

# Regulatory Choice in Communications Governance

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## Abstract

*Empirical research shows that there has been an increase in alternative regulatory institutions (self- and co-regulation) in convergent communications sectors, which, in combination with state regulatory bodies, are striving to achieve public goals. Growing reliance on private actors is leading to a remix of state regulation and alternative modes of regulation, which changes the state's contribution to communications regulation. This raises the questions of why alternative regulation is introduced and how to decide on the adequate mix of state and alternative regulation from a public-policy perspective. Based on theoretical reasoning regarding the advantages and disadvantages of various modes of regulation and on international experiences with different regulatory modes, this paper presents a rough guideline for regulatory / institutional choice. It is intended to assist the political decision-making process in assessing regulatory institutional arrangements for given regulatory problems in the communication sector.*

*Key words: governance, regulation, communications sector, media policy, regulatory choice, institutional choice, self-regulation, co-regulation*

## Governance as modified research perspective

The growing use of governance concepts in communications indicates a modified *research perspective* that stresses the importance of *institutions* in communications policy research, and *extends* the traditional focus on national government in two directions: (1) *Horizontally*, it includes the role of private actors in regulation, the remix of state and private contributions in communications regulation. (2) *Vertically*, it incorporates the multi-level character of regulation, the interplay of national regulation with international, supranational, regional and local regulation. Both extensions are important in order to assess recent changes in communications regulation triggered by liberalisation and globalisation, to grasp the changing / diminishing role of nation states in communications, and to advise policy makers on their regulatory choice between different modes of regulation in convergent communications markets.

This paper focuses on the regulatory part of governance, defined as intentional constraints on market players. Further, it centres on the growing horizontal extension of government in communications, which is indicated by the increasing incidence of self- and co-regulation, summarised in this paper as alternative modes of regulation.<sup>1</sup> These less formalised means of regulation are not new phenomena in communications regulation. However, empirical

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<sup>1</sup> The paper builds on Latzer, Just, Saurwein & Slominsky, 2002; 2003; 2006; Just, Latzer & Saurwein, 2007.

research shows that there is a growing reliance on such alternative forms of regulation, which are carried out partly or even entirely by private regulatory institutions (see Latzer, Just, Saurwein & Slominsky, 2006; PCMLP, 2004; Schulz & Held, 2004). They are gaining importance at all levels of multi-level governance regimes, and their application is encouraged by political institutions, for instance by the European Commission (see COM, 2001, 428; COM, 2002, 278). Early applications of self- and co-regulation in the communications sector have been predominantly in technical areas and in media-content regulation. The greatest reliance on this form of regulation within the communications sector can be found in the regulation of print media (see Suhr, 1998; Nordenstreng, 1999), whereas in telecommunications and broadcasting there has always been a stronger reliance on the statutory legal basis and state actors. However, a sharp increase in self-regulation occurred in the 1990s, triggered by the Internet boom. Many single-issue institutions have been founded that are mainly active in ex-post enforcement measures and in rule making. They usually intervene after problems have occurred and lack strict powers of sanction (see Latzer, Just, Saurwein & Slominsky, 2006).

### **Regulatory choice as institutional choice**

Growing reliance on alternative modes of regulation not only raises the question of *why* alternative regulation is introduced, but also on *how* to decide on the adequate mix of state and alternative regulation from a *public-policy perspective*.

Regarding the first question, two ideal-type explanations can be distinguished: private actors are involved in public regulation as *emergency solution* or as *ideal solution* to regulatory problems. It is an *emergency solution* if traditional state regulation fails, for example in the case of transborder regulatory problems, when political actors do not have much option but to apply alternative modes of regulation. Otherwise, if nation states have an effective choice between different regulatory forms, self- and co-regulation may be chosen as an *ideal solution*. The reasons are the expected advantages over state regulation from a public-policy point of view, for example better know-how within the industry, reduced regulatory cost, faster decisions and more flexible solutions.<sup>2</sup> Alongside to these incentives from a public-policy perspective, from an *industry point of view* the major incentive for a voluntary introduction of self-regulation is to pre-empt state regulation. Accordingly, self-regulation is rather introduced and effectively enforced in areas where governments have the potential to impose state regulation. In other words, “carrot and stick” strategies will work if the public stick capacity is high, if governments can convincingly “threaten” to use “big guns” (command-and-control regulations) if the industry does not solve regulatory problems by means of self-regulation (see Ayres & Braithwaite, 1992: 19ff.).

From a public-policy point of view, self- and co-regulation cannot completely replace traditional state intervention. Nevertheless, alternative modes of regulation may be an effective way to *complement* state regulation. State intervention might only be needed as a temporary and supplementary remedial action (see Gunningham & Sinclair 1999). The effectiveness and efficiency of regulation depends to a large extent on the interplay between the different forms of regulation on the continuum between state and market.

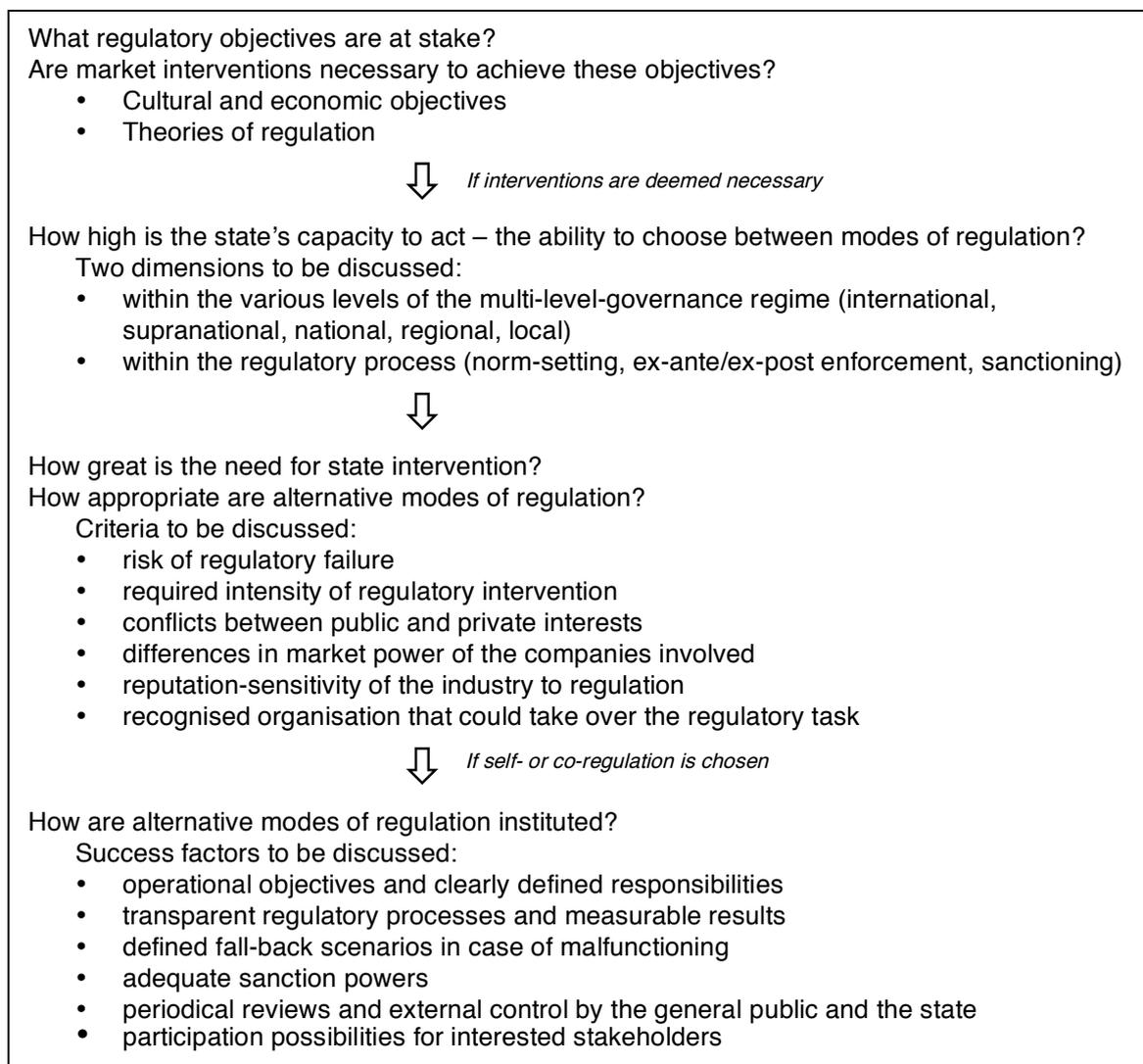
The question of how to find an adequate mix can be conceptualised as part of a multistage regulatory choice process. The plurality of public and private norm-setting actors and a plurality of norms, ranging from classical command-and-control-regulations (laws) to various forms of “soft law” and voluntary agreements, are preconditions for regulatory choice (see

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<sup>2</sup> For potential advantages and disadvantages see Boddewyn, 1988; Ayres & Braithwaite, 1992; Ogus, 1995; Campbell, 1999; NCC 2000.

Schuppert, 2005: 398). The institutional choices regarding the adequate regulatory arrangement cannot be applied across the board for the whole communications sector, but need to be applied on a case-by-case basis for any specific regulatory problem. A rough *guideline* for the systematic search for a suitable regulatory institutional arrangement, which builds on theoretical reasoning and experiences with various modes of regulation, is summarised in figure 1. It is structured by consecutive questions, which are to be discussed in order to choose the regulatory arrangements. Policy makers may use it either for *ex-ante* assessments of regulatory problems at issue, or for *ex-post* evaluations of already existing policy solutions. Because the primary interest of this analysis is in the changing role of the state, the guideline centres on choices regarding the *institutional* dimension of regulatory mechanisms, which shows by whom (actors) and how (processes) regulation is carried out, and not on the *substantive* dimension, which asks what is being regulated (e.g., access, prices).<sup>3</sup>

Figure 1: Regulatory choices as institutional choices – a guideline for its systematic discussion



As a first step, it is to be decided if market intervention is deemed necessary at all. A list of regulatory objectives of communications policy, including both cultural and economic goals,

<sup>3</sup> For an analysis of regulatory choice that centres on the substantive dimension see Schuppert, 2006: 395ff.

makes it possible to systematically discuss the need for market intervention.<sup>4</sup> Regulation theories, in particular normative theories of regulation, prove helpful in this respect.

After the identification of the guiding objectives and the decision on the necessity of market intervention, it has to be clarified, whether there is a capacity to act, i.e. if the state is in a position to choose between different regulatory forms. The state's ability to choose between regulatory mechanisms could be high on national level but low on the international level, it could be high in norm setting but low in sanctioning. Hence the question of the state's options regarding modes of regulation should be discussed systematically on *two* dimensions: for the various levels of the *multi-level governance* regime and for the *regulatory process*, i.e. for norm setting, ex-ante/ex-post enforcement and sanctioning.

If the opportunities for state intervention are *low*, there might be no other choice (*emergency solution*) but to rely on self-regulation / private actors. Even in this case, the state has some remaining options to control the development – for example, it could initiate and promote alternative regulations and it could take part in self-regulation, either with financial or personal contributions. Otherwise, if the regulatory options are *high*, then a rational choice (*ideal solution*) could be made regarding the extent of alternative regulation, which utilises the potential benefits from its advantages over state regulation as listed above, and avoids possible disadvantages of alternative regulations, for example a symbolic policy with weak standards, ineffective enforcement and mild sanctions, regulatory capture and insufficient democratic quality.

The appropriateness of alternative modes of regulation from a public-policy perspective can be discussed based on a list of *criteria* deduced from theoretical and empirical research. Alternative regulation may be appropriate or the necessity for state involvement may be low:

- if the risk of regulatory failure is low
- if only a low intensity of regulatory intervention is required
- if there are no strong conflicts between public and private interests
- if there are no strong differences in market power of the companies involved
- if the reputation-sensitivity of the regulation to the industry is high
- if there is an already recognised organisation that could take over the regulatory task

Some examples illustrate the application of the criteria listed:<sup>5</sup> *Risks* of regulatory failure are high, for instance, if it results in detrimental effects on the functioning of the infrastructure, or if it entails high economic cost, as in the case of spam mail. For the regulation of market transparency the risk of failure is rather low. The *intensity* of regulatory intervention can be considered as high if there are existential effects on market players involved, as in the example of interconnection regulations. For market transparency measures it can be assessed as low. The *reputation-sensitivity* to regulations can be evaluated by taking a look at the effects of non-compliance with these regulations. If the non-compliance to a regulation (e.g. regarding consumer protection) results in a loss of reputation and consequently in falling sales figures, then the reputation-sensitivity can be considered to be high.

Regarding the applicability of this checklist, it should be kept in mind that it will not always be possible to deal with all criteria, and sometimes an assessment may lead to contradictory results regarding the choice of regulatory mechanism. In the case of spam, for example, the risk of regulatory failure is high and at the same time the market is characterised by high

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<sup>4</sup> For a structured overview of regulatory goals in the convergent communications sector see Latzer, Just, Saurwein & Slominski, 2002:105.

<sup>5</sup> For a systematic application of this check list on selected regulatory topics (interconnection, market transparency, spam) see Latzer, Just, Saurwein, & Slominski, 2002: 152ff.; Just, Latzer, & Saurwein, 2007.

reputation-sensitivity. While the former indicates the need for stronger state involvement, the latter indicates the appropriateness of self- and co-regulation. Hence, a balanced mix of state and alternative modes of regulation might be the result of an evaluation that also takes account of the interplay between criteria and the degree of intensity of each particular criterion.

After the decision on the use of alternative modes of regulation, some choices remain to be made regarding their institutional specifics. From a public interest perspective, there are several *success factors* to be assessed (see Campbell, 1999). For example, defined fallback-scenarios in the case of malfunctioning, transparent regulatory processes, periodic reviews, options for stakeholder participation and adequate sanctions.

### **Concluding remarks**

This paper centres on regulatory choices as institutional choices. It takes full account of the changed research perspective of governance and recent developments in the convergent communications sector, for example the growing reliance on self- and co-regulation. Various theoretical and empirical research results on communications governance, in particular on different modes of state and alternative regulation, are bundled in a rough guideline, which is intended to assist policy-makers either in ex-ante assessments of upcoming regulatory problems or in the ex-post evaluation of policy choices regarding the institutional regulatory arrangements. It goes without saying that any specific regulatory choice remains in the end a political decision, that there are no one-size-fits-all solutions and that the guideline is not a technocratic formula that can mechanistically be applied. Further empirical and comparative research will make it possible to gradually refine the guideline, and it will contribute to strengthen the link between communication policy research and policymaking, which has often been criticised as being too weak.

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