



Overcoming dilemmata in developing sector specific codes of conduct

There have been times, when regulators were criticized for overly detailed and specific provisions. A level of detail which eventually was outdated once the new legal provisions came into effect. Consequently, new regulations become more often abstract. This reflects a renaissance of good regulatory style earlier eras when fundamental societal and legal milestones were established. Likewise, this shift represents a needed response and adaptation to real life complexity and speed of development.

1 Building the bridge between abstract regulation and practical implementation

Bridges are built to provide the expected legal certainty and societal benefits. Where the law remains abstract, classic approaches are revived: referring to a new law's rationale, which is an integral part of any act in European law outlined in the recitals and/or relying on jurisprudence to sharpen abstract ideas by ruling individual cases. Where authorities are involved in supervising the laws, they are empowered to draft guidelines to aid interpretation and enforcement. The probably most modern / recent elements are self- and coregulatory means, such a codes or conduct.

SRIW and its ecosystem has been active in establishing sector specific codes of conduct for more than a decade. Experience and continuous, intensive exchange with stakeholders have unfolded several dilemmata.

2 If expectations become unrealistic

Rising dilemmata relate to different expectations, timelines and consistencies. Codes of conduct are expected to clarify the sector specific requirements and interpretations. Society and regulators consider such particularisation to address easily each, and every debate related to such sector. The expected level of detail may not be fit for the procedural elements and possibilities good drafting methodology allows.



2.1 Overarching cross-regulatory solution: a matter of (non-)eligibility

Holistic approaches require overarching solutions, addressing more than one regulation. This creates the first obstacle: co-regulated codes of conduct and their approval processes may prohibit holistic approaches. If the code of conduct addresses elements not limited to the primary regulation, authorities remain hesitant in approving them.

2.2 Holistic approaches – as abstract as the regulation itself?

If a code of conduct will address any related matters holistically and exhaustively, such code of conduct faces the same challenges as the regulator itself. Alignment of stakeholders requires time. In a fast-pacing environment, such alignment may – still – be too slow to address any fine details. Solutions exist to address this challenge, easily. For example, by drafting codes of conduct in a layered approach, where first layers indicate objectives/principles, the second layer addresses obligations by means of implementation agnostic requirements, and a third layer addresses exemplary good practices how obligations of the second layer can be addressed. Depending on the complexity, the third layer may also be replaced / extended in listing mandatory minimum elements for implementations. Such an approach may speed up the process, but still may require lengthy negotiations, especially if the scope remains holistic and exhaustive.

Additionally, drafting processes and guidance to good practices – and in cases of co-regulation completed by independent monitoring – provide an advantage by themselves: fundamentals are built, suitable for continuous particularization, and enforcement. It is a matter of perspective: broadly implemented, minor yet effective steps can be more impactful than non-implement, non-effective big steps simply on paper.

2.3 Diversity vs. complexity vs. compatibility

Alternatively, codes of conduct can be designed more distinct. This approach requires a clear scoping at the very beginning. It allows for very particular and speedy alignments, because the stakeholders can target a particular subject matter. One might argue though, that such a diverse approach incorporates a challenge that the regulator tried to prevent: Overly complex number of specific regulations, requiring significant resources to align and maintain. A multitude of several codes can be beneficial.

- It speeds up the process, because complexities within one code are limited.
- It allows potentially for a higher level of granularity, because fewer real life use cases are within the scope.

The challenge resulting from this approach: a too diverse and potentially conflicting landscape of tools. Companies and services may not only belong to one sector or one scope. The same company or services may be active in several contexts, be covered by several codes of conduct. Yet, solutions exist.

Different scopes can be of less harm, if the requirements simply add-up, because this will allow companies or services to aim simply for the highest standards. One may refer to this approach by “Avoiding compliance discrepancy and ensuring regulatory alignment”. To ease visualization of the approach, the following example may help: Scenarios must be prevented where, e.g., one code provides “not more than 111” where another code provides “no less than 115”. In this scenario, both requirements exclude each other, not even sharing a sweet spot of overlay.

Another solution is – where suitable – to implement a modular approach. Where related additional subject matters exist, or where sectors divide in several subsectors, modular approaches can become an easy way. Commonalities are addressed in a core-section, where specifics are addressed in modules. As in this case the responsibilities remain – prima facie – within the same stakeholders, alignment of requirements becomes easier, conflicts remain limited.

3 Stakeholder’s optimum meets authority’s reality

Codes of conduct, especially in cases of co-regulation, will require a public bodies involvement at some point. Be it to formally approve it, be it to translate the co-regulatory deliverable into an implementing act, be it a simple endorsement.

Public bodies remain hesitant to positively communicate in context of projects and deliverables which were not exhaustively analysed. Codes of conduct’s benefit is their agility and speed of alignment with real life use cases and scenarios. Authorities processes and approaches seem to be partially conflicting, while the regulatory framework allows them to remain in power and control. Nonetheless, a co-operative approach should be aligned between public bodies and stakeholders drafting a code of conduct; it is a matter of expectation management.

4 Recent fields of activity and relevance – let us do it the AI-way

Several regulations allow for codes of conduct. Some with more guidance on the procedural and material requirements, some with almost no guidance and written expectations. One of the most pressing regulations allowing for this tool is the AI Act. Reading the AI Act, one may conclude that the AI Act falls somewhere midground on being particular on the expected process and remaining unnecessarily vague on its expectations.

Currently, the AI office starts drafting codes of practice. It is positively acknowledged that the AI Office foresees several codes of practice, following the approach of distinctiveness. It shall be recommended, though, that the AI Office considers the downfalls of this approach reasonably, ensuring that the variety of codes of practice will remain compatible with each other. It shall be emphasised that AI is an international phenomenon, resulting in an even higher complexity, as good practices should incorporate compatibility with international standards and developments. In the realms of the AI Act, a variety of self- and coregulatory measures are foreseen additionally to codes of practise, i.e., standards and codes of conduct. Principally, the same logics apply to those mechanisms.

5 Conclusion

Drafting codes of conduct is a huge opportunity to resolve societal challenges. Codes of conduct allow for practical, innovation friendly solutions, which incorporate societal interest. They allow for a fair balancing of interests.

On another note, drafting codes of conduct requires expertise in the subject matter and more importantly in the toolbox of suitable methodologies and approaches. If you are interested in drafting a code of conduct, SRIW and its ecosystem is looking forward to partnering up.