Regulation Remixed: Institutional Change through Self and Co-Regulation in the Mediamatics Sector

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■ Introduction

The regulation of communications has changed considerably in advanced economies in recent decades. In terms of institutional regulatory structure, these developments are not only reflected in the rising importance of independent regulatory agencies, but also in growing reliance on self and co-regulatory institutions – which are often neglected in current regulatory research.

In our paper we focus on the role and impact of self and co-regulation, i.e. on the involvement of private actors in regulatory institutions. Increased reliance on such modes of regulation leads to a remix of traditional and alternative regulation (self and co-regulation) between state and market. How does the division of labour change between public/state and private/societal actors in the regulation of the mediamatics sector (media & telematics) (LATZER 1997, 1998)? What are the patterns of application of self and co-regulation that emerge? What is the impact of growing self and co-regulation on regulation, with regard to its democratic quality, for example?

In the first instance, we analytically integrate the phenomena 'self and co-regulation' in the context of three interrelated approaches to broad institutional developments and changes: the transformation of statehood in the mediamatics sector (LATZER, 2000), shifts from government to governance and from the positive to the regulatory state. In the second section of this paper, we develop a novel classification of regulatory

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institutions and an analytical framework for empirical surveys in order to empirically grasp the state's contribution to various forms of regulation. The potential of our analytical tools is illustrated in the third section with the results of a comprehensive survey of Austrian regulatory institutions in the mediamatics sector. Section four discusses criteria for regulatory choice between various kinds of regulatory institutions from a public-policy point of view, followed by an analysis of the impact of self and co-regulation on the democratic quality of regulation. The final section offers a summary of our results.

■ Governance in the Regulatory State

National governments have traditionally played a pivotal role in development and control of the electronic communications sector. Strong, sector-specific state regulations, particularly monopoly regulations and public property in market-dominant companies, have characterised both the electronic media and telecommunications sector in most developed economies worldwide (LATZER, 1997; NOAM, 1991, 1992; SCHNEIDER, 2001). In recent decades, this dominant common pattern of government interventions in the electronic communications sectors has been eroded and a new pattern of control seems to have emerged, leading to a *transformation of statehood in the mediamatics sector* (media, telematics), the convergent communications sector. This new pattern of statehood [1] is characterised by changes in content (policy), institutional structures (polity) and processes (politics), and can be roughly traced by a number of trends of varying strength and intensity (LATZER, 2000):

• From protectionism to the promotion of competition: regulation changes geared towards loosening the protection of national companies and promoting competition in the sector;

• Separation of political/strategic and operative tasks: operative parts of regulation are delegated to independent regulatory agencies (IRAs), publicly owned companies are privatised;

• From vertical to horizontal regulation: hitherto separated regulatory structures for telecommunications and media are gradually integrated (e.g.

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[1] Our approach to statehood is a functional one that focuses on control and regulatory tasks of the state.

integration of regulatory institutions, harmonisation of regulations for telecommunications and media);

- From sector-specific to universally applicable regulation: sector-specific regulations within the communications sector are substituted by general regulations (e.g. general competition law);

- From detailed regulation to broad parameters: traditionally applied detailed regulations (e.g. in telecommunications) are substituted by broad parameters (e.g. blanket clauses or vague definitions such as "according to the latest developments in technology");

- From national to supra- and international regulation: national communications policies and regulation are losing importance vis-à-vis supra- and international regulation for economic and political reasons (Common Market) and due to the rise of trans-national services (e.g. eCommerce) which are difficult to legislate using national regulation;

- From state regulation to selfand co-regulation: private/societal players are becoming increasingly involved in regulation;

- From central regulation to decentralised, technology-based self-restriction: evident, for example, in the case of content regulation, where regulation regarding youth protection for example (violence or pornographic content) is being partially replaced by individual self-restrictions with the help of rating systems and filters.

Our analysis focuses on self and co-regulation, two phenomena that are gaining importance in the regulatory debate on control and the controllability of the communications sector. Industry and politics, particularly the European Commission [2], regard these as highly promising arms in the growing political control crisis caused by a combination of convergence, globalisation, liberalisation and rapid technological change [3].

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[2] See, *inter alia*, White Paper on European Governance (COM (2001) 428) and subsequent communications, especially COM (2002) 278.

[3] Reasons for the control crisis include a lack of governmental resources, knowledge, capacities and competencies for addressing transnational problems (KNILL, 2001, 1) and inadequate compliance with regulations by target groups, caused by a lack of knowledge, willingness, and ability to comply (OECD, 2000, 13). Collective political action at the national and international level faces a rising number of actors, increasing collisions of interest and it is required to cover long lasting constitutionally prescribed procedures which results in regulatory delay. Furthermore, the leeway to achieve public policy goals at the national level is aggravated by globalisation, because national and regional policies for attracting the investment of multinational companies are claimed to create an attractive business environment without restraints on companies behaviour, which results in a dynamic of regulatory arbitrage (MARSDEN, 2000, 19).

The changing role of the state in general, and self and co-regulation in particular, are *not* unique to the communications sector.

Self and co-regulation are, for example, also applied in the financial sector (PIRRONG, 1995; HOEREN, 1995; PAGE, 1986) (stock exchange, banking, insurance), in environmental care (FABER, 2001; HAUFLER, 2001; BÖRKEY, GLACHANT & LÉVÊQUE, 2000; LYON & MAXWELL, 2001) (chemicals, forestry, oil, mining), for the protection of human rights (HAUFLER, 2001; JENKINS, 2001) (e.g. labour and social standards for the improvement of working conditions in connection with the production of garments, footwear, sports goods, and toys, etc.) and in the field of medical care (NCC, 1999). In all of these areas, self and co-regulation are not new phenomena. In the field of traditional mass media, for example, there is a long history of self and co-regulation in the form of press councils and radio and television codes. In the convergent and global mediamatics sector, there are additional incentives for its application in the communications sector, additional fields of application and new institutional settings. Applications are being extended to areas such as telephony, internet-based services and digital television [4]. A variety of regulatory goals are being pursued, ranging from consumer protection to the promotion of effective competition (e.g. internet domain-names administration) and the protection of minors.

Symptoms resembling those identified in relation to the concept of a transformation of statehood in the mediamatics sector are also discussed in various other sectors and are generally dealt with as shifts (1) from government to *governance* and (2) from an interventionist/positive state towards a *regulatory state*.

The governance concept describes the horizontal and vertical extension of government (ENGEL, 2001). At the horizontal level, private/societal actors are included and form regulatory networks (RHODES, 1997; SCHMITTER, 2001), whereas at the vertical level there are changing institutional arrangements of regional, national, supra- and international players towards a multi-level governance structure [5]. Altogether, the institutional governance approach extends the traditional, rather narrow focus on hierarchical control mechanisms of the state to decentralised, alternative forms of (self) control

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[4] For examples regarding Internet see PRICE & VERHULST, 2000, for applications in the UK telecommunications regulation see OFTEL, 2000, 2001.

[5] On the emergence and development of regulatory policy networks in the telecommunications sector within the context of the EC's multi-level system of governance see DANG-NGUYEN, SCHNEIDER & WERLE, 1993.

between state and market, and from a focus on national government to the interplay between various levels of control. In contrast to the traditional hierarchical state, the co-operative state has to achieve policy goals in accordance with private/societal actors based on common consensus (BRAUN, 1995; BEYME, 1995).

Self and co-regulation are indicators of the trend from government to governance. The analysis of self and co-regulation predominantly refers to the horizontal extension of government as it describes institutional forms that include private players in the regulatory process. In other words, the focus is on the changing division of labour between state and private actors in the regulatory system. Moreover, growing self and co-regulation is also to be considered in the vertical extension of government as it emerges at various levels of multi-level governance structures.

Based on the analysis of European integration, changes in the state are discussed as a shift from an interventionist or positive to a regulatory state [6]. Consequently, the state can no longer be treated as an isolated variable, but rather as an integrated part of a multi-level system (MARKS, HOOGHE & BLANK, 1996) of governance within the framework of the European Community [7]. In a nutshell, the major functions/priorities of the state have gradually shifted from (re)distributive policies to rule-making. As far as regulatory institutions are concerned, one of the most salient features of the regulatory state is the rise of non-majoritarian institutions [8], notably independent regulatory agencies [9], which are supposed to combine specialised expertise with credible policy commitments. Recent literature shows that there has been no emergence of "the" regulatory state. Instead, a variety of regulatory states have emerged, creating a rather diverse picture across countries and policy fields (THATCHER, 2002). Nonetheless, for the purpose of this paper it is sufficient to argue that the regulatory state signifies a broad trend of structural change which can be explained by reasons including:

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[6] For an introduction and overview see MAJONE, 1996.

[7] Since the relevant regulatory politics fall under the "First Pillar" of the European Union, we basically refer in this paper to the EC.

[8] Non-majoritarian institutions, for example independent regulatory agencies, central banks and courts, can be conceived as institutions which are not directly accountable to the electorate or to their representatives (MAJONE, 1998, 10).

9 Independent regulatory agencies have a long history and tradition in the political system of the United States. For the relevance of the US model of independent regulatory agencies for the European states and the European Union see YATAGANAS, 2001.

• *Privatisation*: the abandonment of public ownership (SCHMIDT, 2002), notably in the public utility sectors (telecommunications, electricity, railways, etc.), has been accompanied by alternative modes of regulatory control leading to the growth of independent agencies or commissions operating outside politically influenced ministries.

• *Europeanisation*: today's policy making can no longer be conceived simply in terms of the nation-state, but has to be examined within the context of the institutional architecture of the European Community. This does not mean, however, that the nation state is irrelevant. On the contrary, Europeanisation has in many cases obliged member states to establish independent regulatory institutions in certain policy fields in order to implement EC law and policies (MAJONE, 1996).

• *Regulatory competition*: nation states compete with one another in order to attract mobile industry players across jurisdictional boundaries. Accordingly, rulemaking, understood as the essential tool for law-making entities to regulate the market, is gaining importance vis-à-vis (re-) distributive politics.

• *Technological developments*: it goes without saying that advances in technology have been an important force for regulatory change in the state as well as the economy. Nonetheless, recent literature has shown that the impact of technological innovation may vary across policy fields (HÉRITIER 2002).

• *Indirect government*: the growing number of independent regulatory bodies operating outside traditional governmental hierarchies signifies that traditional political institutions (parliaments, ministries, etc.) are no longer willing and/or capable of achieving certain policy goals directly. Instead, they have to rely more on indirect methods such as delegation, outsourcing and standardisation [10]. Methods of co-operation have been developed to avoid classical forms of legislation through directives and regulations. Instead, these initiatives rely on the open method of co-ordination, that is, target development and published scoreboards of national performance as measured by agreed policy objectives and voluntary accords, that is, self-regulation by private actors (HÉRITIER, 2001).

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[10] In the field of product standardisation, co-regulation has been applied since the 1980s in the context of the *New Approach*. In order to meet the deadline of the realisation of the Common Market it was necessary to refrain from a community-wide harmonisation of standards in favour of a harmonisation limited to essential safety requirements and other public interests, and in favour of the concept of mutual recognition, i.e. the reciprocal recognition of national standards.

While most of the literature on the regulatory state focuses on independent regulatory agencies, one has to bear in mind that at least some regulatory goals can also be achieved by less formalised means of regulation, i.e. by alternative regulation. Alternative forms of regulation, which are carried out by private or semi-private regulatory institutions, represent a further step away from traditional, politically dominated state institutions towards indirect government and consequently serve as an additional, but widely under-researched indicator measuring the trend from the interventionist to the regulatory state.

Growing trust in self and co-regulation by various actors in the mediamatics sector and their prominent role as indicators for the two above-mentioned shifts from government to governance and from a positive to a regulatory state, call for a closer analysis, raising the following questions:

- Are self and co-regulation actually increasing on a major scale? How can various forms of governance be empirically grasped?

- What regulatory goals are being pursued with self and co-regulation?

- When and how should alternative forms of regulation be applied, i.e. what is the adequate regulatory mix?

- What are the advantages and disadvantages of self and co-regulation compared to state regulation?

- What success factors in the institutional design of self and co-regulation need to be taken into account?

- What are the consequences of self and co-regulation, especially in terms of the democratic quality of regulation?

The first question to be tackled is therefore how to ascertain different forms of regulation empirically. For this endeavour we need precise definitions and an analytical framework.

■ Definitions and Analytical Framework for Empirical Analysis

Our literature survey on self and co-regulation showed that most analyses lack a solid empirical basis. Generally speaking, there are hardly any systematic and/or comparative empirical analyses of self and co-

regulation [11]. Empirical evidence is mostly limited to the description of randomly picked, best practice or failed examples of self or co-regulation [12], or it is limited to special sub-sectors (e.g. advertising, press, eCommerce, telecommunications) [13]. Moreover, our survey found a myriad of differing definitions and classifications of self and co-regulation in academic literature, as well as in the political debate. However, definitions are not a matter of right or wrong, but more or less helpful analytical tools, depending on individual research questions and methodological approaches. For our purpose, which is – in accordance with the trend of transformed statehood – to empirically assess the different degrees of state involvement in various regulatory institutions, we have chosen the following definitions and classifications: Regulation forms a subgroup of steering or control, it is an *intentional* [14] form of market intervention which limits the market conduct of the industry with the purpose of achieving *public* (economic and social) goals. Furthermore, regulation is limited to those market interventions that go beyond the general rules of the game, limiting freedom of trade and contract (BORRMANN & FINSINGER, 1999, 8). Our understanding of the term covers technical regulations (regarding industry standards), market structure regulations (to limit the number of sellers and buyers) and behavioural regulations (to prevent anti-competitive behaviour; to control prices). This narrow definition of regulation excludes other, non-regulatory market interventions which are brought about in the form of advantages (e.g. tax breaks, exemptions from regulations), subsidies and taxation (PICARD, 1989, 94ff).

Regulation takes place on a *continuum* between the ideal-type models of pure state regulation at one end of the scale and pure self-regulation by industry on the other (GUNNINGHAM & REES, 1997). In literature on this

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[11] THATCHER & STONE SWEET (2002) ascertain a similar lack of comparative research on the sources and consequences of delegation to non-majoritarian institutions.

[12] See, *inter alia*, LEVIN (1967) for case examples in the areas of automotive safety, cigarette labeling/advertising and broadcast programming; OECD (1996) for advertising in the UK, environmental covenants in the Netherlands, or the Responsible Care Initiative (chemicals) in Canada; GUNNINGHAM & REES (1997) for examples such as future markets, fishers in Turkey, the Brazilian extractive reserves system, or nuclear power operations; CAMPBELL (1999) for failed examples involving media.

[13] See for instance: SUHR 1998 and NORDENSTRENG 1999 for the press; BODDEWYN 1985, 1988 for advertising; OFTEL, 2000, 2001 for telecommunications; OECD, 2001 for eCommerce codes of conduct, and SCHULTZ, KAUFMANN-KOHLER, LANGER & BONNET 2001 for online dispute resolution.

[14] As opposed, for instance, to the definition of regulation by LESSIG, 1998, who also includes unintended effects.

subject, the prefix "self" is used both in an individual sense (one company sets its own rules) (AYRES & BRAITHWAITE, 1992) and in a collective sense – an industry group regulates the conduct of its members or of third parties (GUPTA & LAD, 1983). Here, we limit our analysis to collective self-regulation [15]. In the literature *"co"* usually refers to the degree of state involvement in the regulatory process. Co-regulation is self-regulation with public oversight or ratified by the state, in other words it is self-regulation with a legal basis.

Table 1 provides an overview of various categorisations of regulatory mechanisms between state and market. In our effort to analyse the varying degrees of state involvement in regulatory institutions, we distinguish between five ideal-type categories of regulatory institutions, according to the decreasing involvement and influence of the state [16]:

(1) *State regulation in the narrow sense* comprises the classical sovereign tasks (legislative, executive and judiciary)

(2) *State regulation in the broad sense* refers to regulatory institutions that carry out sovereign tasks, but act at a distance to sovereignty, because they are not subject to instructions or are subject to a loose context of instructions, i.e. instructions that have to be justified, put in writing and published. These transparency rules and the need for justification reduce the state's explicit political influence in their day-to-day work. Institutions in this category are often referred to as 'independent regulatory agencies (IRAs)'.

(3) Contrary to (1) and (2) *co-regulation* comprises institutions with no sovereign tasks, but which are based on an explicit unilateral legal basis. State involvement is still strong, for example by means of state supervision of regulatory activities (periodical reviews, control of abusive practices), instructions regarding (organisational) structure, transparency or goals.

No statutory regulations govern the activities of self-regulatory institutions. However, there might be some minor state involvement. This leads us to the following two categories of self-regulation:

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[15] Some authors use self-regulation as the catchall phrase for self and co-regulation; others distinguish between voluntary and mandated (enforced) self-regulation. See PRICE & VERHULST, 2000; GUNNINGHAM & REES, 1997.

[16] This categorisation was developed in LATZER, JUST, SAURWEIN & SLOMINSKI (2002) and applied for a detailed empirical analysis of institutional regulatory forms in the Austrian mediamatics sector.

(4) *Self-regulation in the broad sense* implies a minor state involvement, e.g. in the form of personnel or financial contributions or bilateral contracts.

(5) *Self-regulation in the narrow sense* includes no state involvement. It is a purely private arrangement with the aim of achieving common regulatory goals.

Table 1: Classifications of regulatory mechanisms between state and market

	market	alternative categories			state (hierarchy)	
Grainger 1999	no regulation	industry self-regulation	co-regulation, regulated self-regulation		government regulation	
OFTEL 2000	market forces	self-regulation	co-regulation		statutory or formal regulation	
Price/ Verhulst 2000	market organization	industry self-organization			government organization	
Liikanen 2001	no regulation	self-regulation	negotiated agreements	co-regulation	traditional regulation	
Schulz/Held 2002	implicit self-regulation	explicit self-regulation	regulated self-regulation		statutory regulation	
Latzer/Just/ Saurwein/ Slominski 2002	no regulation	self-regulation in the narrow sense	self-regulation in the broad sense	co-regulation	state regulation in the broad sense	state regulation in the narrow sense

Source: LATZER/JUST/SAURWEIN/SLOMINSKI 2002, 41.

In essence, self and co-regulation, which we summarise as alternative forms of regulation, are collective, intentional restraints on behaviour, which can be located on the *continuum* between state regulation and self-regulation. They are often a *collaborative* arrangement of private and public (legal, organisational, financial, personnel) contributions.

The central advantage of our classification lies in the subtle differentiation between state/public and societal/private involvement in the institutional regulatory structure. This allows for a finely differentiated evaluation of state and private contributions. Regulatory hybrids (e.g. co-regulation, self-regulation in the broad sense) are often not acknowledged sufficiently, or not defined precisely enough. Further, our classification differs, for example, from others listed in table 1 as it does not define market organisation as regulation [17].

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[17] To subsume market mechanisms under the header of self-regulation would conceptually stretch the term too much at the expense of the analytical explanatory power that it gains when it addresses exclusively the intentional union and joint action of private actors as they aim at reaching regulatory goals.

For our empirical institutional survey we couple this classification with an analytical framework that includes four categories:
- regulatory institutions and state involvement (including information on the year of foundation, legal form, degree of state involvement);
- operational scope and regulatory objectives (including information on the chosen regulatory approach, e.g. regulation of market structure or behaviour);
- international involvement and stakeholder participation (including information on the degree of openness of an institution to stakeholder participation, and on financing structure);
- regulatory process and instruments (including information with regard to norm setting and enforcement, appeal procedures and the possibility of sanction).

■ Institutional Patterns of Change

Empirical surveys of national or multi-level regulatory systems based on the above categorisation and analytical framework will mainly yield information on the *institutional* structure and to a lesser degree on the *process* of regulation. In this section we will demonstrate the potential of our analytical tools by presenting selected results, i.e. institutional patterns of change regarding operational scope, openness, and stakeholder involvement, etc., which we derive from a first illustrative application of our empirical approach to analysing institutional changes in the regulatory system of the Austrian mediamatics sector, comprising telecommunications, broadcasting, the internet and the press (LATZER, JUST, SAURWEIN & SLOMINSKI, 2002).

Our survey is based mainly on 23 national regulatory institutions in the mediamatics sector [18]. Besides 3 state regulatory institutions in the broad sense (IRAs), we found 20 alternative regulatory institutions: 7 co-regulatory institutions, 6 self-regulatory institutions in the broad sense and 7 self-regulatory institutions in the narrow sense (see illustration 1). Analysis of these institutions revealed results that include the following points.

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[18] Further, we have also identified two state regulatory institutions in the narrow sense, which are not included in illustration 1.

Alternative regulation: no new phenomenon, institutional changes over time

Self and co-regulation are not new phenomena (see illustration 1): They have traditionally been applied in *technical areas* (since the 2nd half of the 19th century) for issues such as standardisation, standards conformity assessment and electro-technical matters, as well as in the *press* and *advertising* sectors, among other things for the protection of minors, film assessment, and the promotion of minimum standards and fairness in news reporting. The majority of co-regulatory institutions founded before 1990 originally commenced their work as purely self-regulatory initiatives in response to technical and security problems caused by the industrial revolution, which state regulation could not counter owing to the lack of (financial) resources and technical expertise. These reasons, along with the fact that self-regulatory efforts were successful, later led to their establishment as co-regulatory institutions on a statutory basis. This also indicates the possibility of institutional changes in regulatory structures over time.
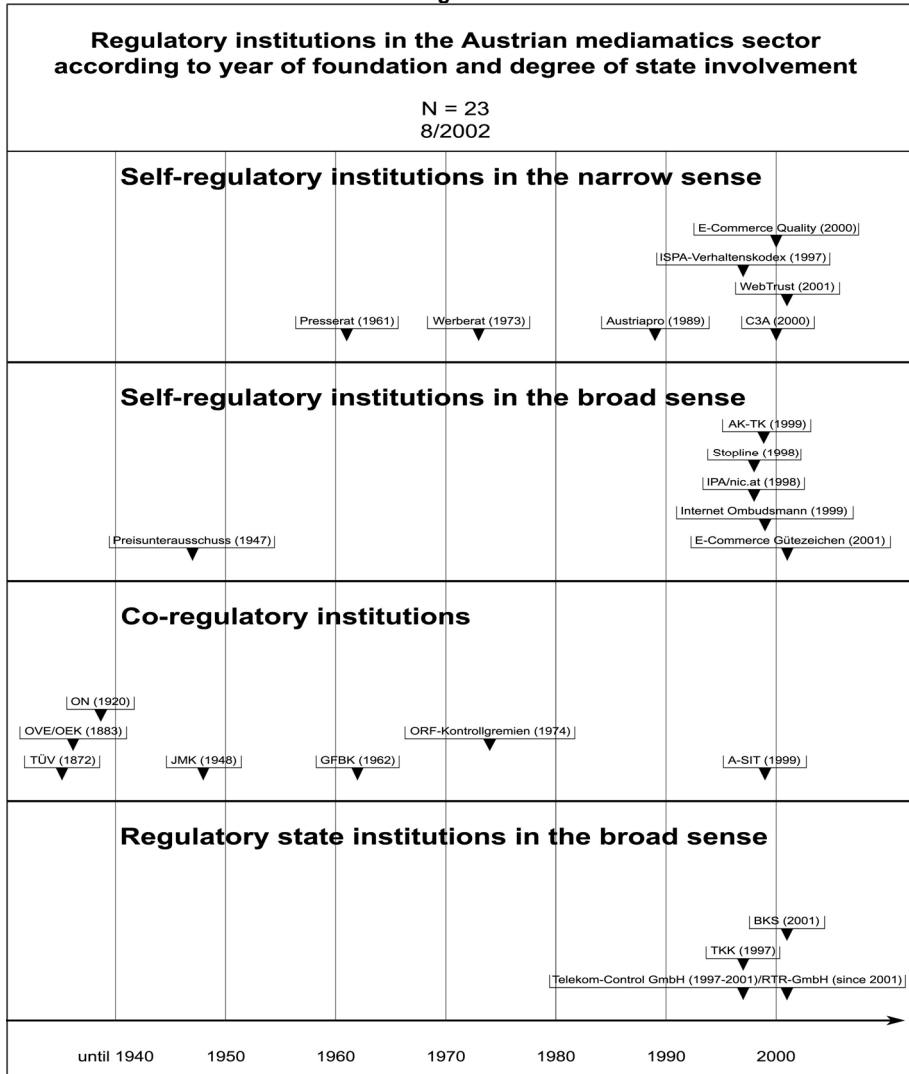
Sharp rise in self-regulation, establishment of 'independent regulators' and not much new co-regulation

Since the end of the 1990s a sharp increase in the presence of self-regulatory institutions in the broad and narrow sense, as well as the establishment of regulatory state institutions in the broad sense, i.e. the independent regulators, has been observed. The reasons behind this phenomenon are the Internet boom and the liberalisation of the broadcasting and telecommunications sectors respectively. The establishment of independent regulators is indicative of the 'separation of political/strategic and operative tasks' mentioned earlier in the context of the trends of transformed statehood.

Politically promoted co-regulation (e.g. by the European Commission) [19] has not yet resulted in new foundations. Only one institution, active in the area of electronic signatures, was founded after 1990. One possible reason for this is that co-regulation is based on an explicit unilateral legal basis and therefore has to meet with certain procedural requirements that self-regulation does not satisfy. It therefore takes longer to implement.

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[19] See, *inter alia*, White Paper on European Governance (COM (2001) 428) and subsequent communications, especially COM (2002) 278.

Figure 1

Regulatory institutions in the Austrian mediamatics sector according to year of foundation and degree of state involvement

N = 23
8/2002

Self-regulatory institutions in the narrow sense

E-Commerce Quality (2000)
ISPA-Verhaltenskodex (1997)
WebTrust (2001)
Presserat (1961)   Werberat (1973)   Austriapro (1989)   C3A (2000)

Self-regulatory institutions in the broad sense

AK-TK (1999)
Stopline (1998)
IPA/nic.at (1998)
Internet Ombudsmann (1999)
Preisunterausschuss (1947)   E-Commerce Gütezeichen (2001)

Co-regulatory institutions

ON (1920)
OVE/OEK (1883)   ORF-Kontrollgremien (1974)
TÜV (1872)   JMK (1948)   GFBK (1962)   A-SIT (1999)

Regulatory state institutions in the broad sense

BKS (2001)
TKK (1997)
Telekom-Control GmbH (1997-2001)/RTR-GmbH (since 2001)

until 1940   1950   1960   1970   1980   1990   2000

Key: *AK-TK*: Working Group Technical Co-ordination in Telecommunications (responsible *inter alia* for the co-ordination of technical/administrative issues in telecommunications); *A-SIT*: Secure Information Technology Centre Austria (responsible *inter alia* for security aspects in the context of electronic signatures); *Austriapro*: responsible *inter alia* for EDI standardisation; *BKS*: Federal Communications Senate (*inter alia* authority of appeal regarding decision of KommAustria, the Austrian Communications Authority, that, *inter alia* administers regulatory activities in broadcasting); *C3A*: Certified Austrian Advertising Agency; *E-Commerce Gütezeichen*: Austrian eCommerce Quality Mark; *e-Commerce Quality*: e-Commerce Quality mark; *GFBK*: Common Film Assessment Board of the Provinces; *Internet Ombudsmann*: Internet Ombudsman (incl. alternative dispute resolution); *IPA/nic.at*: Internet Private Foundation Austria/Network Information Center (Domain-Names-Administration); *ISPA-Verhaltenskodex*: Internet Service Providers Austria – Code of Conduct; *JMK*: Austrian Board of Media Classification (protection of youth by means of content ratings (film and multimedia contents)); *ON*: Austrian Standards Institute; *ORF-Kontrollgremien*: Austrian Public Broadcasting-Controlling Bodies (ORF-foundation council and ORF-public/audience council); *OVE/OEK*: Austrian Electrotechnical Association/Austrian Electrotechnical Committee; *Preisunterausschuss*: Price Subcommittee of the Parity Commission (social partners body responsible for control of prices/decisions on price increases); *Presserat*: Austrian Press Council; *RTR-GmbH*: Austrian Regulatory Authority for Telecommunications and Broadcasting; *Stopline*: hotline for illegal internet content; *TKK*: Telekom-Control-Commission; *TÜV*: TÜV Austria Group (technical supervision); *WebTrust*: WebTrust eCommerce seal; *Werberat*: Austrian Advertising Council.

Operational scope: major focus on Internet – mostly single-issue institutions, stronger reliance on legal basis in telecommunications and broadcasting

The majority of institutions (20) are active in the Internet sector [20]. The reasons for this are the existence of many single-issue institutions (8), i.e. they are responsible only for one regulatory task (e.g. electronic signatures or the administration of the domain-name system), and the fact that most institutions, traditionally active in telecommunications, broadcasting or the press only, have extended their operational scope to the internet. This can also be seen as an indicator for regulatory convergence. The Internet sector is dominated by self-regulatory institutions, whereas approximately three quarters of institutions active in telecommunications and broadcasting regulation operate on a statutory basis.

No alternative regulation in case of strong conflicts of interest

Analysis of regulatory objectives indicates the limits of alternative regulation. Self and co-regulation are employed for a variety of objectives, but not for market-power control. This supports the assumption that the scope for self-regulation decreases with increasing conflicts of interest. Other regulatory objectives are better suited for self and co-regulation. More than half of self-regulatory institutions pursue user-specific objectives such as consumer protection and user empowerment. In terms of media content regulation, merit content is pursued mostly thanks to strong state influence, while the avoidance of demerit content also occurs through self-regulation.

High entry barriers for participation in alternative regulation: success factor 'stakeholder involvement' only partly met

One factor for successful alternative regulation is supposed to be the involvement of all relevant stakeholders (consumer representatives, social partners) with the aim of balancing interests. This criterion has only been partly met. The possibility of stakeholder participation decreases with falling state involvement in alternative regulation. In effect, we find high barriers to participation in the form of financial barriers or restricted access (e.g. nomination, compulsory industry membership).

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[20] It should be noted, however, that the large number of institutions active in this area is not an indicator of high regulatory intensity in this sector.

*Self-regulatory institutions: low enforcement powers and possibilities
of sanctions*

Self-regulatory institutions mostly *react* to problems that have already occurred. At the same time, the regulatory intensity of intervention falls with decreasing state involvement. Sanctions in the case of non-compliance by members are limited to reputation or organisational sanctions such as the withdrawal of already granted seals of approval, fines, public reprimands or expulsion of members. Self-regulatory institutions are usually not in a position to sanction existentially, by professional disbarment for example. This indicates that self-regulation is not well suited to regulatory issues that might entail a high risk of regulatory failure: it reacts after problems have happened and can only counter such failures with mild sanctions.

Our institutional survey forms the basis for the substantiation, as well as the disapproval of theoretical reasoning, and yields detailed information on national patterns of regulatory institutions. In addition, comparative surveys of various national mediamatics sectors based on our analytical tools could contribute to a deeper and broader understanding of the application and impact of alternative regulatory mechanisms in different countries. It could also help to answer the question of whether there are common or different patterns across nations, i.e. whether imitation strategies [21] prevail over national regulatory innovations, whether varieties of capitalism (HALL & SOSKICE, 2001) are reflected in varied regulatory arrangements, etc. Furthermore, by extending analysis to other policy fields (e.g. biotechnology) it would be possible to assess whether the findings, particularly the patterns generated on the transformation of statehood in the Austrian mediamatics sector, are part of 'regulatory regimes' that are implemented across various issue-areas, and which are not limited to individual countries [22]. And finally, the adjustment of our analytical tools, in order to cover the EU level as well, would enable us to draw conclusions regarding the vertical extension of government towards a multi-level system of governance.

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[21] As argued by SCHNEIDER (2001) for telecommunications reforms in various countries.

[22] See THATCHER (2002, 869f.) who suggests an analytical framework based on regulatory regimes for cross-sectoral and cross-country research on regulatory reform.

■ The Mix of Regulatory Mechanisms

Our empirical analysis shows an increase in alternative regulatory institutions, which, alongside state regulatory institutions, are striving to achieve certain public goals. This raises the question of why alternative regulation is introduced from a public policy perspective.

Two ideal-type explanations for the application of self and co-regulation can be distinguished: they are employed as a makeshift solution or as an ideal solution to regulatory problems. They may be used as a makeshift solution, if traditional state regulation fails, for example with regard to trans-border regulatory problems such as content-related regulation on the Internet. In this case, there is not much leeway left for political actors to choose between state and alternative regulation. On the other hand, if there is the possibility of choosing effectively between regulatory forms to solve regulatory problems, then self and co-regulation may be chosen as an ideal solution. In such cases they can be expected to have certain advantages over state regulation. From a public policy point of view, the potential advantages of alternative regulation over state regulation are as follows [23]:

-   greater expertise / special skills within the industry, e.g. of a technical nature (to overcome the problem of information deficits of state regulation);
-   alternative regulation is faster and more flexible than state regulation, mostly because it is not bound by statutory procedures to the same extent as state regulation;
-   it reduces regulatory cost to the state and is cheaper to implement, especially because profit-minded companies are supposed to carry out the self-regulatory process more cost-efficiently;
-   it is applicable in areas sensitive to state regulation (e.g. in content regulation), where conflicts of interest are possible in terms of state censorship and there is a need to safeguarding the freedom of speech/ press.

From an industry point of view there are other incentives for introducing self-regulation voluntarily. The major reason is to pre-empt state regulation [24]. With 'carrot and stick' strategies, governments take advantage

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[23] For potential advantages see, *inter alia*, CANE, 1987; BODDEWYN, 1988; AYRES & BRAITHWAITE, 1992; Office of Regulation Review, 1998; CAMPBELL, 1999; NCC, 2000.

[24] Further incentives on the part of the industry are: higher reputation, lower costs, improved information flows, higher demand or first mover advantages (CABUGUEIRA, 2000; GUPTA & LAD, 1983).

of the industry's interest in preventing the imposition of state regulation. Hence, self-regulation tends to be introduced and effectively enforced in areas where governments have a high stick-capacity (AYRES & BRAITHWAITE, 1992, 19ff), in other words, where governments would have the potential to impose state regulation and can convincingly 'threaten' to do so if the industry does not solve the regulatory problem by means of self-regulation.

Moreover, the effectiveness and efficiency of regulation depends to a large extent on the interplay between different forms of regulation, on the continuum between state and market. However, this interplay does not only take place in a simple hierarchical manner as illustrated by the AYRES & BRAITHWAITE enforcement pyramid (1992), where the state, positioned at the top of the pyramid, can gradually intensify state regulation (e.g. by increasing the intensity of sanctions) in order to safeguard compliance. On the contrary, for GUNNINGHAM & SINCLAIR (1999) it is more of a complementary interplay between different regulatory institutions (state regulation, co-regulation, self-regulation), where state intervention might only be needed as a temporary and supplementary remedial action.

How can the right mix of state and alternative regulation be achieved from a public policy perspective? From our theoretical and empirical analysis of regulatory institutions we drew up a checklist for regulatory choice. This is intended to assist the political decision-making process in assessing how much state involvement is deemed necessary to solve a given regulatory problem. The checklist, which includes two illustrative examples, is summarised in table 2. It goes without saying, that the checklist is not a technocratic formula, but a guideline for the systematic discussion of regulatory choice.

Further, it should be noted, that it is not always possible to deal with all criteria listed in table 2 and an assessment may sometimes yield contradictory results regarding the choice of regulatory mechanism. For example, the risk of regulatory failure might be high although a market is characterised by a high reputation sensitivity. While the former would seem to indicate the need for stronger state involvement, the latter indicates the contrary. Hence, a final decision on regulatory models has to depend on the balanced evaluation of each particular criterion, while accounting for their interplay and degree of intensity. It is therefore important to bear in mind that the choice of regulatory mechanisms ultimately remains a political decision.

Table 2: Checklist for regulatory mechanism selection, including two illustrative examples: telecommunications interconnection and market transparency in eCommerce

Regulatory goals	Fostering of competition: Interconnection	Market transparency: eCommerce
Capacity to act :	high	high
CRITERIA to be assessed from public policy point of view: *Stronger state involvement seems necessary*		
the higher the *risks* of regulatory failure, and/or the higher the *need* for uniform and binding minimum requirements	high	low
the higher the *intensity* of regulatory intervention	high	low
the higher the *conflicts of interest* between public and special interests in regulatory issues	high	low
Less state involvement seems necessary		
the lower the *differences in market power* and the *market (entry) barriers*	high	case-by-case decision
the more *reputation-sensitive* a regulation is to an industry	low	case-by-case decision
if there is the possibility of transferring tasks to already *recognised organisations*	case-by-case decision	case-by-case decision

To briefly illustrate the applicability of the checklist we provide two examples in table 2: 'the fostering of competition in telecommunications markets by means of interconnection' and 'the establishment of market transparency in eCommerce'. For both goals the basic prerequisite for the practical application of the checklist is given: the government has a high capacity to act, which makes it possible to take decisions regarding its means of regulation.

The analysis of the interconnection example from a public policy point of view shows that the risk of regulatory failure is high because of the significance of a functional telecommunications infrastructure. Similarly, the intensity of regulatory intervention is high, because a market-dominant former monopolist has to be obliged to grant fair interconnection fees to its competitors, which then form the basis for final consumer fees. There are strong conflicts of interest between public and private interests in interconnection regulation and significant differences in market power between the telecommunications companies. Interconnection regulation is not very reputation sensitive, especially because consumers do not usually follow interconnection agreements in detail. Whether there are widely recognised organisations to whom these regulatory tasks could be

transferred has to be assessed on a case-by-case basis. On the whole, interconnection regulation calls for heavier reliance on state regulation, although private elements can always be employed as well. The Austrian and German telecommunications acts, for instance, leave some room for private negotiations regarding interconnection fees among competitors. Independent regulators (state regulation in the broad sense) become active only in the case of failure.

Unlike interconnection regulation, analysis regarding the establishment of market transparency in eCommerce points to the fact that alternative regulation may be a feasible possibility. The capacity to act on the part of the state is 'high'. The dangers deriving from regulatory failure are rather negligible. Similarly, in the absence of a fundamental political decision, or as far as basic rights are concerned, the degree of regulatory intervention is rather low. The economic consequences of regulatory intervention are also rather insignificant, as are conflicts of interest between individual parties. The extent of differences in market power, the degree of reputation-sensitivity of regulation, and whether there are recognised institutions that could take over these regulatory tasks has to be assessed on a case-by-case basis. Possible instruments of regulation are codes of conduct or means to increase price transparency, e.g. by publishing price comparisons.

Finally, after having decided that alternative forms of regulation are practicable, certain factors that make for successful self and co-regulation have to be borne in mind (*inter alia*, CAMPBELL, 1999; LIIKANEN, 2001). These success factors include:
- the need for operational objectives and clearly defined responsibilities,
- transparent regulatory processes and measurable results,
- defined fall-back scenarios in case of malfunctioning,
- periodical reviews and external control by the general public and the state, and
- the possibilities for interested stakeholders to participate in alternative regulation.

The observance of these success factors may help to reduce the potential risks and disadvantages of alternative forms of regulation. In this respect it is worth bearing in mind that [25]:

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[25] For potential risks see, *inter alia*, CANE, 1987; BODDEWYN, 1988; OGUS, 1995; Office of Regulation Review, 1998; CAMPBELL, 1999; NCC, 2000.

- alternative forms of regulation are only a symbolic policy with weak standards, ineffective enforcement and mild sanctions;
- there is an increased probability of regulatory capture, because of tight co-operation between the regulators and the regulatees;
- self-regulation is understood as self-service by the industry, with public interests being neglected vis-à-vis private interests;
- there is an increased danger of cartels and other anticompetitive behaviour, resulting from tight co-operation between companies in self and co-regulatory regimes;
- dominance of large companies in self and co-regulatory regimes leads to solutions that may discriminate against SMEs;
- the outsourcing of regulation results in a loss of know-how on the part of regulators, thus exacerbating existing information asymmetries;
- there is a danger that industries may try to profit from self-regulation as free-riders without contributing to it (e.g. financially, by means of personnel);
- it applies only to those who voluntarily participate and not to all members of an industry;
- there is an insufficient democratic quality, especially due to lack of accountability, transparency, legal certainty and the like.

One of these potential risks, i.e. the danger of insufficient democratic quality, is assessed in greater detail in the following section.

■ The impact on the Democratic Quality of Regulation

The rise of alternative forms of regulation is often accompanied by concerns regarding potential risks. As our list of potential risks shows, one of the dangers is that the growing application of self and co-regulation may result in a steady decrease in the democratic quality of regulation. To put it more bluntly, many scholars as well as politicians fear that alternative forms of regulation have to be equated with insufficient participation of democratically elected parliaments [26], lack of accountability, unbalanced representation of interests (e.g. absence of proper stakeholder involvement), etc. But how well-founded are these concerns?

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[26] This trend to "de-parliamentarisation" is often related to the trend towards broad legal parameters within which the executive branch and/or alternative forms of regulation exert growing regulatory power at the expense of elected assemblies.

The assessment of the democratic quality of a given institutional arrangement crucially depends on the model of democracy used. This paper argues that the evaluation of the legitimacy of alternative forms of regulation has to account for the fact that there is no single democratic standard. Democracy can be conceived of as a method by which society exercises influence on the process of relevant decision-making in a given polity (COULTRAP, 1999, 108). Hence, it has to be stressed that democratic rule cannot simply be equated with majority rule. The above mentioned shift [27] from the interventionist to the regulatory state urges us to reassess the standards by which we measure the democratic quality of a given polity. Every state, as well as the European Community, is shaped by two different paradigms, namely the "parliamentarian-representative" and the "regulatory model" [28]. The legitimacy of the parliamentarian-representative model is based on the general election of a parliament whose primary purpose is to pass laws. This function grants a leading role to parliaments vis-à-vis the other two governmental branches (executive, judiciary) – at least in formal terms. Democratically elected representatives make political judgements and take concrete decisions for which they are – after a given period of time – responsible to the electorate. Secondly, since the 1980s we have seen a trend both at the nation-state as well as the European Community level that can be described as a shift from the interventionist to the regulatory model. It goes without saying that non-majoritarian institutions of the regulatory state do not replace the institutions of the interventionist state, let alone parliaments. 'Highly political' decisions (e.g. liberalisation of telecommunications), especially in the sensitive area of (re-)distributive politics, should not be made by non-majoritarian institutions. Decisions of this kind should be determined by parliaments. Nonetheless, these polities also rely heavily on non-majoritarian principles and institutions, notably separation of powers, checks and balances, judicial review and delegation of policy-making capacity to independent regulatory agencies or commissions with limited or no direct accountability to political majorities (MAJONE, 1998, 11). These non-majoritarian institutions can only operate effectively when they are based on expertise and when they prove to be resistant to 'political' influence (JOERGES, 2002, 27).

But how can the democratic standard of the regulatory state, namely independent regulatory institutions as well as alternative forms of regulation, be evaluated? Due to their institutional structure, it is widely argued that

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[27] For a detailed description see above.

[28] See DEHOUSSE (1998) who argues this with regard to the European Union.

independent regulatory agencies are able to pursue policy goals in a more coherent, consistent and efficient way than state institutions in the narrow sense, as state institutions are subject to political influence in their day-to-day operation. Conversely, these institutions appear normatively questionable precisely because of this independence from politics. How can the decision-makers of these institutions be held accountable? An adequate system has to meet the following two criteria. Firstly, due to the fact that the main reason for establishing agencies is their immunity from political influence any responsive system has to respect the independence of the regulatory decision making process. By doing so, any institutional setting has to ensure that a single institution – let alone a politically dominated one – does not control the entire decision making process. Secondly, given that direct political influence is no longer feasible, we have to turn our attention to more indirect measures such as transparency, due process, contestability of decisions, clear legal objectives, budgetary measures and rules of appointment, etc.

We can distinguish between three dimensions of accountability: who is accountable to whom for what? Empirical data show that the rise of the regulatory model has led to an extension of all three dimensions of accountability (SCOTT, 2000). However, to ensure accountability we also have to focus on the input of the decision-making process. The sheer complexity of regulatory issues makes it impossible for traditional parliamentary assemblies to take all relevant interests of a given polity into account. Consequently, the argument can be made in favour of a process-oriented approach in which all relevant stakeholders are empowered to express their views and concerns and participate in the regulatory process on an equal basis (DEHOUSSE, 2001).

The widely discussed trend from the interventionist state to the regulatory state, i.e. independent regulatory authorities operating at arm's length from traditional governmental institutions is further fuelled by the rise of self and co-regulation. Consequently, the same democratic standards developed in the context of the regulatory state have to be applied when evaluating the democratic quality of alternative forms of regulation.

Generally speaking, we argue that self and co-regulation *per se* do not constitute any normative problem. From a normative point of view, regulatory choice depends crucially on the intensity of intervention of the intended measure, i.e. the greater a regulatory measure encroaches upon an individual's basic rights the more urgent is its democratic legitimacy. Fundamental political and economic decisions therefore still have to be

taken by the democratically elected institutions. Less invasive regulatory measures (e.g. award of a quality mark) may be principally suited for alternative forms of regulation.

In terms of the democratic quality of alternative regulation, the Internet Corporation for Assigned Names and Numbers (ICANN) illustrates the precarious status of a self-regulatory institutions in terms of democratic quality. Domain-name policy is carried out by ICANN under contract with the U.S. Department of Commerce (DoC) (MUELLER, 1999). ICANN decides what new families of 'top-level' domain names can exist and how names and essential routing numbers will be assigned to websites and other Internet resources. The institutional design of ICANN has been the target of extensive criticism due to its far-reaching competencies as well as its high intensity of intervention (lack of legitimacy, unbalanced stakeholder involvement, violation of antitrust law, etc.) (WEINBERG, 2000; FROOMKIN, 2000; FROOMKIN & LEMELY, 2002; MOSING, OTTO & PROKSCH, 2002).

From a national perspective, our empirical analysis of the institutional design of the Austrian mediamatics sector shows that important success factors [29] for self and co-regulation, such as openness and involvement of all relevant stakeholders, have only been partly met [30]. However, these shortcomings do not mean that institutional arrangements of self and co-regulation on the whole can be interpreted as problematic in terms of democratic quality. As pointed out above, a proper assessment of democratic quality always has to take into account the intensity of intervention of a given regulatory measure. Owing to their low enforcement and sanction powers, the intervention intensity of self-regulatory institutions seems to be minimal. Thus, potential democratic problems caused by growing self-regulation are rather negligible in the Austrian case. However, even if alternative regulatory institutions are not entitled to make important decisions, it may prove more efficient to make sure that decisions are made in a democratic way, i.e. by observing indirect standards developed in the regulatory state model (transparency, due process, etc.). In this way, decisions not only enhance the legitimacy of a given regulatory measure but – because of their higher degree of acceptance – also tend to be enforced more efficiently.

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[29] For a detailed description of applied success factors see section above.

[30] For empirical evidence see above.

■ Summary

Self and co-regulation, which we refer to as alternative regulation, are indicators of a number of broad institutional changes. Firstly; growing self and co-regulation contribute to the transformation of statehood in the convergent communications sector (mediamatics). They are changing the traditional common pattern of the role of the state in the communications sector, which has been stable in advanced economies for decades. However, self and co-regulation are by no means isolated phenomena and are not limited to the communications sector. Secondly, alternative regulation has to be conceived as an indicator of the general shift from government to governance: it horizontally expands traditional government (state regulation) by involving private/societal players in the regulatory network and it is an integral part of the vertical extension towards a multi-level system of governance, characterised by the interplay between regional, national, supranational and international regulation. Thirdly, alternative regulation is often neglected as an indicator of the shift from an interventionist/positive towards a regulatory state, which is discussed in the context of European integration. One of the main reasons leading to the regulatory state is indirect government, notably the delegation of regulatory power to independent regulatory agencies and – what is often overlooked and therefore under-researched – less formalised means such as self and co-regulation.

Comprehensive empirical analysis of self and co-regulation is necessary to assess its impact on regulatory systems, but this is generally absent in literature on the topic. In order to study the institutional structure of regulation, we propose a novel classification and analytical scheme which allows us to pin down the different contributions of the state in various forms of regulatory institutions. We propose a classification that distinguishes five categories of regulation, ranging from state regulation in the narrow and broad sense to co-regulation and self-regulation in the broad and narrow sense. This enables us to locate any given regulatory institution in the above mentioned continuum and to identify institutional change over the course of time.

As illustrated in its application in the Austrian mediamatics sector, the national survey reveals patterns of application of alternative regulation in relation to public goals, regulatory convergence, scope of application and stakeholder participation. Empirical institutional analysis consequently supplements and refines theoretical findings on self and co-regulation as indicators of a transformed statehood in the mediamatics sector. As a further

step, comparative research based on the above classification could contribute to a deeper and broader understanding of the usage and impact of alternative regulatory mechanisms in other countries and other policy fields (e.g. biotechnology). Thus, commonalties and differences between various national institutional structures could be evaluated, making it possible to assess whether the findings on the transformation of statehood in the mediamatics sector are also valid beyond this policy field. Furthermore, adjusting the classification and analytical framework, would also make it possible to empirically grasp changes regarding the vertical extension of government towards a multi-level system of governance.

Regulatory problems call for an adequate mix of regulatory mechanisms. We offer a checklist for regulatory choices that is intended to assist policy-makers to decide whether the pursuit of specific public policy goals allows for alternative forms of regulation or calls for state regulation. This list is, in essence, derived from analysis of the potential advantages and disadvantages of alternative regulation from a public-policy point of view.

Finally, in terms of the issue of democratic quality of regulation, we argue that the regulatory state, which rests on non-majoritarian as well as self and co-regulatory institutions, calls for a different set of criteria in assessing the democratic quality of the regulatory institutions concerned. Given that direct political control is no longer possible or desirable, we have to focus less on classical parliamentarian and more on indirect means such as transparency and due process. Thus, we conclude that there is no normative problem with alternative forms of regulation *per se*. The decisive factor for regulatory choice regarding democratic quality should be the *intensity of the regulatory measure*, i.e. the greater the intensity of a given regulation, the more closely the regulatory institution should meet the criteria developed in the regulatory state model.

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