25 How to Regulate? The Role of Self-Regulation and Co-Regulation

Lóránt Csink[*] *and Annamária Mayer*[**]

25.1 The Necessity to Regulate

'It is not good that the man should be alone'[1] – this truth of the Bible is also confirmed by numerous studies in sociology and psychology. Humans are fundamentally social beings. However, empirical evidence shows that it is not necessarily good to be with others, either. Thus, the fundamental paradox of sociology is that humans are social beings, but life in a community is not necessarily smooth; *bellum omnia contra omnes* – the war of all against all – constitutes the 'state of nature', as Hobbes points out.

It is a fundamental recognition that the social relations of human beings – i.e. the description of behaviour expected or to be refrained from when interacting with others – must be regulated. There needs to be an order, an authority that influences the actions of individuals with a view to social coexistence. Consequently, social norms date back to the emergence of human societies. A multitude of norms describe the various forms of correct and expected behaviour, capable of influencing and controlling human behaviour.[2]

In this context, norms constitute the authority that defines the rules of behaviour. If the objective of a norm is recognised to be the regulation of relationships within society, a norm can be deemed 'successful' if it is complied with in general. The occasional breach of a norm in itself does not render the norm unsuccessful. However, the norm becomes pointless if non-compliance reaches a critical threshold.

Consider the following example: a traffic sign (e.g. a stop sign) represents a norm as it imposes a mandatory rule of behaviour: 'stop here and let those travelling the main road pass!' The purpose of this norm is to make traffic predictable, so that those driving on the main road will know for sure that they will be allowed to pass. Ideally, a driver facing a stop sign does not consider whether or not the given sign makes any sense at its given

* Associate professor, Pázmány Péter Catholic University, Faculty of Law; Head of unit, Office of the Commissioner for Fundamental Rights. E-mail: csink.lorant@ajbh.hu.

** Legal advisor, Ministry of Justice. E-mail:annamaria.mayer@im.gov.hu. The authors would like to thank the Institute for Media Studies for their contribution to the preparation of the present paper.

1 Genesis 2; 18.

2 Regarding the obligatory nature of the law, *see* J. Raz, *The Authority of Law: Essays on Law and Morality*, Clarendon Press, Oxford, 1979.

location. It is generally accepted that stop signs serve traffic safety and the possible pointlessness of a given sign is not subject to any scrutiny.

Thus, stop signs serve their purpose; drivers comply with the signs, vehicles on the main road are granted priority, and traffic becomes predictable. The success of stop signs is not affected by the fact that some drivers may decide to break the rule and do not stop at the sign. Drivers on the main road can still expect to be given priority by those facing the stop sign, so traffic remains generally predictable. However, if the number of drivers failing to observe the sign reaches a critical threshold, any expectation of priority becomes unreasonable, and the norm will become incapable of serving its purpose (i.e. to regulate traffic).

A norm may be prescribed by various measures, as rules of behaviour may be determined by religions, customs, morals, manners, etiquette or even fashion. It is a common feature of all norms that they prescribe rules of behaviour[3] and they cannot regulate relationships within society unless they are accepted by individuals.

Legal norms constitute a special branch of norms. A legal norm is the order of the legislator (state) that determines the rule describing the expected behaviour and implies a 'promise' made by the legislator that the mandatory rule of behaviour will be enforced even by the use of force, if necessary.[4] In other words, the distinctive feature that separates legal norms from all other social norms is that legal norms can be enforced by the state.[5] It follows that legal norms may not exist without a state. Ever since their conception, states make use of the means of legal regulation (adoption of legal norms) and subject certain fields of social relationships to the rule of legal norms.

The next stage of development in history is that the norms regulating different fields of life are organized into a system. The direction of this development shows that legal norms are expected to regulate the relationship between the state and the individual, as well as the relationships between individuals, in a comprehensive manner, instead of sticking to the regulation of certain fields only. However, this expectation does not mean the elimination of other norms, since religious and moral norms certainly have their place even in societies subject to the rule of law. It is clear though that (historic) development

3 Naturally, legal norms can prescribe norms that are not norms of behaviour; it is not necessary that some people act in a certain manner as a result of the norm. Hart believes that there are secondary rules that apply to the adoption of primary rules, while Dworkin believes that the purpose of some rules is not to ensure a given action but to provide criteria for evaluating a given action (in this context *see*: Scott J. Shapiro, 'The Hart-Dworkin Debate. A Short Guide for the Perplexed', *Michigan Law, Public Law and Legal Theory Working Paper Series* 2007/77). However, this does not change the fact that the primary purpose of legal norms is the definition of social relations.

4 A.Zs. Varga, Gondolatok a kodifikáció mélyrétegeiről (Thoughts on the Depth of Codification) 3 *Magyar Közigazgatás* (2011), p. 67.

5 Szabadfalvi József, 'A jogszabály', *The Law*, Jog- és államtud. (1995), p. 54.

points from the use of particular legal norms toward the emergence of homogenous and closed systems, from fragmentation toward universalism.

The state expands regulation to more and more fields of social relationships by the means of law.

The following observations have been made so far:

1. the regulation of social relationships is indispensable for human coexistence;
2. rules of behaviour are necessary for the regulation of social relationships;
3. legal norms assumed a prominent role with the emergence of the state;
4. law became a more and more homogenous system through gradual legal development.

The question arises if this is the only path for further development, or some other form of regulation may be even more efficient? In other words: is it really necessary for the state to regulate behaviour in every field, or can the 'top-to-bottom' (state) regulation be replaced by other forms of regulation in certain fields?

The latter option seems to be expedient as the ordinary operation of the market in certain sectors requires the implementation of fast regulatory mechanisms. In such cases, regulation by the state cannot keep up with the pace of changing market and social needs. Changes to such needs often take place at far too high a speed for the legislator to react. A possible answer to this challenge is that the state 'withdraws' from its role as regulator to give space for other forms of regulation: self-regulation and co-regulation.

25.2 Definition of Self-Regulation and Co-Regulation

The definition of self-regulation and co-regulation appears straightforward at first, but authorities tend to emphasise different components of the definition. Some believe that self-regulation is a method for regulating behaviour where the relevant organisations and interest groups regulate themselves and the regulatory rules are voluntarily adopted, self-specified, conduct is self-monitored and rules are self-enforced.[6] According to Angela J. Campbell, self-regulation works independently from the state through the voluntary undertaking of market actors, following their own rules of procedure, financed by the participants and without any adverse legal consequence. However, it is not necessarily the case that government involvement is entirely lacking.[7] McGonagle offers a simple solution to the dilemma of co-regulation by defining co-regulation as a form of regulation which is softer than the traditional regulatory prototype governed by the state, where emphasis

6 I. Bartle and P. Vass, 'Self-Regulation and the Regulatory State. A Survey of Policy and Practice', *The University of Bath Research Report*, 17 (2005), p. 19.

7 A.J. Campbell, 'Self-Regulation and the Media', *Federal Communications Law Journal* (06/15/99), p. 715.

is put on the cooperation between professionals and state authorities in the regulatory field, and this synergy can be exploited in the field of enforcement as well.[8]

This paper seeks to examine the relationship between self-regulation and co-regulation, on the one hand, and state regulation, on the other hand, as well as the prevalence of the state component. Hereinafter we use the following working definition for self-regulation: voluntary and flexible determination of operation in a given sector (i.e. the behaviour of actors of a given sector), where regulation is based on the identical interests of the actors, instead of enforcement by the state. To devise a definition for the purposes of this article, co-regulation refers to situations where the regulation required by law is delegated to an industrial – or even self-regulatory – body. The codes of behaviour are accepted by professionals and state regulatory bodies as the result of cooperation.

25.3 The Meaning of Self-Regulation and Co-Regulation in Light of Their Relationship with State Regulation

According to the most simple and generally accepted approach, self-regulation comes closer to the complete lack of legal regulation (no regulation) than to statutory regulation on the regulatory spectrum.

While self-regulation is not outside the law, its primary source of legitimacy is not the law. The most important feature of legal norms is that they are obligatory and enforceable. State bodies (as substantial sources of the law) create and recognise legal norms to regulate behaviour. By contrast, a mandatory feature of self-regulation is its voluntariness. Under the framework of pure self-regulation, the subjects weigh the advantages and disadvantages, and decide freely if they want to participate in the self-regulatory regime and if they are willing to be subjected to the self-regulatory mechanism.

Legal norms are not adopted to convince their subjects, but to make them obey. When the legal system operates in an ordinary fashion, the subjects do not wonder whether it is 'worth' observing the law. By contrast, self-regulation means that a community adopts certain rules to promote specific common interests. The rule adopted does not have any practical importance, unless members of the community actually comply with it, but prudential reasons dictate that the rule will not be complied with, unless the subjects of the self-regulatory system believe that the rule does in fact promote their own interests, at least on a middle term.

We do not claim that legislation does not promote common interests. However, it certainly means that the promoted 'common interest' is more abstract and distant in the context of legal rules, than in the context of self-regulation – it is not a requirement of legal

8 Final Report Study on Co-Regulation Measures in the Media Sector Study for the European Commission, Directorate Information Society and Media by Hans Bredow Institute, 2006.

rules that the subjects fully agree with them. Only extreme rejection may prevent legal rules from being applied in practice. In most cases, subjects comply with the provisions of laws/acts, possibly after expressing their reservations in formal or informal ways, because they know that the state's monopoly on violence supports the given legal rule. By contrast, the threshold is much lower for self-regulation; subjects of self-regulatory systems may find it much easier to arrive at the conclusion that the regime does not serve the common (indirectly their individual) interest, removing themselves from under its scope.

In practice, pure self-regulation means that the regulatory regime is based on the voluntary decision of the subjects to regulate certain issues, that any and all external interference by the state or other body is prohibited, and that control may be exercised by the regulated organisations only.[9] However, this does not mean that the state would be 'indifferent' toward self-regulation. In such cases, members of a self-regulatory regime decide, voluntarily and free of any interference by the state, to adhere to another set of rules that *complements* existing state regulation. On the basis of the right to self-determination, individuals may freely decide to be bound by certain rules – complementary to legal regulation –, provided that their actions do not violate the provisions of the law. In the context of the traffic regulation example, the Fair Driver Initiative in Hungary is a possible form of self-regulation. Drivers may join the initiative voluntarily by agreeing to be bound by the unwritten rules of driving in addition to the Highway Code, with a view to improving the morale of drivers in general.

The situation is somewhat different where the state decides *to withdraw* from a given area to give space for self-regulation. In such cases, regulation by the subjects is specifically mentioned by the state regulatory regime and legal relevance is attributed thereto. This form is also called self-regulation, although in a sense it was created by the state.

Yet another scenario is when the state not only imposes the duty to regulate upon the subjects of the law, but also defines the directions and the framework of such regulation. This is called co-regulation.

What role does the state play in the context of self-regulation and co-regulation? First, the state recognises the existence of the self-regulatory regime and that legislation is not the most efficient form of regulating certain fields. Second, the state respects the voluntary nature of self-regulation.

Self-regulation promotes 'bottom-to-top' regulation, meaning that the actors of individual sectors develop their own rules of ethics and behaviour, which they accept as binding and impose sanctions on those breaching the rules.[10] An important aspect in the assessment of the relationship between the state and a self-regulatory system is the question whether

9 Bartle and Vass, *op. cit.*, p. 19.

10 J. Bayer, 'Az internet tartalomszabályozása Magyarországon. Önszabályozás versus állami szabályozás.' (Regulation of the Content of the Internet in Hungary), in M. Enyedi Nagy et al. (Eds.), *Magyarország médiakönyve 2002*, Enamiké, 2002, p. 451.

the state is constitutionally required to regulate the given field or to maintain certain institutions. Naturally, the state plays a more active role if it *is obliged to* carry out certain tasks. Consider the example of schools: operating the educational system is the duty of the state. However, the state may decide to delegate the task of developing the curriculum to the self-regulation of the stakeholders, but the state remains obliged to monitor the process and efficiency of the self-regulatory regime, since the overall operation of the system is the responsibility of the state. The situation is different where the state is not required by the constitution to operate any institution. This is the case of media regulation; the freedom of the press and the provision of media content are *fundamental rights*, and the state is primarily obliged to play a passive role. The state is not obliged to provide any media content,[11] but it may not prevent access to the media market. We believe that the state, in such cases, is not subject to any primary obligation to take action, therefore, its interference with the self-regulatory system may be of a lesser degree.

Co-regulation is the middle ground between direct state regulation and industrial self-regulation[12] and allows for a discourse between the state and the self-regulatory body and for an interaction regarding the regulation.

In theory, there are two different forms of co-regulation. In the first scenario, the state transposes an existing mechanism into the state regulatory regime, while the second scenario is when the state defines the legal basis and framework for the self-regulatory process.[13] These two forms point into opposite directions. The first form means 'bottom-to-top' co-regulation, where the state joins the self-regulatory scheme implemented by the market and the civil sector, this form also necessitates self-regulatory bodies to be established for an already regulated – or, as of yet, unregulated – field The second form means 'top-to-bottom' co-regulation, where the state is the source of regulation (for it defines the objectives and the framework), but it gives space for self-regulation to develop its own rules within the given framework.

11 It followed from Art. 61(4) of the previous Constitution directly that public service media must exist. The Basic Law does not include any reference that could be legitimately construed to suggest that the existence of public service media does not follow from the Basic Law. However, it should be noted that the case-law of the Constitutional Court established a connection between the 'continuous and undisturbed operation of public service broadcasters and news outlets' and the right to know data of public interest, Decision 22/1999 (VI. 30) of the Constitutional Court.

12 Self-Regulation of Digital Media Converging on the Internet: Industry Codes of Conduct in Sectoral Analysis by Programme in Comparative Media Law & Policy, Oxford University Centre for Socio-Legal Studies, 2004 (hereinafter Oxford study), p. 84.

13 C. Palzer and A. Scheuer, *Self-Regulation, Co-Regulation, Public Regulation, IRIS plus*, Strasbourg, 2002. p. 44.

In the first scenario, co-regulation is a bottom-to-top process, where a mandatory decision regarding the needs of the community is made at the higher levels of the system.[14] An example of transposing an existing rule of ethics into the realm of legal regulation is the mandatory use of the emergency warning lights when running into a traffic jam on the motorway. Many drivers turn on the emergency warning lights to let those driving behind know that they will slow down extremely, or even stop, due to a traffic jam. The Ministry of National Development recommends the transposition of this cautionary and polite gesture into the Highway Code. Mandatory legal regulation and the experience-based regulatory efforts of the stakeholders are simultaneously present in a co-regulatory regime. An advantage of this setup is that the actors involved in the regulatory and enforcement processes better identify with the pursued objectives, increasing thereby the efficiency of rule enforcement.[15]

Constitutional law has always had some reservations regarding this type of co-regulation, since it lacks democratic legitimacy. The essence of democratic legitimacy is that executive decisions can be traced back to the people – the subject of sovereignty – directly or through the chain of elections and appointments. Democratic legitimacy would be missing (and it would be inconsistent with the rule of law) if the state would grant executive (regulatory) powers to an organisation that was established on a voluntary basis and the executive powers of which cannot be traced back to the voters.

For constitutional purposes, a regulatory regime that is independent from the will of its subjects cannot be accepted, unless its source is the executive power. Of course, it is desirable for professional experience and the needs of market actors to be taken into account in the course of exercising executive powers, but the regulatory power itself cannot be delegated to such bodies.

The other form of co-regulation satisfies the test of constitutionality, where the executive power defines the objectives to be reached in a normative manner, and self-regulation is allowed to develop the necessary details. Under this form of co-regulation, the task of implementing the objectives defined by the legislator may be handed over to recognised interest groups of the given field.[16] This concept has a number of variants in different legal systems.

Schulz and Held have investigated co-regulation in the German context.[17] In their view, self-regulation in the Anglo-American debate is concerned with 'reconciliation of private

14 G. Polyák, 'Hatalomleosztás – Nemzetközi önszabályozási kísérletek. (Distribution of Powers – Attempts for National Self-Regulation), in M. Enyedi Nagy et al. (Ed.), *Magyarország médiakönyve 2002*, Enamiké, 2002, p. 475.

15 G. Polyák, *Európai médiapolitika és médiaszabályozás a digitális korban* (European Media Policy and Media Regulation in the Digital Era) in PhD, tanulmányok, 1. PTE – ÁJK Doktori Iskola, Pécs, 2004, p. 318.

16 Polyák, *op. cit*., p. 316.

17 W. Schulz and T. Held, *Regulated Self-Regulation as a Form of Modern Government*, Hamburg, Verlag Hans Bredow Institut, 2001.

interests' whereas their formulation – regulated self-regulation – is indirect state regulation based on constitutional principles. According to this German concept, the state may play a role in a regulated self-regulatory system, if constitutional rights are to be upheld. The powers that may be delegated to a self-regulatory body depend on whether there are any fundamental rights involved. This combination is known as intentional self-regulation, where the market actors are allowed to adopt economic or social measures, and the state functions as a last resort in imposing sanctions.

The French term of co-regulation expresses the shared responsibility of market actors and the state. The same approach is followed in the United Kingdom, where the state interferes if the market actors fail to take action within their own self-regulatory competence.

The third approach – known as audited co-regulation – is followed in the United States, where auditing may be carried out by an independent body according to a standard, or by an individual company according to pre-determined provisions.[18] This approach is most frequently understood as self-regulation with the involvement of the state or a public authority. According to Bartle and Wass this is the most common perception of co-regulation and it can be manifested in a number of ways:

- Co-operation between public authority and industry on regulatory matters;
- The delegation of statutory powers by a public authority to an industry or profession-led body, or a self-regulatory organisation undertaking regulatory tasks with a statutory body behind it;
- A public authority sets an industry/profession specific tasks with statutory backing;
- A public authority encourages, reviews, approves or endorses self-regulatory schemes developed by the industry, though normally not backed by the full force of a statute.

Co-regulation also includes cooperation between companies, regulators and associations in various working groups.

25.4 Models Describing the Position of Self-Regulation and Co-Regulation within the Legal System

There are numerous models that describe the place of self-regulation and co-regulation within the regulatory system and in relation to the legal system. The basic model defines the following stages depending on the extent of regulation:[19]

1. No regulation: there is no explicit control over the organisation;
2. Self-regulation: the rules are laid down and enforced by the regulated bodies;

18 Oxford study, pp. 9-12.

19 Bartle and Vass, *op. cit.,* p. 20.

3. Co-regulation: the rules are defined and enforced by the state and the regulated bodies jointly;
4. Statutory regulation: the rules are laid down and enforced by the state.

The basic model is accepted by the European Commission. According to the Commission, self-regulation grants the possibility for economic operators, the social partners, NGOs or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of best practices or sectoral agreements).[20] While several international organisations and even the Australian legal system accept the basic model, they usually apply a somewhat more detailed model. In Australia, one more component – *quasi-regulation* – is added to the above regulatory scale between self-regulation and co-regulation. Quasi-regulation describes those situations where industry adopts or uses codes of conduct in which government involvement extends to matters such as drafting its provisions or endorsing the code, but the enforcement of the code is left to the industry. Under the Australian model, the most important difference between quasi-regulation and self-regulation is that government involvement in the former implies that legislation may be introduced if industry does not satisfactorily comply with the code. According to the Australian approach, pure self-regulation means that the rules are adopted and implemented by the given sector without any interference from the government.[21]

Within the system of alternative regulatory means described by the British Better Regulation Task Force (BRTF) in 2003, self-regulation is halfway between the information and education based system and the incentive based structure. The BRTF model defines the following stages in the order of moving from no intervention toward strict regulation:

1. No regulation: there are no formal government measures;
2. Information and education: enables more informed decisions and can change attitudes – 'hearts and minds';
3. Self-regulation: codes are developed through sectoral negotiations and enforced by the regulated organisations;
4. Incentive based structure: the encouragement of particular types of behaviour. Financial instruments, for example price caps, taxes are often used;
5. Classic regulation: rules prescribing a particular conduct.

BRTF defines self-regulation as a set of voluntary rules created by their subjects.[22]

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20 Report from the Commission 'Better lawmaking 2003' pursuant to Art. 9 of the Protocol on the application of the principles of subsidiarity and proportionality, 11th Report, 2003, p. 11.

21 Bartle and Vass, *op. cit.*, p. 23.

22 http://webarchive.nationalarchives.gov.uk/20100407162704/http:/archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf.

In a report – similar to that of the BRTF – on alternative regulatory mechanisms, the OECD defined a scheme that includes performance-based regulation, process-based regulation, co-regulation, economic instruments, information and education guidelines and voluntary approaches. The OECD model describes the range of all means of regulatory and non-regulatory policy based on the extent of government interference within a given sector. While it does not provide an explicit definition of self-regulation, it is implicit within 'voluntary approaches' to regulation.

In addition to the rather practical models mentioned above, there are several academic approaches concerning the place of self-regulation in relation to the legal system. While the diversity of the various systems describing the possible complexity a self-regulatory scheme is endless, one of these multidimensional models states that state regulation and self-regulation overlap in two categories. One such category is self-regulation recognised by the state, where regulation may be granted statutory power ex-post, if necessary. The other overlapping field is mandatory self-regulation, where regulation is developed on the basis of ex ante requirements, and the institutions and procedures subject to self-regulation are specified by law. The multidimensional model describes the following stages (moving from no regulation toward strict regulation):[23]

1. No regulation: there is no interference by the state;
2. Pure self-regulation: there is no statutory basis, the role of the state is limited to informal supervision;
3. State approved self-regulation (ex post):: the state approves the code and monitors its implementation, but the code is not supported by the law in general;
4. Statutory self-regulation (ex ante): the law defines the fields subject to self-regulation, and the adopted codes can acquire the status of law;
5. Co-regulation: the regulation required by law is delegated to a sectoral body. Codes are created in cooperation between industry and state bodies and approved by the government;
6. Statutory regulation: regulation is defined, controlled, and enforced by the state or a state body.

The multidimensional model provides a more detailed description of the possible methods of self-regulation than the basic model. It is a common solution to use state involvement as support for the self-regulatory scheme, so it cannot be omitted from any model. While in an *ex post* regime, rules are not adopted and enforced by the regulated bodies independently, since state approval is a requirement, it can be established in general that the state confirms a top-to-bottom initiative. In an *ex ante* regime, the fields to be regulated are not identified by the regulated bodies, but they are granted the opportunity by the state to

23 Bartle and Vass, *op. cit.,* p. 29.

regulate a given field, and the rules adopted by such bodies have legal force, so it is reasonable to assume that these rules can be enforced and applied more efficiently. Statutory self-regulation comes quite close to co-regulation, the main difference being that the rules are adopted independently, with state approval, or jointly with the agreement of the state. Within the framework of the basic model, state approved and statutory self-regulation would probably be classified as co-regulation. There is no general agreement regarding the place of self-regulation within the regulatory scale, but the prevalence of several similarities between the various models is unquestionable. The line between self-regulation and state regulation is blurry, the terms used are not in a thesis-antithesis relationship and the mechanisms used in practice are often difficult to assign to the general categories available.

A summary overview of the models describing the scale of regulatory measures is provided in the table below:

Basic model	No regulation	Self-regulation	Co-regulation	Statutory regulation		
Australian model	No regulation	Self-regulation	Quasi-regulation	Co-regulation	Statutory regulation	
British model	No regulation	Information and education	Self-regulation	Incentive-based structure	Classic regulation	
OECD model	Voluntary approaches	Information and education guidelines	Economic instruments	Co-regulation	Performance and process-based regulation	
Multi-dimensional model	No regulation	Pure self-regulation	State-recognised self-regulation	Statutory self-regulation	Co-regulation	Statutory regulation

25.5 The Advantages and Disadvantages of Self-Regulation and Co-Regulation

The frequently mentioned advantages of self-regulation over statutory regulation include higher efficiency, flexibility, stronger incentives and cost reduction. The same advantages are also attributed to co-regulation, with the additional advantages that, in the case of co-regulation, the state not only provides a legal framework and supervision for the system, but also assumes the ultimate responsibility for it, meaning that the state does not waive its claim for the achievement of state and professional policy objectives.[24]

24 Palzer and Scheuer, *op. cit.*, p. 7.

Efficiency – i.e. the higher level of regulatory efficiency – is the most frequently mentioned argument, which is based on the assumption that market actors have special expertise and information – known as collection expertise – regarding their given sector that cannot be acquired by the government. This factor may be of exceptional importance in fields where special technical knowledge is needed to adopt the appropriate rules.[25] Legislators are rarely in a position that allows them to obtain all necessary sectoral information, they tend to know the market mechanisms less thoroughly, and the use of 'comparative forces' offered by the knowledge and expertise of parties directly involved in the problems may be particularly advantageous in such cases.[26]

The second advantage of self-regulation and co-regulation is *flexibility*. A less formal professional organisation can amend and adopt its rules to an ever changing environment more easily than the government. Legislation and the amendment of legal acts takes longer and involves a slower and more complicated process and the overly general rules thus adopted are not always capable of solving specific problems.

The third advantage is the *incentivizing power* over the market. It is frequently argued that rules adopted by actors of a given market are regarded as more reasonable and acceptable by other actors on the market – not least out of professional courtesy – than traditional statutory regulation.[27] A possible consequence of self-regulation is that it raises the professional level of quality in the affected organisations, prompts experts of the profession to think about the development of various norms[28] and encourages them to solve certain problems 'in-house' instead of addressing the regulator more frequently than necessary. Thus, the administrative burden can also be reduced.

It follows from the above considerations that the use of self-regulation is less costly for the state than the use of direct regulation, as the costs of developing and enforcing the rules are borne by the regulated sector. This argument – frequently raised in the context of the American approach – is primarily applicable to co-regulation, but may also arise in the context of self-regulation, in case the client trusts the self-regulatory body and refrains from taking further legal action. While the government does have certain supervisory duties, self-regulatory systems require less resources, thus, the regulatory system can operate more efficiently and flexibly, and, due to resulting savings, more resources can be devoted to innovation and the reduction of prices of consumer services.

Parallel to the above-mentioned advantages, some disadvantages also arise. In response to the arguments emphasising the importance of collective expertise, *Peter Swire* raises the question of how and why the sectoral actors would use that expertise for the benefit

25 Campbell, *op. cit.*, p. 715.
26 Bartle and Vass, *op. cit.*, p. 36.
27 Campbell, *op. cit.*, p. 716.
28 A. Puddephatt, *The Importance of Self-Regulation of the Media in Upholding Freedom of Expression. UNESCO*, Brasilia Office SERIES CI Debates. No. 9, 2011, 12.

of the public, instead of trying to gain profit.[29] Swire also questions that the sectoral actors would comply with the rules adopted by them with higher probability than with other instructions given by outsiders, as he believes that market pressures on the government and willingness of the government to take market considerations into account are apparent in the legislative process. Swire argues that, if the government leaves regulation to the market, self-regulation may turn into 'self-service', and selfish market interests may prevail over the interests of citizens, consumers and the actors of other sectors. Others note that self-regulatory bodies may not be able to free themselves from market pressures that could otherwise be averted by the government through the use of adequate guarantees.[30] The position that self-regulation relieves the state from administrative burdens can be maintained in the above cases only, but the decisions brought this way are not necessarily consistent with the purpose of statutory regulation. This phenomenon is known as the 'regulatory bias', where the given sectoral regulator regulates only those fields that are important and advantageous for their own sake.[31]

The conflicts of interest regarding enforcement also constitute an argument against self-regulation, for it seems to be unlikely that the regulated sector would spare no expense to impose sanctions on itself. It is also unclear that the self-regulatory bodies would be capable of using adequate measures to ensure compliance with their rules; until no sufficient incentives against 'misbehaving' market actors are applied, 'good' market actors who comply with the applicable rules may suffer disadvantages in the market competition.[32] Self-regulatory regimes may be taken over and dominated by highly influential market actors, which scenario may be even used to restrict market competition.[33] If a media outlet can realise more profit by ignoring the provisions of the self-regulatory regime, it will probably follow its own financial interests, unless doing so would not reflect on its behaviour in the eyes of the customers or the reputation of the company. This situation is known as the 'free rider problem', when certain members of a profession do not join a self-regulatory initiative, or they do join the initiative, but fail to observe the adopted rules of behaviour.

Some argue that self-regulation is the hotbed of counter-competitive behaviour for numerous reasons. The first reason is the possible use of pressure by major market actors as mentioned above; secondly, because competitors may agree under the disguise of self-regulation on the course of action to be followed in the future, while such agreements fall within the scope of anti-trust regulations. Another argument is the creation of barriers against market entry. Since self-regulatory and co-regulatory schemes are usually voluntary,

29 Campbell, *op. cit.*, p. 716.
30 Campbell, *op. cit.*, p. 717.
31 J. Segal, 'Institutional Self-Regulation: What Should Be the Role of the Regulator?', Twilight Seminar, Canberra, 2001, p. 5.
32 Campbell, *op. cit.*, p. 718.
33 Bartle and Vass, *op. cit.*, p. 37.

the rules do not apply to those who do not join the system and this may give rise to concerns on the side of the consumers. By contrast, complete coverage – i.e. a scheme that applies to all actors of the sector – may even restrict market competition by imposing various requirements on new entrants.

Another argument against self-regulation is that significant differences are discernable in the performance of the various systems, while their frequently noted efficiency cannot be measured. Cost-efficiency may be countered by the argument that co-regulation in fact duplicates the institutional environment, so it does not reduce but much rather increases respective costs on the long run.[34] Thus, transparency and public accountability are also requirements toward such systems.[35]

Significant problems for self-regulation and co-regulation may arise on the side of consumers due to the lack of perceived credibility and trust in the system.[36] The existence of numerous self-regulatory or co-regulatory bodies, the use of different codes or the existence of overlaps between the competences of various bodies may cause problems to consumers and market actors alike, for situations may arise where an applicant cannot decide which body he or she should turn to with a complaint, and even market actors may become confused regarding their own rights and obligations.[37]

25.6 Summary: The Place of Self-Regulation and Co-Regulation within the Legal System

After reviewing the meaning of self-regulation and co-regulation, we made the following observations:

1. The fundamental purpose of legal regulation is the formation of various relationships within society. To this end, the legislator lays down rules of behaviour in an abstract manner and for the future. However, legislation is not the only available means of shaping social relationships. Enabling self-regulation and co-regulation by the legislator is also a possible route; it allows the subjects of regulation to adopt norms for themselves, with (state) legal force being attached to such norms.
2. Self-regulation means the regulation of the operation of a given sector (or of the behaviour of actors in the given sector) in a flexible manner and on the basis of voluntary submission and the identical interests of the subjects, instead of by prescription of the executive power.

34 Palzer and Scheuer, *op. cit.*, p. 7.
35 Bartle and Vass, *op. cit.*, p. 38.
36 Segal, *op. cit.*, p. 5.
37 www.bis.gov.uk/policies/bre/better-regulation-framework/alternatives-to-regulation/choose-the-alternative/self-regulation/advantages-and-disadvantages-of-self-regulation.

3. Self-regulation comes closer to the complete lack of legal regulation than to statutory regulation. This does not mean that self-regulation would fall beyond the realm of the law or that the state would be indifferent toward it, but the law is not the primary source of legitimacy for this regulatory solution. Self-regulation *complements* state regulation in the sense that its subjects agree to be bound by another set of rules (i.e. self-regulatory rules) that operate along with statutory regulation and apply to issues not regulated by the law. On the basis of the right to self-determination, one may freely decide to be bound by certain rules – complementary to legal regulation –, provided that their actions do not violate the provisions of the law.
4. As for the distinction between self-regulation and co-regulation, state involvement is indispensable for the latter. Co-regulation is halfway between direct state regulation and sectoral self-regulation[38] that operates in situations where the regulatory power prescribed by law is delegated to sectoral bodies – even to self-regulatory bodies. Thus, the applicable regulatory scheme is created in cooperation between professional and state bodies. Consequently, the state plays a regulatory role in co-regulated fields.
5. There is no clear line between self-regulation and co-regulation, since – apart from pure self-regulation – the presence of the state cannot be construed as a distinctive feature; the difference between the two methods is more quantitative than qualitative.
6. The main objective – and benefit – of self-regulation is to let the regulator know that the possibly too wide margin of action may have an adverse impact on the achievement of statutory objectives.
7. Co-regulation may play an important role in fields where state regulation and presence is required, the duty to regulate is imposed by law, and the regulatory activity can be outsourced to professional bodies only because of the above-mentioned benefits of the self-regulatory mechanisms, so that state supervision is always in place to serve as the ultimate guardian of the public interest.

On the basis of the above observations, we attempt to define the situations where self-regulation and co-regulation may be used as viable alternatives to traditional legal regulation. However, it must be noted that the need for state administration and the possible extent of involving market actors in the regulatory process tends to depend on the given social circumstances and cultural settings. Legislation cannot 'create' culture or quality – this belongs to the field of ethics –, but it can create the circumstances that allow for the emergence of culture and quality. Self-restraint and withdrawal shown in the context of state involvement does not mean the lack of regulation, but only the repression of its official nature. This does not mean irresponsible decision-making or endangering the rule of law or professionalism, but the self-criticism of the state – i.e. the acceptance of its own limita-

38 Oxford study, p. 84.

tions. It is also a clear sign of opening toward the market and society, which may produce a re-evaluated, simplified, and probably efficient regulatory scheme by involving more specialized professional expertise in the regulatory process.

After reaching the conclusions described above, the following question needs to be answered: when should self-regulation be used, i.e. when is self-regulation better suited to settle social relations than legal regulation?

The state does not face this question in the context of pure self-regulation, where the subjects decide for themselves (formally or informally) and regardless of the state that they agree to be bound by a set of rules. In this sense, pure self-regulation is independent from state regulation; there are no overlaps between the roles of the two regulators.

The situation is different when the state deliberately 'refrains' from regulating a given field and gives space for self-regulation. Thus, the question should be posed as follows: when should the state refrain from regulation and allow the stakeholder to settle the issue by self-regulation?

We believe that numerous aspects must be taken into account to answer this question.

1. The first aspect is subsidiarity. Occam's razor offers important guidance when choosing between legal regulation and self-regulation[39]; when choosing from among various possible correct solutions, one should choose the simplest solution. In the context of legal regulation, overregulation is a permanent 'temptation' for the state, while self-regulation – as discussed above in detail – is more flexible, efficient and closer to the stakeholders. In other words, if legal regulation and self-regulation is *equally* suitable for regulating the given field, self-regulation should be preferred.
2. It follows from point 1 that one has to consider if self-regulation and state regulation is equally suitable for achieving the desired objective. Thus, the second criterion is suitability; is self-regulation suitable for regulating a given social relationship?
   It seems difficult to offer general guidance in this respect. The level of development of the field (sector) to be regulated, the market culture, the number and motivation of stakeholders, and other aspects have to be considered to decide whether or not the stakeholders are ready and capable of developing rules under the framework of self-regulation and to what extent the above-mentioned problem of 'regulatory bias' may arise.
3. The state must always bear in mind that the use of self-regulation may not jeopardise the achievement of the objectives of the state or the performance of its obligations regarding the protection of various institutions and fundamental rights. The constitution imposes numerous duties on the state. Performance of these duties may not be omitted by claiming that the legislative framework was 'relieved' of the regulation of a given field. Thus, it must be also considered to what extent the stakeholders are capable of

39 'Pluralitas non est ponenda sine necessitate' ('Plurality should not be posited without necessity').

ensuring compliance with the rules adopted by them. Enforcement in the field of self-regulation may give rise to concerns due to the possible existence of bias and the limited means of sanctioning in comparison to those of the state.

Thus, the state may not give up legal regulation fully where it is subject to a constitutional duty. The stronger the constitutional relationship between the state and the field to be regulated, the less space can be granted for self-regulation.[40] Consequently, the third criterion is the existence of a constitutional duty on the side of the state.

It is our position that the choice between the use of legal regulation and self-regulation should be by the due consideration of the three criteria mentioned above.

40 A practical example: the state cannot give the keeping of public order to the hand of self-regulation, even if the population could be organised enough and the stakeholders would be capable of developing the rules of policing (thereby meeting the first two criteria). Maintaining public order is a constitutional duty of the state, and the risks associated with the release of this field from the realm of legal regulation cannot be undertaken in a constitutional manner.