictions) compared to enterprises ('black sheep') who consider themselves exempt but profit nonetheless from its effects (e.g. prevention of statutory regulation).
- The codes developed through self-regulation mainly only contain regulations that correspond to the *status quo*.

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[66] *Baums/von Braunmühl*, in: *Baums/Scott* (Publisher), Compendium of Digital Localisation Policy. From 1x1 to 3x3, 2013, p. 156; *BITKOM*, Fostering of self-regulation in data protection by the Federal Government and the EU – Privacy Breakfast, p. 7.

[67] *Metz*, Consumers and Law, 2012, 85; *Brown*, Internet Self-Regulation and Fundamental Rights, Index on Censorship, 1, 2010, p.98; *OECD*, Alternatives to Traditional Regulation, 2006, p. 6.; from a legal theory perspective, see the summary in *Buck-Heeb/Dieckmann,* Self-regulation in private law, 2010, *p*. 229 *et seq*. with further citations.

[68] *OECD,* Recommendations of the Council on Regulatory Policy and Governance, 2012 p. 26.

[69] See, for example, *Kirchner*/*Ehricke* AG 1998, 105, 108 on the previous takeover code in Germany; *Augsberg,* Law-making between State and society, 2003, p. 284.

- Often self-regulatory approaches lack effective penalties for infringements, a complaint mechanism and systematic and independent evaluation.[70]
- Self-regulatory approaches may be abused by (economic) operators involved in order to enter into concerted agreements or erect market entry barriers.[71]
- Furthermore, self-regulation may tend to ignore general public interests not articulated in the procedure.[72]

On balance, as a result of these deficits, co- and self-regulation are often seen as 'symbolic projects by umbrella or central associations' and used as fig leaves, in the ultimate aim of 'preventing legislation'.[73]

Negative examples cited include voluntary agreements on inadmissible fax advertising, on the right to a giro account (where the consumer has no legal entitlement despite a 'recommendation' by the credit industry, even if a bank advertises as much) or the failed attempt to establish a code of conduct for social network providers.[74]

3.4.3. Challenges for co- and self-regulation

Furthermore, even supporters of co- and self-regulation cite structural challenges that currently stand in the way of increased use of these approaches in Germany. These challenges can be grouped in five categories:[75]

i) Fundamental dilemmas

The 'free rider' problems outlined above represent a fundamental dilemma for co- and self-regulation. That is because the enterprises that endorse a code must both finance the self-regulation and comply with the requirements of self-regulation. At the same time, they are often unable to prevent 'black sheep' from profiting from the indirect positive effects of regulation (e.g. prevention of statutory regulation). That is because the results of co- and self-regulation represent a 'public good'.

Furthermore, the real costs of complying with self-regulation are often only offset against hard-to-grasp advantages in terms of potential improved reputation, customer confidence or legal certainty.

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[70] *Frenz*, Voluntary commitments by the economy, 2001, p. 59; *Bachmann*, Private order, 2006, p. 54; *Thoma*, Regulated self-regulation in regulatory administrative law, 2008, p. 76; *Schmidt-Preuss* VVDStRL 56 (1997), p. 160, 219 *et seq*.

[71] *Franzius,* Governance through 'better' use of instruments: The idea of co-regulation in the Commission's White Paper on Governance, 2002, p. 7, 8; *Bachmann*, Private Order, 2006, p. 54, 362.

[72] *Thoma*, Regulated self-regulation in regulatory administrative law, 2008, p. 76; *Bachmann,* Private Order, 2006, p. 66 *et seq*.; *Schuppert*, in: *Berg/Fisch/Schmitt Glaeser et al*, Regulated self-regulation as a concept of influence by the State as guarantor, 2001, p. 201, 229; *Buck-Heeb/Dieckmann*, Self-regulation in private law, 2010, p. 231 *et seq.*, with further citations.

[73] *Metz*, Consumers and law, 2012, 85.

[74] *Ibid*.

[75] *SRIW*, Position paper: Opportunities and preconditions for effective self- and co-regulation to promote consumer protection and data protection in the digital world, 2014, p. 2, 3, available at http://www.sriw.de/images/pdf/Broschueren/140521_SRIW_Positionspapier_Selbst-_und_Ko-Regulierung_v03.pdf (last downloaded: 13.04.2015).

If they are to be credible, the requirements of self-regulatory approaches must go beyond statutory provisions or must specify essential aspects of statutory provisions. From the enterprises' perspective, additional requirements demanded by the supervisory authorities, for example in the field of data protection, often go too far. That means that one serious practical challenge is to achieve a level of regulatory content that takes proper account of the interests of various stakeholders.

ii) Inadequate basic conditions

There is currently a lack of minimum requirements for the purpose of the development, content and implementation of a code of conduct. There is also a lack of minimum requirements for accrediting voluntary self-control systems.

There is also a deficit in terms of legal certainty, i.e. if the rules established within the framework of self-regulation will stand up in court. There is likewise a lack of clarity as to when and how standards based on self-regulation will have legal effects before the authorities and courts.

iii) Insufficient incentive

To date there has been no incentive in Germany for enterprises to use co- and self-regulatory approaches, such as government recognition of codes of conduct in the field of consumer protection (e.g. by the German Federal Office of Consumer Protection, by using approval schemes for recognised codes or taking them into account in public procurement) or by giving preference to members of a recognised voluntary self-control scheme in the form of less supervisory action (voluntary commitment by the administration similar to the protection of minors from harmful media (see for example Section 18(8) of the Youth Protection Act and Section 20(5) of the Interstate Treaty on the Protection of Minors from Harmful Media; see also section 4.3.3.3). In this context, for example, Section 38a BDSG (German Data Protection Act) is criticised. Although that section lays down a basis for self-regulation in the field of data protection, there is contention as to whether the decision by the competent supervisory authority is also binding on other supervisory authorities. It is also unclear if the regulations need to go beyond the statutory requirements or 'merely' specify them.[76] Finally, recognition as a code by a supervisory authority does not result in less stringent legal requirements; it merely results in a binding, officially confirmed interpretation guide for data protection law.[77]

iv) Insufficient willingness on the part of the economy to participate in co- and self-regulation

Credible and effective co- and self-regulation depends on economic operators applying such approaches not defensively, in order to avoid statutory regulation, but rather seeing this instrument as a corporate responsibility opportunity and contribution. However, that is still a rare approach. Instead,

[76] *Dehmel*, in: *Baums und Scott (Publisher.),* Compendium of Digital Localisation Policy. From 1x1 to 3x3, 2013, p. 162.
[77] *Vomhof*, PinG 2014, 209, 215; *Bizer,* in: *Simitis*, BDSG, Section 38a, paragraph 3, 40.

enterprises appear to fear that self-regulation will create an occasion for statutory regulation (‘wake sleeping dogs’).

v) Insufficient openness on the part of state actors to alternative forms of regulation

Despite the state’s avowals of giving greater recognition to alternative regulatory approaches within the framework of regulatory impact assessments referred to in section 3.2, organisations such as the OECD have found that a culture of public operators ‘preferring state regulation’ often stands in the way of that concern. This culture of ‘preferring state regulation’ feeds on a series of factors:

First, a government can demonstrate to the public that it is willing and able to act by engaging in state intervention.[78]

Second, alternative forms of regulation involve a higher risk for state actors than traditional ‘command and control’ approaches. For example, the OECD points out that the persons responsible for a failed alternative attempt at regulation must contend with greater negative consequences than when a traditional attempt at state regulation fails.[79]

Third, ignorance prevails about the use of alternative regulatory approaches. State actors are generally more familiar with the use of traditional than with the use of alternative regulatory approaches. This problem is exacerbated by the fact that there are various ways in which co- and self-regulation can be implemented and that self-regulation sometimes rightly attracts criticism.[80]

The OECD concludes from this that governments must actively campaign against inertia, risk aversion and a culture of ‘regulate first, ask questions later’.[81]

3.5. Preliminary conclusion: Requirements of co- and self-regulation

The main findings of this third chapter on the value of the different regulatory approaches can be summarised in six points:

1) The challenges of the information society can in theory be met with four ideal typical regulatory approaches: These regulatory approaches can be mapped along the continuum between State and market: State regulation, co-regulation, self-regulation and market regulation.

2) The best regulatory approach for all types of market failure does not exist: An analysis of the strengths and weaknesses of the four regulatory approaches illustrates that each approach has its own pros and cons. It is therefore a question of selecting the most appropriate regulatory approach for the subject matter to be regulated or sensibly combining different approaches. This conclusion is basically endorsed at international, European and national

[78] See, for example: *OECD,* Alternatives to Traditional Regulation, 2006, p. 10.
[79] See, for example: *Ibid*, p.11.
[80] See, for example: Ibid, p.11, 12.
[81] *OECD,* Recommendations of the Council on Regulatory Policy and Governance, 2012, p. 26.

level. For example, numerous OECD, EU and Federal Government recommendations on 'better regulation' call for alternative regulatory approaches to be examined during regulatory impact assessment.

3) State regulation is the most appropriate regulatory approach in three cases: State regulation is the most appropriate form of regulation in cases in which fundamental rights are in grave conflict with each other and in which regulations are needed in politically contested areas spanning more than one sector or policy field.

By contradistinction, this means that state regulation is not necessarily the best form of regulation in all other fields. Therefore respective strengths and weaknesses need to be considered when selecting a regulatory approach.

4) Co-regulation might offer a sensible alternative/complementary form of regulation: Co- and self-regulation are alternative forms of regulation. However, these regulatory approaches are contested. As the debate for and against co- and self-regulation illustrates, most criticism is levied against self-regulatory activities which are implemented half-heartedly, and it is generally justified in such cases. However, self- and co-regulation should not be 'lumped together'. As research illustrates, co-regulation initiatives implemented on a legal basis which take account of minimum requirements can provide a sensible complement to state regulation.

The *minimum requirements* needed should address the following aspects:

- the code development process;
- requirements in terms of involving important stakeholders;
- public communications about the code;
- its implementation, including penalty mechanisms;
- monitoring, evaluation and complaint procedures.

5) There are structural obstacles in Europe and for instance on the national level in Germany to the successful application of co-regulation in the information society: In order for co-regulation to function, preconditions for its use must be created if this approach is to be applied successfully. This means creating the following basic preconditions in particular:[82]

i) Resolve fundamental dilemmas

- find a solution to 'free rider' problems

ii) Develop encouraging framework conditions

- allow for accreditation of voluntary self-control schemes

[82] *SRIW,* Opportunities and preconditions for effective self- and co-regulation to promote consumer protection and data protection in the digital world, 2014, p. 3, 4; *Baums/Scott* (Publisher), Compendium of Digital Localisation Policy. *BITKOM*, Position paper: Anchoring self-regulation in data protection in the EU General Data Protection Regulation, 2013, p. 2, 4 available at: http://www.bitkom.org/files/documents/BITKOM_und_SRIW_Stellungnahme_Selbstregulierung_DS-VO_final.pdf (last downloaded: 13.04.2015; *Dehmel*, in: *Baums/Scott (ed.)*, Compendium of Digital Localisation Policy. From 1x1 to 3x3, 2013, p. 162, 164.

- improve legal certainty as to whether the regulations created within the framework of self-regulation will stand up before the courts

iii) Increase incentives

- create powers for state supervisory authorities to initiate self-regulation
- recognise codes of conduct (e.g. by the authorities); if necessary create the right for trade associations to obtain approval of a code by the competent authorities by a reasonable deadline, provided that statutory requirements have been complied with
- introduce approval schemes for recognised codes (registration of codes with government departments)
- take account of the code during public procurement
- reduce the risk of sanctions by the supervisory authorities by joining a recognised self-control scheme
- uniform interpretation of the law by the various competent data protection supervisory authorities
- legal facilities available to the regulator if co-regulation fails

iv) Encourage willingness on the part of the economy to join a co- or self-regulation scheme

- take measures to encourage enterprises to use co- and self-regulation

v) Encourage openness on the part of State operators to alternative forms of regulation

- Increase openness on the part of State operators to alternative forms of regulation

6) Preliminary conclusion: Alternative regulatory approaches such as co-regulation should be considered as potential forms of regulation more frequently than in the past. However, if they are to be effective, they require a regulated framework: Alternative regulatory approaches such as co-regulation are a sensible complement to state regulation. Co-regulation stands out in terms of the challenges of the information society by being flexible and adaptable, by allowing for detailed regulations to be adopted for certain sectors and fields of action and ‘tested’, by taking account of the expertise of the various stakeholders and by encouraging own initiatives by stakeholders overall.

Nonetheless, as the discussion illustrates, this approach will only be effective if embedded in a regulatory framework which defines *minimum requirements for standard-setting and enforcement* and creates *appropriate framework conditions*. In that sense, there is a **dual shared responsibility** here: First, co-regulation makes no claim to be a substitute for state regulation. Rather it endeavours to complement state regulation in selected legislative fields and to improve the application of those regulations by specifying and concretizing abstract regulations. (Within the framework of law-making processes at EU level, co-regulation could also be considered as an alternative instrument to

delegated legal acts or Commission implementing decisions.[83]). Second, effective co-regulation itself needs to depend on a legal framework if it is to be effective, legitimate and credible.

The core task is to regulate self-regulation and give it a statutory framework for action. The focus below has therefore been shifted from self-regulation to co-regulation.

[83] Proposal of the Federal Government for a new version of Article 38 (Codes of conduct) and for a new Article 38a (Voluntary self-control schemes) in the General Data Protection Regulation (Draft), 2013, p.1.

4. Constitutional requirements and national and international lessons for co-regulation

This chapter considers the constitutional requirements which co-regulation must satisfy, on the one hand, and analyses what can be learned from national and international experience with co-regulation, on the other. What minimum requirements must apply to *standard-setting*? What minimum requirements must be satisfied by *standard enforcement*? What general framework conditions should be created in order to provide incentives for co-regulation?

Account must be taken here of the fact that a (legal) theoretical reappraisal of co- and self-regulation has progressed to differing degrees, depending on the sub-discipline in question. With regard to the German discussion early on public law formulated constitutional and administrative requirements for co- and self-regulation and their recognition under the law; in contrast, private law was still lacking a comprehensive system in 2010.[84] The situation seems to be similar on the European level – with the notable exception of the UK, given the widely differing system of constitutional law in England.

However, there are numerous self-regulations which interfere in both public and private law (from banking and insurance law through press, radio and television law,[85] accounting law[86] to competition law (Unfair Competition Act) [87]), not all of which can be systematically included within the framework of this study. The following analysis draws its conclusions in principle from German law – however, it is very likely that the European Court of Justice would adopt similar views regarding the minimum requirements for private standards which specify European legal acts and which would have to some extent binding effects upon authorities and courts.

4.1. Minimum requirements in terms of standard setting

If private standards are to be more than a quality seal in free competition and are to have at least limited legal effects (across different legal fields with the necessary modification for each legal standard), the standard-setting process requires a degree of institutionalisation within which minimum requirements are complied with.

4.1.1. Principles

There are no fundamental constitutional objections to the use of private standards or standards laid down within the framework of co-regulation. Thus

[84] See *Buck-Heeb/Dieckmann*, Self-regulation in private law, 2010, p. 6 *et seq.*
[85] See, for example, *Gottzmann,* Potential and limits of voluntary self-control in the press and advertising, 2005, passim; *Ullrich*, Mass Media Law, 2005, p. 743 *et seq.*
[86] The International Financial Reporting Standards (previously IAS) are a cardinal example, see *Köndgen,* AcP 2006, 478, 491 *et seq;* see also p. 19 above.
[87] See for example *Teubner*, Standards and Directives in General Clauses, 1971, p. 94 *et seq*.

the German Federal Constitutional Court has pointed out that the parliament cannot enact requirements when there is a need for flexible and continual adaptation to complex subject matters.[88] Especially with regard to acts concerning security of technologies, the parliament can confine itself to unspecific legal terms as open-ended terms allow for a dynamic protection of fundamental rights.[89] However, the loss of legitimacy of standards set privately must be compensated by safeguarding democratic structures in the standardisation process itself. An intensive debate in the 1990s led to the recognition that the loss of publicity, transparency and public debate must be made good through organisational and procedural precautions and requirements in terms of the pluralistic composition of committees.[90] This is not a demand for democratisation of the associations but of the standard-setting process as such. This democratisation is important since in this system standards are set outside the State sphere, which are then in fact converted by the State into binding standards. Aside from the usual criteria for committees of experts and for the development and adoption of standards of objectivity, expertise on the part of the committee, independence in respect both of the organising institution and the committee members themselves, neutrality, the balance of various representatives, documentation of the decision-making process and the adoption of rules of procedure, the legislature should also rule on the following questions due to the associated conflict of objectives: [91]

- definition and delimitation of participants in the procedure;
- safeguarding of status of participants or minority rights in the procedure;
- guarantee of full and undistorted flows of information;
- consideration of the time factor and
- factual correctness and consideration of the public good.

For example, although the German High Federal Administrative Court agrees that DIN standardisation committees (the German Industrial Standardization Organization) have in general the necessary expertise and responsibility for the public interests, it notes that they are composed of people representing

[88] Federal Constitutional Court Judgments 49, 89 (134 *et seq.*) – Kalkar; for materiality doctrine see also Federal Constitutional Court Judgments 40, 237, 248 *et seq*.; Federal Constitutional Court Judgments 68, 1, 108 *et seq*.; *Stern*, Constitutional Law, Vol. II, 1980, p. 572 *et seq*. with further citations.

[89] Federal Constitutional Court Judgments 49, 89 (135 f) – Kalkar ; *Trute*, DVBl. 1996, 950, 956 *et seq*.

[90] For example *Lübbe-Wolff*, ZG 1991, 219, 234, 242 *et seq*., which takes as its example the procedural rules in the USA for reappraisal of agency regulations under the Administrative Procedure Act (APA) 1946; *Trute*, DVBl. 1996, 950, 956; *Schmidt-Preuss*, VVDStRL 1997, 160, 205 *et seq*.; see also the legal policy proposals by *Battis/Gusy*, Technical Standards in Construction Law, 1988, paragraphs 482–560, such as deployment of representatives of the public interest (paragraphs 508 *et seq.*), adoption of legal criteria for standard-setting in individual laws (paragraphs 518 *et seq.*) and internal technical expertise (paragraphs 523 *et seq.*); compare with *Di Fabio*, Risk Decisions under the Rule of Law, 1994, p. 467, who argues against pluralisation but concedes that procedures are lacking in transparency.

[91] List from *Denninger*, Constitutional Requirements for Standard Setting in Environmental and Technological Law, 1990, paragraphs 177 *et seq*.; *Steinberg*, in: *Steinberg (Publisher)*, Reform of Atomic Energy Law, 1994, p. 82, 96 *et seq.*; *Kloepfer/Elsner*, DVBl. 1996, 964, 971.

specific interests, so that the outcome of their deliberations should not be understood uncritically as established expertise or as the results of independent research. The fact should not be overlooked that these are agreements by interested circles intended to have a certain influence over market events, which therefore do not satisfy the requirements of a court expert (such as neutrality and impartiality). Caution is needed *a fortiori* if the statements cannot be classed as extrajudicial technical questions, but as assessments by opposing interests. Such issues do *per se* require a democratically legitimate political decision in the form of law. However, the courts concede that DIN standards act as a legal presumption within the framework of the overall appraisal of the case at issue, but deny them any importance over and above that.[92]

Also civil case-law (German Federal Court of Justice) imposes minimum requirements on technical standards and, more importantly, reviews them to establish if they still reflect the state of the art and are not outmoded or only reflect the interests of a particular industrial group.[93] Private standards set essentially by a particular interest group are unlikely to have any legal effects. Case-law in all areas of the law has always refrained from ascribing legal effects to unilateral standards due to the effect on fundamental third party rights. This applies even more where it is not just purely natural science/technical expertise laid down in standards that is at stake and where assessments stand at the forefront within the framework of standards. Well-known examples of such standards by private or semi-governmental committees are the German Noise Technical Instruction and the German Air Technical Instruction. Therefore, as many different interests as possible need to be taken into account.[94] (Where a State act of recognition of a private standard is adopted, as in product safety law or accounting law, the legal act restores any lack of legitimation of the standard.)

Therefore various criteria must be established and fulfilled in order to take account of technical standards:[95]

- the standard must record the facts;
- it must not be outdated and must be the product of expertise;
- the standard-setter must be objective and neutral;
- more importantly, the stakeholders concerned must be involved in the standard-setting[96] and,

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[92] Federal Administrative Court Judgments 77, 285, 291 *et seq*.; Federal Administrative Court Judgments 79, 254, 264; Federal Administrative Court Judgments 81, 197, 203 *et seq*.; Federal Administrative Court Judgments Now 1991, 884, 885; Federal Administrative Court Judgments UPR 1997, 101, 102; *Gusy*, VerwArch 1988, 68 *et seq*.

[93] See for example Federal Court of Justice judgment of 10 March 1987 – VI ZR 144/86 NJW 1987, 2222 *et seq*. – Komposthäcksler.

[94] *Köndgen*, AcP 2006, 477, 522 *et seq.*: contrary to the democracy principle (majority principle), Stakeholder Involvement; *Buck-Heeb/Dieckmann*, Self-regulation in private law, 2010, p. 278 *et seq*.

[95] See summary in *Buck-Heeb/Dieckmann*, Self-regulation in private law, 2010, p. 166 *et seq*. with further citations; *Röthel*, Standard specification in private law, 2004, p. 270 *et seq*.; *Brennecke*, Standard-setting by private associations, 1996, p. 176.

[96] Federal Court of Justice NJW 1987, 2222 *et seq*. – Komposthäcksler.

- finally, the standard-setting must be transparent and public.[97]

Moreover, minimum requirements are also found in international and national standards (such as the ISO/IEC Guide 59 (Code of Good Practice for Standardization), the *ISEAL Code of Good Practice*[98] or DIN 820), EU regulations and directives (such as Directive 2009/125/EC establishing a framework for the setting of eco-design requirements for energy-related products) or other codes. Especially important in this context are the *EU Principles for Better Self- and Co-Regulation*.[99] These are minimum requirements for self- and co-regulation developed over recent years within the framework of a multi-stakeholder process at EU level.[100]

The constitutional requirements and the requirements which transpire from international and national standards and codes stand as follows in relation to each other: The stronger the legal effects of the standard set and enforced within the framework of co-regulation, the more standard-setting and enforcement must fulfil constitutional requirements. By contradiction, that means that co-regulatory approaches not necessarily need to fulfil all the requirements listed below if they are designed to have no or only weak legally binding effects. However, if they do not meet the requirements listed, the co-regulation will lose legitimacy and thus its legal effects will be invalid or at least impaired. This in turn can have a negative impact on the incentive of organisations to participate in co-regulation. However, deficits in the standard-setting procedure can be remedied after the event if an authority recognises the standard.

Minimum requirements for standard-setting have been extrapolated below from these legal requirements and the reference documents. They relate to the following aspects of standard-setting:

- Objectives that are consistent with statutory requirements and promise a real added value
- Participative approach that guarantees the involvement of important stakeholders
- Decision-making procedures that ensure a substantial say for all stakeholders
- Openness and transparency
- Financing that does not compromise impartiality

[97] *Müller-Foell*, The importance of technical standards in specifying legal provisions, 1997, p. 81 *et seq*.
[98] *ISEAL Alliance,* Code of Good Practice for Setting Social and Environmental Standards, Rev. 2014.
[99] *European Commission,* Principles for Better Self- and Co-Regulation, 2014*,* available at: http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=16 (last downloaded: 13.04.2015).
[100] See also: *Baden-Württemberg Consumer Commission*, From label misuse to trustworthy labelling, 2011.

4.1.2. Objectives that are consistent with statutory requirements and promise a real added value

If an issue is to be regulated using co-regulation, the first step is to clearly define the objectives. Three aspects need to be highlighted here:

First, care must be taken to ensure that the objectives of co-regulation are consistent with statutory requirements and that public interests can be reached with this approach. The OECD argues, for example, that: 'An effective self or co-regulatory regime [must] be well integrated and consistent with other existing legislation'.[101] It therefore makes sense to establish *Terms of Reference* at the start of the standard-setting process, in which the subject matter and objectives are defined and which explain why it should be possible to attain those objectives using co-regulation.[102]

Second, the objectives must be set out clearly and unambiguously. In order to ensure that the effectiveness of co-regulation can be measured (*ex post*), the current situation (i.e. baseline) and the objectives set by the participants in co-regulation must be defined. Interim targets and associated indicators can then be extrapolated based on the baseline and the objectives.[103]

Third, importance should be attached to objectives that deliver 'added value'.[104] Added value can be delivered in various ways. For example added value may be delivered by

1. creating a regulation for a previously completely unregulated issue;
2. adopting supplementary legislative specifications on topics which are already regulated but which have grey areas;
3. adopting a regulation on an issue that is already regulated providing for voluntary requirements that go beyond the legal requirements.

4.1.3. Participative approach that guarantees the involvement of important stakeholders

Based on the objectives formulated, the relevant stakeholders must then be identified and included in the standard-setting process. According to ISO 26.000, stakeholders can be defined as operators who have an interest in the decisions and activities of an organisation or are affected by the decisions and activities of the organisation.[105] Stakeholders therefore include actors with an

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[101] *OECD,* Alternatives to Traditional Regulation*,* 2006, p. 42; see also: *OECD*, Recommendations of the Council on Regulatory Policy and Governance, 2012, p. 26; *European Commission*, Principles for Better Self- and Co-Regulation, 2014, 1.5 Legal Compliance, available at: http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=16 (last downloaded: 13.04.2015).

[102] See also: *ISEAL Alliance,* Code of Good Practice for Setting Social and Environmental Standards, Clause 5.1.

[103] *European Commission,* Principles for Better Self- and Co-Regulation, 2014, 1.4 Objectives, available at: http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=16 (last downloaded: 13.04.2015) and Annex VIII point 4 of Directive 2009/125/EC.

[104] See Annex VIII point 2 of Directive 2009/125/EC*; Baden-Württemberg Consumer Commission*, From label misuse to trustworthy labelling, 2011, p. 2.

[105] ISO 26000: Guidance on social responsibility, 2010, p. 4.

interest in co-regulation and actors who would be affected (directly or indirectly) by the co-regulation. – In the information society, the main actors are: enterprises and their associations, consumer and civil rights organisations, representatives of the executive and legislature and supervisory authorities.

Moreover, stakeholders should be involved such that those who were unable to provide input from the outset can do so at a later stage in the process.[106]

In practice, in connection with stakeholder integration the question often arises when all stakeholders should be involved. In principle, two options can be used: either all stakeholders can be included in the standard-setting from the beginning or a key group can start the standard-setting process and the wider circle of stakeholders (especially critics) can be included at a later stage. However, the deciding factor for the second variation is that the extended circle of stakeholders must be given a substantive ability to influence the standard-setting process. This applies in particular to resolutions (see next point).

The British Office of Fair Trading (OFT) has published guidance on this. It provides for an authority that operates an approval scheme for co-regulation to identify the relevant stakeholders for the issue in question. The idea behind this concept is to ensure that co-regulation actually produces results which are relevant to citizens and consumers.[107]

4.1.4. Decision-making procedures that ensure a substantial say for all stakeholders

In order to guarantee substantive involvement of and input from all stakeholders, standards should where possible be set unanimously and, where majority decisions are taken, they should not conflict with the interests of a relevant minority, such as consumer protection associations. The German Federal Court of Justice refused to recognise a DIN standard because it unilaterally reflected the interests of the sector in question and was adopted even though the Stiftung Warentest (which is the comparative testing organisation in Germany) and consumer protection associations had voted against it.[108] Thus qualified majority requirements are needed to ensure that standards are set with due regard for minority interests.[109]

This qualified majority requirement is also found in international standardisation, which defines a consensus as: ‘General agreement, characterised by the absence of sustained opposition to substantial issues by any important stakeholder group’.[110]

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[106] *European Commission,* Principles for Better Self- and Co-Regulation, 2014, 1.1 Participants, available at: http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=16 (last downloaded: 13.04.2015).

[107] *Office of Fair Trading*, Consumer Codes Approval Scheme - Core criteria and guidance, 2013, p. 11.

[108] Federal Court of Justice NJW 1987, 2222 *et seq*. – Komposthäcksler.

[109] See also *Buck-Heeb/Dieckmann*, Self-regulation in private law, 2010, p. 287 *et seq.*

[110] ISO/IEC Guide 2:2004.

4.1.5. Open and transparent process

Transparency and publicity of the procedure and the standard adopted are further requirements that must be fulfilled if co-regulation should have legal effects.[111]

This means that, in particular:[112]

- public information must be provided on the standard-setting process;
- interim results during the standard-setting process must be made public, so that outsiders can comment. It may be expedient here to provide for public consultation;[113]
- the standards adopted must be published, so that everyone can inspect them;
- the procedure must be documented through to resolution, including the considerations that fed into particular decisions, so that the reasoning which informed the committee can be understood.

DIN 820-4 regulating the standardisation process in detail through to resolution can be used as one possible model for standardisation work.[114]

4.1.6. Financing that does not compromise impartiality

The question of committee financing is closely bound up with pluralistic manning of standard-setting committees. One frequent complaint is that standardisation committees depend financially on certain interest groups, for example when standardisations secretariats are ‘provided’ or financed by certain enterprises. Pluralistic representation of interests can be scuppered in practice by questions as simple as payment of stakeholders’ travel costs. On the other hand, State funding alone is questionable, as this would in turn push the character of private self-regulation into the background.[115] Thus the ideal solution is to establish a foundation which could finance the work of such a committee. In particular, this should also ensure that civil society organisations are enabled to attend committee meetings, for example by paying their travel costs.

Financing must be publicly accounted for in all cases.

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[111] *Röthel*, Standard specification in private law, 2004, p. 110 *et seq*., 272 *et seq.*; *Schmidt-Preuss,* VVDStRL 1997, 160, 205 *et seq*.; *Buck-Heeb/Dieckmann,* Self-regulation in private law, 2010, *p.* 283 *et seq*.

[112] *Müller-Foell*, The importance of technical standards in specifying legal provisions, 1987, p. 99 *et seq*.; *Hommelhoff/Schwab,* in: FS Kruse, 2001, S. 693, 708; *Augsberg,* Law-making between State and society, 2003, p. 208 *et seq*.; *Buck-Heeb/Dieckmann,* Self-regulation in private law, 2010, p. 289 *et seq*.

[113] *ISEAL Alliance,* Code of Good Practice for Setting Social and Environmental Standards, Rev. 2014, Clause 5.4.

[114] Current version DIN 820-4:2014-06.

[115] See *Hommelhoff/Schwab* BFuP 1998, 38, 51; *Hommelhoff/Schwab,* in: FS Kruse, 2001, p. 693, 711 *et seq*.; overall: *Buck-Heeb/Dieckmann,* Self-regulation in private law, 2010, *p.* 282 *et seq*.

4.2. Minimum requirements for standard enforcement

Successful regulation also depends on effective enforcement of regulations.[116] It therefore comes as no surprise that the question of appropriate enforcement of standards within the framework of co-regulation is a key component both of case-law and of national and international best practices.

The following elements are indispensable to effective enforcement of standards:[117]

- Public declaration of the organisations that participate in the co-regulation scheme
- Monitoring, evaluation and continual further development
- Effective complaint mechanisms and dispute resolution
- Effective penalties

4.2.1. Public declaration of the organisations that participate in the co-regulation scheme

In order for co-regulation to work, the participating organisations must make a commitment to comply with and enforce the objectives set out in the standard. Organisations can express participation in the co-regulation scheme either in the form of a press release announcing their participation in a co-regulation initiative and by taking them into account in internal codes. The participating organisations must also ensure that the human and financial resources needed for enforcement are available and are provided.[118]

4.2.2. Monitoring, evaluation and continuous improvement

Section 4.1.2 illustrated that objectives, interim targets and indicators must be defined within the framework of standard-setting. These targets and indicators need to be monitored and evaluated.

The monitoring and evaluation process should fulfil the following requirements:[119]

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[116] *Buck-Heeb/Dieckmann,* Self-regulation in private law, 2010, p. 278; see also *Augsberg,* Law-making between State and society, 2003, p. 229; *Brennecke,* Standard-setting by private associations, 1996, p. 169.

[117] See also: *European Economic and Social Committee*, Self-regulation and co-regulation in the Community legislative framework (DRAFT), 2014, sections 1.6 and 5.22; *European Economic and Social Committee,* European Self- and Co-Regulation, 2014, p. 23-29.

[118] *Office of Fair Trading*, Consumer Codes Approval Scheme - Core criteria and guidance, 2013, p. 9-10.

[119] *European Commission*, Principles for Better Self- and Co-Regulation, 2014, available at: http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=16, S. 2 (last downloaded: 13.04.2015); *OECD*, Alternatives to Traditional Regulation, 2006, p. 43-45; *ISEAL Alliance,* Assessing the Impacts of Social and Environmental Standards System, 2014; *European Commission*, Guidelines on the self-regulation measures concluded by industry under the Ecodesign Directive 2009/125/EC, 2013, p. 5.

- The carrier organisation must develop a monitoring approach. Monitoring must involve the various stakeholders, in the same way as with standard-setting.[120] The approach must guarantee that the effects of co-regulation can be verified in terms of the objectives. The approach should also clearly define the monitoring limits.
- Essential data that must be taken into account in monitoring are information on satisfaction and familiarity values, complaints and complaint procedures. Also mystery shopping results may provide helpful data, depending on the field of application.
- The carrier organisation must ensure that the persons appointed for monitoring are suitably qualified and have the monitoring resources needed.
- The carrier organisation must check if the objectives of co-regulation are being achieved at regular intervals. The primary objectives are to establish if the standards require further development, if standard enforcement needs to be adapted, if any unintended side effects are occurring or if attainment of objectives as a whole can be improved.
- Evaluation results must be published. Results should be discussed with stakeholders and joint conclusions drawn.[121]
- Evaluation should be carried out by an independent third party at regular intervals (once or twice yearly) where there is a lack of public confidence in co-regulation.
- Depending on whether an external committee or supervisory authority is (jointly) responsible for standard enforcement, the carrier organisation should be required to report to that committee or supervisory authority. As part of that obligation, the carrier organisation should file an annual report on the following aspects: changes to the standard, third-party complaints and their settlement, monitoring and evaluation results and penalties. It would be helpful if that information were prepared by an independent third party and supplemented by proposed action.[122]

4.2.3. Effective complaint mechanisms and dispute resolution

Differences of opinion and disputes may arise both between the stakeholders of the carrier organisation and between the carrier organisation and third parties. Internal differences of opinion should be resolved in accordance with internal rules of procedure which also take particular account of the rules on resolutions dealt with in Section 4.1.4.

[120] *European Commission,* Guidelines on the self-regulation measures concluded by industry under the Ecodesign Directive 2009/125/EC, 2013, p. 12.
[121] Annex VIII point 5 of Directive 2009/125/EC.
[122] *Office of Fair Trading*, Consumer Codes Approval Scheme - Core criteria and guidance, 2013, p. 35.

An independent complaints committee should deal with third-party complaints. Third-party complaints should be included and published in monitoring and evaluation reports.[123]

4.2.4. Effective sanctions

Infringements of the standard by members must be penalised. Some authors see a lack of penalties as the 'mortal sin' of self-regulation.[124] Penalty procedures need to be developed which are independent, fair and incremental.[125] Independent means that at least half the members of the sanctions committee must comprise persons unconnected to the carrier organisation and the organisation accused. Fair means that the organisation accused has a right to be told of and comment on the complaint. The stages of the sanctions might be: warning, fine and withdrawal of membership.

Committee decisions must be published.

4.3. Framework conditions

Successful co-regulation depends on a series of framework conditions in addition to minimum substantive and procedural requirements for standard-setting and enforcement. As discussed in section 3.4.3, answers must be found to a series of challenges. They include, for example, solutions to the fundamental dilemmas of co-regulation (especially 'free rider' problems), encouraging framework conditions (such as facility for accreditation and improved legal certainty), greater incentives (enabling authorities to initiate co-regulation, public recognition of code of conduct, introduction of approval schemes for recognised codes etc.) and making enterprises more willing to participate in co-regulation.

These aspects are addressed in the following sections, based on constitutional considerations (according to German constitutional law, however representing general thoughts and principles) and national and international experience.

4.3.1. Active role of State institutions

National and international experience with co-regulation suggests that it can only succeed if state institutions actively flank co-regulation activities.[126] A distinction must be made here between positive and negative incentives. *Positive incentives* range from the provision of a public platform in which

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[123] *European Commission*, Principles for Better Self- and Co-Regulation, 2014, available at: http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=16, S. 2 (last downloaded: 13.04.2015).

[124] *Schulz/Held*, Regulated self-regulation as a form of modern governance – Commissioned by the Federal Commissioner for Culture and Media Affairs, 2002, p. D-4, available at: https://www.hans-bredow-institut.de/webfm_send/53 (last downloaded: 13.04.2015).

[125] *Baden-Württemberg Consumer Commission*, From label misuse to trustworthy labels, 2011, p. 3; *Office of Fair Trading*, Consumer Codes Approval Scheme - Core criteria and guidance, 2013, p. 39.

[126] *Ofcom*, Initial assessment of when to adopt self- or co-regulation, 2008; Annex VIII point 9 of Directive 2009/125/EC.

stakeholders can exchange information, through part financing of co-regulatory approaches in the start-up phase (as with the Sustainable Palm Oil Forum in Germany), making co-regulation statutory in a particular field and improving legal certainty. - These aspects are addressed in greater depth in section 4.3.3.[127]

In addition, state institutions should encourage co-regulation through *negative incentives*. For example, *Schulz* and *Held* hold that 'the threat of mandatory state-regulation in the event that self-regulation fails is needed in order to safeguard the objectives of regulation and motivate enterprises to cooperate'.[128] That means that state institutions should formulate clear expectations of co-regulation and evaluate their attainment. If the objectives are not attained, the state institutions should threaten mandatory state regulation (if that should be possible in the given case) and carry out that threat in the event of doubt.

These considerations illustrate that the way in which state institutions flank co-regulation is in itself an important success factor. As discussed in section 3.2, both the GGO and the Act establishing the German National Regulatory Control Council are the reference points for this. Nonetheless, these reference points should be expanded, while at the same time breaking through the 'culture' of state regulation, as indicated by the OECD (see also section 3.4.3).

A working party which brings different DGs of the EU together (as well as different ministries on the national level) needs to be set up in order to initiate this 'cultural shift'. The objective of that party would be to evaluate European and/or national experience from co-regulation, draw conclusions and extrapolate recommendations for action.

Here experience of the member states needs to be taken into account. First, interesting examples can be found in the Netherlands. The Dutch *Social and Economic Council*, comprising representatives of the economy, civil society and politics, is responsible for self-regulation activities in the consumer protection sector. For example, labelling codes and general terms of business have been developed at the Council's initiative.[129]

Second, the example of the *Danish Consumer Ombudsman* should be considered. Under section 24 of the Danish Marketing Practices Act, the Ombudsman has the powers to issue guidelines which are developed within the framework of multi-stakeholder processes. These guidelines should then be used in particular where numerous consumer complaints are made on the same issue or the enterprise itself requests a regulation. The guidelines are used to pursue the objective of safeguarding increased legal certainty and better law enforcement.[130]

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[127] See also: *Bertelsmann Stiftung*, Fostering Corporate Responsibility through Self- and Co-Regulation, 2013, Chapter 3.

[128] *Schulz/Held*, Regulated self-regulation as a form of modern governance – Commissioned by the Federal Commissioner for Culture and Media Affairs, 2002, p. 3, available at: https://www.hans-bredow-institut.de/webfm_send/53 (last downloaded: 13.04.2015).

[129] *van Mierlo,* Self-regulation in the consumer field: the Dutch approach, 2011.

[130] *Oe*, Self- and co-regulation: The Danish Consumer Ombudsman's Experience, 2014.

Third, account should be taken of German experience from co-regulation e.g. in the environmental sector (German Air Technical Instruction, ecodesign), the capital market, the media sector and from sustainable consumption (alliances such as the German Textile Alliance or the Sustainable Palm Oil Alliance) and experience with co-regulation on the part of authorities.

The results of that process should be used to further develop a regulatory impact assessment[131] and European and national guidelines on effective co-regulation.

4.3.2. Solutions to fundamental dilemmas

As the discussion in section 3.4.3 illustrated, one of the biggest challenges for co-regulation is to find solutions to 'free rider' problems. The challenge is to address the fact that co-regulation comes with costs attached for the enterprises involved in it (both for standard-setting and enforcement and for compliance with the standard). Often what happens is that enterprises which are not participating in co-regulation derive an advantage from co-regulation, for example through the avoidance of 'hard' regulation or through the positive reputational effects of successful co-regulation.

The key question therefore is what measures can be taken to best ease the 'free rider' problem. In principle there is a choice of three measures here:

- **Ensure maximum industry coverage:** On the one hand, these problems can be eased by introducing co-regulation primarily in those sectors in which associations exist with maximum industry coverage. The associations would then require their own members to participate in co-regulation as and when co-regulation is enforced. The Ecodesign Directive, for example, requires co-regulation to cover at least 70 % of the entire market.[132] – Care should be taken, however, to ensure that competition law is not infringed.[133]
- **Guarantee exclusive advantages for enterprises which participate in co-regulation:** The incentive for enterprises to participate in co-regulation increases in proportion to the degree to which the resultant advantages are reserved *exclusively* for those which participate in co-regulation. Co-regulation initiatives should therefore offer their members exclusive services, such as technical work-shops and conferences on specific topics or exchanges of best practices.
- **Approval system for credible co-regulation:** A procedure used by the British government to formally distinguish creditable co-regulations has a good track record. Originally devised by the former Office of Fair Trading (OFT), the *Consumer Codes Approval Scheme* is now operated by the Trading Standards Institute. The idea behind the scheme is that the 'TSI approved code' label can be used for voluntary enterprises that fulfil the

[131] See for example: *OECD*, Report: Alternatives to Traditional Regulation, 2009, p. 17.
[132] *Ofcom*, Initial assessments of when to adopt self- or co-regulation, 2008, p. 11. See also: *European Commission,* Guidelines on the self-regulation measures concluded by industry under the Ecodesign Directive 2009/125/EC, 2013, p. 4.
[133] *Ibid* and Annex VIII point 3 of Directive 2009/125/EC.

minimum criteria of the scheme. Enterprises can then use the label for advertising purposes, in order to inform their customers that they voluntarily meet requirements that go beyond minimum statutory requirements.[134] The minimum requirements cover the following areas: organisational requirements, preparation, content of co-regulation, complaint management, monitoring, enforcement and transparency.[135]

4.3.3. Encouraging framework conditions

As already indicated, the problem of 'free riders' is very important from the point of view of acceptance by enterprises. It can only be overcome if those who set and enforce the standards or are subject to the relevant standard enjoy legal advantages over 'free riders'. That is the only way to ensure that the enterprises involved have sufficient incentives to set and enforce standards.

Conversely, the requirements for standard-setting described above must be taken into account in order to facilitate legal consequences, especially in terms of acceptance by the courts and authorities.

4.3.3.1. Increased legal certainty – Introduction of a presumption of conformity

If standards are set through co-regulation and if, due to the way in which the standards are developed and enforced, they enjoy a high degree of legitimacy, they may also have legal effects. This applies primarily where legal terms are specified, in that industry and function- or service-related standards can be developed which are then accepted by the courts and authorities in both civil and public law. Here specification with regard to constitutional requirements must not be such that the courts and authorities are definitively bound by the standards (unless a State acceptance act has already been issued, as in accounting law).

Thus case-law has always given credence to standards set by National (and European or International) standardisation organizations (and compliance with them) during the appraisal of evidence due to the technical expertise contained in them.[136] In product safety law, the CEN standards accepted by the EU are understood as specification of safety standards which must be used as a basis by the supervisory authorities and which are also binding on the courts. Environmental law goes even further in terms of the German Air Technical Instruction and the Noise Technical Instruction, in that case-law ascribes a standard-specification effect to these standards and they too are binding on the courts in terms of the effects identified there.[137]

These effects, which to date have only applied selectively, could be generally extrapolated and given a **presumption of conformity anchored in law**, as in

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[134] See in particular: http://www.tradingstandards.gov.uk/advice/Areyouabusiness.cfm (last downloaded: 13.04.2015).

[135] *Trading Standards Institute*, Consumer Codes Approval Scheme: Core criteria and guidance, 2013.

[136] See FN 32 above.

[137] So-called standard-specifying administrative provisions, see Federal Administrative Court, DVBl 2007, 1564 = Federal Administrative Court Judgments 129, 209.

product safety law. Accordingly, enterprises which have subscribed to self-regulation could expect a court or authority to assume at least for the purposes of *prima facie* evidence that an enterprise that complies with the standards in its industry is also behaving in accordance with the law. Conversely, in individual cases in which there is good cause to suspect that the standards are outmoded, do not comply with the criteria explained above or that stricter standards must apply, state bodies (courts, authorities) could impose stricter requirements, so that state control would simply be taken back rather than relinquished, including for constitutional reasons.

However, if such standards are to have the effect of a presumption of conformity described above, a legal framework is needed which lays down requirements for standard-setting in accordance with section 4.1 and regulates state recognition. The model used here for such state recognition acts are the German Interstate Treaty on the Protection of Minors from Harmful Media (JMStV) and recognition of voluntary control under Section 20 JMStV (of which more below).

4.3.3.2. Continual evaluation of standards and codes

However, continual review of standards and codes is needed in light of practical experience or new economic or technological developments. Such continual evaluation is not equivalent to enforcement of codes or standards and takes place, as it were, at an interim level between standard-setting, on the one hand, and enforcement, on the other, as it requires ongoing learning and review in the sense of a quality assurance management system. It is only on the basis on such information and experience that standards and codes can be kept up-to-date, which too is a requirement of case-law for the purpose of recognising the effects of the standards.

Such processes should ideally be anchored in institutions which are involved directly both in standard-setting and enforcement but which do not necessary also implement them. For example, the task of evaluation can also be undertaken by the institution that sets the standards, as is the case with industrial technical standards. Conversely, institutions that have also assumed the tasks of enforcement and observation can provide this further development, as is the case with the JMStV (German Interstate Treaty on Proection of Minors) or as assumed by the SRIW for the Geodata Protection Code (in Germany). Mere enforcement or certification do not suffice for this, as they have no impact on the code or standard and the standard may therefore become outdated or unsuitable at some point as a result. It is important for an independent committee to rule on sanctions and complaints (see also section 4.2.3 and no 2.4 of the EU principles) rather than the issuer of the code itself.

4.3.3.3. Implementation and enforcement

The effect of standards must not be limited to a presumption of conformity with regard to undefined legal terms. Where standard-setting goes hand in glove with the establishment of corresponding dispute resolution bodies with powers to impose penalties, those private enforcement mechanisms can be used to reduce the intensity of state supervision and thus relieve the burden on the

state, on the one hand, and allow industry-specific supervision tied to a high level of expertise, on the other.

For example, Section 58e of the German Federal Emission Control Act (BImSchG) provides for less stringent supervision of emission control for enterprises that comply with the Eco-Audit Regulations, as the Eco-Audit Regulations are tied to private certification/testing (in this case eco-audit certifiers).

Similarly, supervision of product safety can be exercised in the form of certification against the corresponding standards (CEN, CENELEC). Here again products are tested by certifiers and seals are issued which have legal effects on the supervisory authorities in that the intensity of supervision is reduced significantly.[138]

Finally, the regulation in Section 20(5) JMStV is an excellent example for the online economy of the reduced potential for state supervision to interfere directly with telemedia providers. If a provider is a member of a recognised voluntary self-control scheme (such as the FSM, an organisation in charge of self regulation concerning media), a decision by the scheme must be obtained first in the event of possible infringement, at which point supervisory measures are not allowed (Section 20(5) JMStV).[139]

What all these instruments have in common, however, is that the co-regulated standards or their institutions must provide for measures that allow for the necessary implementation and compliance control of the standards. Self-regulation cannot succeed without effective enforcement. Nor can private standards without penalties replace or supplement State supervision. A distinction needs to be made here between control of standards, dispute resolution mechanisms and penalties:

- Product safety can be used as a model for **control of private standards**, whereby accredited certification bodies conduct tests. In areas which do not lend themselves to such controls, for example because ongoing supervision is not necessary and demand-driven monitoring suffices, different control mechanisms can be used, such as the establishment of (online) complaint and reporting desks, as is the case in the field of the protection of minors from harmful media. The choice of the means of control depends, first, on the relevance of the legal right protected (the higher it ranks, the sooner the ongoing controls) and, second, on the characteristics of the item or industry or service being monitored.

- There are numerous forms of **sanctions** attached to private standards:[140] They may range from simple criticism (naming and shaming)[141] through contract penalties imposed by associations to sanctioning on the market

[138] See *Spindler*, Corporate organisation obligations, 2011, p. 499.
[139] For details see *Erdemir,* in: *Spindler/Schuster*, JMStV Section 20, paragraphs 26 *et seq*.
[140] See summary in *Buck-Heeb/Dieckmann*, Self-regulation in private law, 2010, p. 291 *et seq*. with further citations.
[141] See *Bachmann*, Private Order, 2006, p. 35; *Heimann*, The press code in the area of contention between media law and media ethics, 2009, p. 255 *et seq*.

(comply or explain).[142] As a rule, penalties through market mechanisms alone may not suffice in most of the areas of the law in question, as otherwise the market itself would have already made the improvement or remedied the shortcomings; often market operators do not react to such signals. What penalties need to be imposed in response depends in turn on the ranking of the legal rights being protected and the characteristics of the industry. Often naming and shaming is more important than a derisory fine or contract penalty compared to the profit or sales achieved; it is precisely here that self-regulation may have the advantage.

- Various institutions are available for **dispute resolution**, such as an ombudsman, which has proven successful in the banking sector, or a dispute resolution body recognised by the state, as in the German energy sector (Section 11a *et seq.* of the German Energy Economy Act). These institutions can also be embedded in online dispute resolution[143], but do not have to be. The only thing that matters is that procedural rules must be adopted that guarantee a fair procedure in compliance with recognised principles for a procedure in accordance with the rule of law without the need for sophisticated rules of procedure such as the Code of Civil Procedure etc. Arbitration law or the principles laid down in the Alternative Dispute Resolution Directive[144] can be used as a model here.

4.3.3.4. State recognition and accreditation

As explained, a state recognition act is required if private standards are to have legal effects and be enforced. Again in Germany section 20 JMStV can be taken as a model (although there are parallels in other areas of the law): recognition is needed by a state authority, which verifies compliance with the above criteria governing standard-setting.

This is accompanied by – but is conceptually different from – recognition of control by the self-regulating bodies: the model of accreditation used in product safety law[145] and anchored in the German Accreditation Bodies Act[146] can be used as a model here for substantive control. ISO/IEC 17011:2005 and the EN 45011 to 45013 series of standards can also be cited here. However, these costly procedures to obtain accreditation by certification bodies or private monitoring bodies based on ongoing monitoring need not necessarily be used and any such procedure would be disproportionate for the purpose of demand-driven monitoring, e.g. by online complaint bodies. All that is needed here is to ensure though appropriate requirements that complaints are passed on immediately, that their content is recorded and that they are documented.

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[142] See FN 23 above.
[143] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165 of 18.06.2013, p. 1 *et seq*.
[144] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165 of 18.06.2013, p. 63 *et seq*.
[145] *Spindler*, Corporate organisation obligations, 2011, p. 313 *et seq*.
[146] Accreditation Bodies Act of 31 July 2009 (Federal Law Gazette 2625; see also *Tiede/Ryczewski/Yang,* NVwZ 2012, 1212 *et seq.*

4.3.3.5. Division of tasks with authorities

Based on the models described above (JMStV or BImSchG (Emission Control Act)), a sensible division of tasks between state monitoring and private enforcement may involve the supervisory authorities confining themselves to serious infringements (Section 20(5) JMStV). Thus only infringements of Section 4(1) JMStV are pursued directly by the supervisory authorities, provided that self-regulation complies with procedural principles and the limits of discretion. Similarly, Section 58e BImSchG divides tasks between the environmental supervisory authority and private control bodies.

In other words, state supervision is downgraded to a form of legal supervision of self-regulation, but with the facility to intervene if self-regulation fails.

4.3.4. Increased engagement by enterprises within the framework of their corporate social responsibility (CSR)

Another important success factor for co-regulation is the approach of the enterprises themselves. If they see co-regulation primarily as a way of avoiding 'hard' regulation, then co-regulation will not succeed.

Instead, enterprises should see co-regulation as a way of fulfilling their corporate social responsibility (CSR). For example the OECD Guidelines for Multinational Enterprises refer at various points to the connection between corporate responsibility and co- and self-regulating activities. For example, they state: 'Enterprises should [...] develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate'.[147]

The issue of corporate responsibility has now been boosted, especially for large enterprises, by an EU directive on publicity.[148] It requires all large enterprises with over 500 employees to regularly disclose information on their non-commercial activities. Co-regulation can play in an important role within this framework. For example, the new Article 19a(1)(d) provides for enterprises with a reporting obligation to provide information on risks which are likely to cause adverse impacts in those areas, and how the enterprise *manages* those risks. Participation in co-regulation activities may provide a way of managing such risks.

[147] *OECD*, Guidelines for Multinational Enterprises, 2011, p. 19.

[148] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330 of 15.11.2014, p. 1 *et seq.*

5. Applying the general principles to selected legal areas

Some legal areas of the information society may serve as examples or prototypes for the application of these general principles - such as data protection, unfair competition, IT security, liability of intermediaries, and consumer protection in e-commerce. These examples are not meant to be exhaustive, the general principle may be applied to all legal areas where it is deemed to be adequate.

5.1. Data Protection, in particular General Data Protection Regulation

Existing data protection laws provide already for some kind of co-regulation, like Sec. 38a of the German Data Protection Act. However, these norms scarcely acknowledge any legal binding effects upon supervisory authorities neither upon courts. On the European level Art. 27 of the Data Protection Directive provides for a similar procedure of acknowledging codes, including participation of the Art. 29-group. However, there is only one case known, the codex of the Federation of European Direct Marketing FEDMA. [149] Concerning cloud computing a new Code of Conduct for Cloud Service Provider is being prepared which shall be acknowledged by the Art. 29-group.[150] However, the Data Protection Directive neither grants any privileges for those who follow such a codex nor does it provide any binding effects upon legal authorities (supervisory authorities, courts).

Unfortunately, the proposals of the General Data Protection Regulation just carry on this approach by specifying the criteria under which codes can be acknowledged (Art- 38 and following).[151] Art. 38a provides now for controls of compliance with codes and requires independent and accredited enforcement. Even though the concept of self-regulation and the requirements of endorsing the codes are now more detailed than before they still do not have any impact on supervisory authorities or courts.

In contrast, an acknowledged and endorsed code could be used as specifying general clauses etc. in the General Data Protection Regulation, establishing a prima-facie assumption that compliance with the code is in line with compliance to the ‘General Data Protection Regulation'. As most of the norms of the GDPR provide for a balance of interests between involved parties (controller, individual, interests of public, intermediaries) such a code could

[149] Cf. Art.29-Group WP 77 and WP 174 for the new codex of 2010, http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/index_en.htm.
[150] http://cloudindustryforum.org/code-of-practice/cop (zul. abgerufen 13.04.2015).
[151] Council of the European Union, 30. June 2014, Interinstitutional File 2012/0011 (COD) – 11028/14.

strike a balance which is fine tuned according to the needs of a specific market or service. Most of the provisions of the General Data Protection Regulation do need specifications on a lower level as they are too broad and too abstract as to be used for all markets or services without any adaptation.

Thus, issues of profiling should not be mixed up with problems of coping with "Big Data", the same is true for cloud computing or for scoring. With regard to the rapid evolving new business models and technologies in the digital world such co-regulated standards at a lower level can enhance legal certainty, making use of specific knowledge of stakeholders in these markets.

With regard to monitoring a hybrid system of complaint management and controls without a previous cause, operated by an acknowledged association (which could also be the standard setting body) could help supervisory authorities by shifting a large bulk of enforcement to private bodies, thus strengthening supervisory authorities for their core tasks. Other approaches could be used as well, such as a certification by third parties as it is being provided by the Code of Conduct for Cloud Service Provider – being made transparent by the use of different labels.

5.2. Unfair competition

Unfair competition is harmonized at the European level to some extent. The Unfair Commercial Practices Directive[152] contains a definition of codes of conduct in Ar. 2 f):

> ''code of conduct' means an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;'

Recital 20 of the Directive explains that:

> 'It is appropriate to provide a role for codes of conduct, which enable traders to apply the principles of this Directive effectively in specific economic fields. In sectors where there are specific mandatory requirements regulating the behaviour of traders, it is appropriate that these will also provide evidence as to the requirements of professional diligence in that sector. The control exercised by code owners at national or Community level to eliminate unfair commercial practices may avoid the need for recourse to administrative or judicial action and should therefore be encouraged. With the aim of pursuing a high level of consumer protection, consumers' organisations could be informed and involved in the drafting of codes of conduct.'

Accordingly, associations have begun to establish such codes of conduct in Member States such as for instance in Germany the central council for marketing or the rules of the voluntary self-control of movie producers or multimedia-services.

[152] OJ of 11.6.2005, L 149, 22

However, neither the Directive nor member states law do provide for any legal binding effects of these codes of conduct. They are treated more or less as some kind of hint for applying the general terms of the Directive.[153] In contrast, no court is being bound by the codes of conduct. The only legal effect attributed to a code of conduct refers to misleading advertisements in cases where a company pretends falsely to adhere to the conduct or to comply with it.

Once again, codes of conduct could play a much more important role by specifying the abstract and general clauses of the Directive (and member states law). As markets and services differ widely, also consumer's perceptions, codes of conduct specifying the expectations of stakeholders could enhance legal uncertainty – without restricting courts too much. The prima-facie assumption would leave enough leeway for courts to deviate from a code in cases when a code does not match the specific circumstances.

Issues of enforcement do not arise – at least in Member States which adhere to civil enforcement of unfair competition rather than administrative law. Even then, associations can establish complaint management systems like the Scandinavian model of ombudsmen, shifting the bulk of complaints to private complaint systems, thus alleviating the courts.

5.3. IT-Security

One of the main targets in the EU digital agenda refers to IT security. Amongst other actions, the Commission has proposed a new directive 'concerning measures to ensure a high common level of network and information security across the Union'.[154] Thus, Art. 14 of the proposed directive requires:

> '1. Member States shall ensure that public administrations and market operators take appropriate technical and organisational measures to manage the risks posed to the security of the networks and information systems which they control and use in their operations. Having regard to the state of the art, these measures shall guarantee a level of security appropriate to the risk presented. In particular, measures shall be taken to prevent and minimise the impact of incidents affecting their network and information system on the core services they provide and thus ensure the continuity of the services underpinned by those networks and information systems.'

In addition Art. 16 refers to standardization:

> '1. To ensure convergent implementation of Article 14(1), Member States shall encourage the use of standards and/or specifications relevant to networks and information security.

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[153] See for Germany BGH (German High Federal Court) GRUR 2006, 773 Rn. 19 – Probeabonnement; *Köhler,* in: *Köhler*/*Bornkamm*, UWG § 2 Rn. 115; *Kocher*, GRUR 2005, 647, 651; *Balitzki,* GRUR 2013, 670, 672.

[154] Proposal of, 7.2.2013 COM(2013) 48 final 2013/0027 (COD)

> 2. The Commission shall draw up, by means of implementing acts a list of the standards referred to in paragraph 1. The list shall be published in the Official Journal of the European Union.'

Thus, the proposed directive acknowledges the need for standards specifying the technical requirements relevant for the security of networks etc. However, the proposed Directive does not specify how these standards shall be adopted, by whom, and to what extent they should have any legal effect.

Even though Art. 14 provides for a set of delegated acts empowering the European Commission the norm does not refer to any technical standard etc. concerning the appropriate measures and actions to be taken. Moreover, there are no norms which declare an (approved/acknowledged) technical standard to specify in a legal sense the general clause of Art. 14. Art. 16 remains opaque regarding the legal status of the technical standards approved by the Commission.

Once again, provisions which would render co-regulated standards to bind in a legal sense supervisory authorities as well as courts on a prima-facie base (or on some sort of an assumption) would enhance legal certainty as well as they would encourage engagement of all stakeholders. EU directives on product safety can serve as a blueprint for this approach (even though their shortcomings are also well known). Hence, co-regulated standards would specify general security requirements, courts and authorities would have to respect these standards unless unusual circumstances or new technical facts are presented. Moreover, this approach could be combined with private enforcement, once again following the example of product safety directives but with avoiding their pitfalls (such as self-declarations, self-certifications etc., and providing strong liability provisions for certifying third parties).

5.4. Liability of Internet Intermediaries

Concerning liability of internet intermediaries the Commission deplored in the declaration of a Digital Single Market the different implementations and developments in Member States regarding liability of intermediaries, such as notice-and-take-down actions or even more injunctions which gave rise to a hundreds of decisions across the EU against intermediaries, the last ones concerning injunctions against access provider in order to block illegal content. In particular in Germany the courts developed very sophisticated systems of injunctions and monitoring obligations for providers concerning illegal content[155] – what is still in line with Art. 15 E-Commerce-directive as these obligations do not turn into general obligations which are forbidden by Art. 15.

[155] Overview by *Spindler*, in: FS Köhler, 2014, S. 695, 698 ff. and *Nolte/Wimmers,* GRUR-Beil. 2014, 58, 59 ff. as well as *Leistner,* ZUM 2012, 722, 724 ff.; explicitly cf BGH GRUR 2013, 1030, 1032 f., Rn. 30 ff.- File-Hosting-Dienst; BGH GRUR 2013, 370, 371 f., Rn. 22 f. – Alone in the Dark.

The German government reacted to that situation by proposing an amendment to the national implementation act of the E-commerce-directive, providing a safe harbour against injunctions for commercial public WiFis.[156]

However, neither courts nor the legislator refer to technical standards or co-regulated standards. Hence, legal certainty can be achieved only after years of court procedures, applicable only for one (perhaps outdated) business model and technology. For all other, it remains uncertain which obligations shall apply in case of injunctions.

It goes without saying that co-regulated standards could be once again a solution to this unsatisfying situation: As these standards can be fine-tuned according to the specific needs of a service and specific risks they may well serve as a prima-facie assumption for courts concerning the reasonable actions to be taken by providers in order to prevent future infringements.

5.5. Consumer Protection

Finally even for consumer protection the approach of co-regulated standards can be highly efficient in order to elude legal uncertainty whilst respecting and integrating stakeholders' interests.

The consumer rights directive requires sellers (and other operators) to comply with many information duties regarding consumers. Amongst those information duties one is of main interest: The consumer rights directive obliges the seller in Art. 5 (1 a) to provide

> '(a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services'

In a similar way Art. 6 (1 a) requires information for off-premises contracts about

> 'The main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;'

Both provisions cause a lot of legal uncertainty in practice concerning the words “main characteristics” and “appropriate to the medium”. Courts seem to interpret these elements quite differently so that enterprises (as well as consumer associations) are worried about the substance of these provisions. A recent evaluation commissioned by the German Ministry of Justice and Consumer Protection revealed that enterprises are concerned chiefly about

[156] Entwurf eines Zweiten Gesetzes zur Änderung des Telemediengesetzes (Zweites Telemedienänderungsgesetz – 2. TMGÄndG) vom 11.3.2015, RefE des BMWi, abrufbar unter http://www.bmwi.de/BMWi/Redaktion/PDF/S-T/telemedienaenderungsgesetz,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf (zul. abgerufen 13.04.2015).

these vague terms in practice.[157] These findings are valid also for other information obligations in telecommunication provisions etc.

As before, co-regulated standards approved by relevant stakeholders including consumer protection associations could serve as specifications of those vague terms, according to the needs in specific markets or for specific services etc. Once again, they would not bind courts ultimately – however, they would shift the burden of arguing upon those who want to deviate from the given standard as only in those cases when exceptionally circumstances are evident or a standard is outdated (due to new business models etc.) a ruling against the standard shall be accepted.

[157] *Spindler/Thorun/Blom*, MMR 2015, 3, 5.

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Prof Spindler has been full professor of civil law, commercial and economic law, comparative law and multimedia and telecommunications law at the University of Göttingen since 1997, having refused offers from the Universities of Cologne, Bielefeld, Frankfurt and Zurich, and focuses on legal issues in connection with e-commerce, Internet and telecommunications law and copyright and intellectual property law, on the one hand, and problems in connection with company and capital market law, on the other.

He is chairman and member of numerous councils and has advised both the German and European legislatures on various matters in connection with the information society and company and capital market law. He drafted the review report on the implementation of the E-Commerce Directive for the European Commission in 2006/2008, also advised the 2012 German Legal Practitioners' Conference on questions of online privacy and data protection and has advised the German *Bundestag* on copyright and media and IT law at numerous hearings.

Prof Spindler was dean of the faculty in 2002/2001 and bursar from 2002 to 2004.

Prof Spindler is also a member of the Academy of Sciences and deputy chairman of the Publications Committee of the Union of Germany Academies of Sciences. He is also second member of the Göttingen Center for Digital Humanities (GCDH), second member of the CeGe (Centre for European, Governance and Economic Development Research), member of the Centre for Medical Law and Director of the Institute for Agricultural Law.

Prof Dr Christian Thorun – CEO (ConPolicy GmbH)

Prof Dr Christian Thorun is a founder and CEO of the Institute for Consumer Policy (ConPolicy GmbH). He is also a member of the Consumer Research Network of the *Federal Ministry of Justice and Consumer Protection* and advises the *European Commission* on consumer issues. Before the institute was founded, he worked for the German Federation of Consumer Associations (vzbv) in Berlin, where he was responsible for economic and competition policy questions, data protection and corporate social responsibility.

Christian Thorun studied at and was awarded a Ph.D by *Oxford University* in the specialist area of international relations. His work has been commended on several occasions. In 2001 he received a *Cecil Rhodes Scholarship* for his studies at Oxford. For years he was also a stipendiary of the *Friedrich-Ebert-Stiftung* and was awarded scholarships by the Russian Federation and the *Kennan Institute of the Woodrow Wilson International Center*.

In addition to his executive duties, Christian Thorun is also Professor of Political Sciences, International Policy and Public Affairs at the *Quadriga Hochschule* in Berlin. He is also a member of the supervisory board of the Fairtrade certification firm *FLO-Cert,* a member of the board of the *Verein für Selbstregulierung der Informationswirtschaft (SRIW)* and an associate member of *Think Tank 30* – a network of young people under the aegis of the Germany society of the *Club of Rome*.