



**Identifying appropriate  
regulatory solutions: principles for  
analysing self- and co-regulation**  
Statement

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## Executive summary

- Some of the most important decisions that Ofcom takes are in choosing the appropriate regulatory approaches to deliver our statutory duties. Our choices can range from no regulation at all, through industry self-regulation (where industry administers a solution without formal oversight), co-regulation (where a form of statutory control is present), to full statutory intervention.
- We aim to be as transparent and objective as possible when making such assessments. This statement describes the high-level principles that we will refer to when determining appropriate regulatory solutions. The aim of these principles is to provide a starting point for our analysis of options, taking into account any case-specific considerations. They have not been developed with any specific scheme or policy issue in mind.
- Since Ofcom's inception, our preference has been to work in partnership with stakeholders to develop regulation. We recognise that self- and co-regulation can, in the right circumstances, provide an effective means to address citizens' and consumers' interests, in line with our statutory duties and obligations. The fast moving and technologically complex nature of the communications markets can also, under some circumstances, make statutory regulation insufficiently flexible. There are several good examples of self- and co-regulatory schemes in the sector; for example, in the areas of mobile content, broadcast training and skills, and metering and billing solutions. However, in some cases the incentives for industry to act without statutory regulation may be insufficient to achieve the required outcomes.
- We have a number of legal responsibilities, set out in the Communications Act 2003, in relation to promoting self-regulation and reducing unnecessary regulatory burdens. Our consultation in March 2008, and this statement, update our 2004 Guidelines on self-and co-regulation, to incorporate our experience to date and to reflect market changes over the past four years.
- Our consultation document proposed an approach to determining whether self- or co-regulation is likely to succeed in specific cases. Central to this was the recognition, based on an analysis of existing schemes, that industry approaches work best where the incentives of industry are aligned with those of the public. Our proposals included five steps to help assess industry's incentives to deliver effective self- or co- regulation. We also proposed a set of criteria to consider as good practice when establishing new self- and co-regulatory schemes.
- We received 26 responses to our consultation, from a wide range of stakeholders. Overall, stakeholders were broadly supportive of our proposals, and made a number of useful comments and suggestions. Based on this feedback, we have decided to adopt the high-level principles set out in our consultation. We have adjusted the detail of our steps and criteria in the light of stakeholders' suggestions.
- In summary, we have found that self-regulation is most likely to work where the following conditions are present: industry collectively has an interest in solving the issue; industry is able to establish clear objectives for a potential scheme; and the likely industry solution matches the legitimate needs of citizens and consumers. It is unlikely to be appropriate where the following conditions are

found: there are incentives for individual companies not to participate; or there are incentives for participating companies not to comply with agreed codes. Where we determine that self-regulation is unlikely to succeed, co-regulation may be used to ensure that incentives are effectively aligned. Where neither self- or co-regulation are appropriate but regulation is necessary, a statutory solution will be required.

- When supporting the establishment of new self- and co- regulatory schemes, we will refer to criteria identified following our review of best practice. These are: public awareness transparency, significant industry participation, adequate resources, clarity of processes, ability to enforce codes, audits of performance, system of redress in place, involvement of independent members, regular review of objectives, and non-collusive behaviour.
- We will adopt a pragmatic and flexible approach to applying our principles, and take additional factors into account as appropriate to a specific case. In every instance we will look to engage stakeholders in discussions on how best to achieve the desired outcome. For instance, it may be that not all criteria will be required for any given scheme. We will consult publicly on any proposals for changes in regulation, and will include impact assessments of different options in our consultations.

## Section 1

# Introduction

## Background to this statement

- 1.1 This statement follows a consultation we published in March 2008. That document proposed a set of principles to refer to when considering if either self- or co-regulation would represent an appropriate means of addressing specific regulatory objectives. We put forward five steps to follow in these assessments, and a subsequent set of criteria to consider when designing self- or co-regulatory schemes. This statement sets out our updated approach, taking into account, and responding to, stakeholders' feedback.
- 1.2 Since the establishment of Ofcom in 2003 we have consistently sought to engage with industry, whenever possible, in the development of regulatory solutions. We believe that industry-led approaches can play an important role in delivering regulatory objectives: these can help address an issue quickly and flexibly while benefiting from industry expertise, often at a lower cost to society than formal regulation. Timeliness and flexibility of solutions are particularly critical in fast moving, technologically complex communications markets.
- 1.3 In many cases the market will deliver desired outcomes without regulation. In others, a statutory solution may prove the only option to secure objectives because the incentives of industry to resolve the identified concerns effectively may be weak or non-existent. A combination of industry and statutory involvement may be most appropriate in situations where a regulatory backstop can ensure that industry faces sufficient incentives to comply with industry-led rules.
- 1.4 Ofcom has a key role in ensuring that regulatory approaches adopted in the areas where we have duties are both effective and proportionate, and are in line with best regulatory practice. The Communications Act 2003 sets out a number of specific duties and obligations for us in carrying out our regulatory activities, for example, in relation to promoting self-regulation and reducing regulatory burdens, as explained in Section 2. In 2004 we consulted on a set of criteria to apply when considering the transfer of our functions to co- regulatory bodies.
- 1.5 The communications industry has evolved significantly since 2004. Almost all UK citizens and consumers now use digital communications, and new information and entertainment services, platforms and devices are being introduced on a regular basis. The market has become increasingly complex and the boundaries between sectors are blurring, involving players from different backgrounds, including those outside the UK.
- 1.6 At the same time, the needs of citizens and consumers are becoming more diverse. While many are embracing the opportunities brought by convergence, others continue to rely on more traditional services. The growing number of offers in the market brings great benefits to consumers, but can also result in new regulatory challenges.
- 1.7 The policy landscape has also changed considerably in recent years. The number of new co- and self-regulatory schemes has increased both in the UK and abroad, and there is a growing body of knowledge on the application of such solutions. Ofcom

itself now has several years of experience in co-regulation – for example, in relation to the broadcasting code and premium rate services.

- 1.8 Given the fast pace of change in the sector, and the consequent issues facing stakeholders, it is critical that an assessment of what constitutes appropriate regulation is based on clear and objective principles. It is therefore timely to update our approach to determining the appropriate solutions. It is with this in mind rather than any one particular regulatory issue or policy development that we have undertaken this work.

### Consultation proposals and stakeholders' feedback

- 1.9 Our consultation document proposed a set of principles to which we would refer when considering the appropriateness of self- or co-regulation where a need for some form of regulation has been identified, in particular, in securing the interests of citizens and consumers.
- 1.10 We examined a wide range of evidence in developing these proposals. This included an analysis of existing schemes in the UK and international communications sectors, as well as interviews with stakeholders and experts in this area. We also considered initiatives outside the sector, for example in advertising, energy and banking, seeking to identify the key determinants of successful models. In addition, we conducted a study of the economic incentives of companies in relation to self- and co-regulation.
- 1.11 This analysis informed our proposals on the steps to follow when making initial assessments of the merits of alternative approaches to specific regulatory concerns. We also identified a set of criteria to refer to when supporting the establishment of new schemes, to update our 2004 guidelines.
- 1.12 We received 26 responses to our consultation from a wide range of stakeholders: consumer organisations, trade associations, self- and co-regulatory bodies, communications companies and academics. We greatly appreciate this feedback. A summary of the key issues raised by stakeholders is included in Annex 1<sup>1</sup>.
- 1.13 Overall, there was broad consensus that it was helpful for us to employ an objective and systematic approach when considering the appropriateness of self- and co-regulatory solutions in specific cases. Many respondents highlighted the challenges for regulation posed by the fast pace of convergence. Some argued that the need for faster-paced and more flexible regulation favoured a greater reliance on self-regulation; others said that, on the contrary, regulators should be more cautious when considering the delegation of responsibilities to industry.
- 1.14 We agree with those stakeholders who argued that while an objective approach to determining appropriate regulation is important, we need to retain a degree of flexibility in our approach. Each case is likely to be different, depending on the particular issue at hand, market conditions, the collective and individual incentives of industry players, and the likelihood of compliance by industry. We need to be pragmatic in our approach.
- 1.15 Several stakeholders asked for clarification of the intended scope of application of our proposals, in particular, in areas beyond our current duties and in relation to established schemes. We would like to note that our principles are forward-looking,

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<sup>1</sup> Non-confidential responses can be viewed at <http://ofcom.org.uk/consult/condocs/coregulation/responses/>

and it is our intention that the scope of this statement is determined by reference to our statutory duties, in particular towards citizens and consumers. We are not looking to extend our activities to areas outside our duties, to become an overarching supervisor of industry schemes or to apply our principles on a wholesale basis to all existing schemes. Figure 2 in Section 2 sets out the areas where we may need to assess self- or co-regulation.

- 1.16 Stakeholders also made a number of specific suggestions in relation to definitions of regulatory approaches, the proposed steps in making initial assessments, and on the subsequent institutional criteria for schemes. We have considered these comments when finalising our approach, described in Sections 3 and 4 of this statement.

### **Structure of this document**

- 1.17 This document sets out our position, taking into account stakeholders' feedback and responding to comments and suggestions. Section 2 describes the approaches available for addressing regulatory objectives, discusses the changes occurring in the sector and the associated challenges for regulation, and highlights the need for transparency and objectivity when discriminating between regulatory solutions.
- 1.18 Section 3 explains the steps we will take when making assessments of what the appropriate type of regulation is in any given case, in particular taking into account citizen and consumer interest. Section 4 describes a set of good practice criteria for institutional arrangements in self- and co-regulatory schemes. Section 5 sets out how we will apply these principles in practice.

## Section 2

# The regulatory toolkit and the role of self- and co-regulation

## Regulatory options

- 2.1 Three broad approaches can be used to secure policy objectives that are not met by the markets: industry self-regulation; co-regulation, and statutory regulation. These are explained in Figure 1 below, together with the 'no regulation' option. All have their merits and drawbacks, and different solutions are appropriate for different circumstances, as we discuss further in this section. We have a key role in ensuring that the most effective solutions are adopted in the areas where we have duties, in the interests of citizens and consumers, and in line with regulatory best practice.
- 2.2 Our assessment of the appropriate regulatory options in each specific case must be consistent with our statutory duties and obligations. Section 3(4)(c) of the Communications Act 2003 (the Act) provides that, in performing its statutory duties, Ofcom must have regard to "the desirability of promoting and facilitating the development and use of effective forms of self-regulation." Further, according to Section 6(1) of the Act, Ofcom must: "keep the carrying out of their functions under review, with a view to securing that regulation does not involve (a) the imposition of burdens which are unnecessary; or (b) the maintenance of burdens which have become unnecessary." Section 6(2) of the Act provides that, in reviewing its functions under Section 6, Ofcom has the duty "(a) to have regard to the extent to which the matters which they are required under section 3 to further or to secure are already furthered or secured, or are likely to be furthered or secured, by effective self-regulation; and (b) in the light of that, to consider to what extent it would be appropriate to remove or reduce the regulatory burdens imposed by Ofcom."
- 2.3 While we should aim to reduce unnecessary burdens, any assessment of regulatory approaches must be guided by our broader statutory duties set out in Sections 3 and 4 of the Act, and in particular, our principal duty of furthering the interests of citizens and consumers.

**Figure 1: Types of regulation**

Approach	Description
<b>No regulation</b>	Markets are able to deliver required outcomes. Citizens and consumers are empowered to take full advantage of the products and services and to avoid harm.
<b>Self-regulation</b>	Industry collectively administers a solution to address citizen or consumer issues, or other regulatory objectives, without formal oversight from government or regulator. There are no explicit ex ante legal backstops in relation to rules agreed by the scheme (although general obligations may still apply to providers in this area).
<b>Co-regulation</b>	Schemes that involve elements of self- and statutory regulation, with public authorities and industry collectively administering a solution to an identified issue. The split of responsibilities may vary, but typically government or regulators have legal backstop powers to secure desired objectives.
<b>Statutory regulation</b>	Objectives and rules of engagement are defined by legislation, government or regulator, including the processes and specific requirements on companies, with enforcement carried out by public authorities.

## No regulation

- 2.4 Regulation, in all its forms, aims to secure public objectives where these are not being delivered by the markets on their own. In many areas intervention is not necessary, for example where:
- desired outcomes are delivered by competitive markets (e.g. increased choice and reduced prices);
  - all companies delivering a product or service have incentives to address citizen and consumer needs through best practice and corporate policies; and
  - regulatory activity would fail to achieve desired outcomes due to the nature of the issue, and where emphasis needs to shift to empowering consumers to benefit from new services and protect themselves from harm.
- 2.5 In its response, the Internet Advertising Bureau (IAB) suggested that our approach should place more emphasis on the role of good practice. It noted that this may be particularly important in markets with novel or fast-moving business models, complex value chains or where services are very diverse. It referred to the use of best practice guidelines by the Home Office taskforce on Child Protection on the Internet and the labelling practice sponsored by the Broadband Stakeholders' Group (BSG). Yahoo! similarly felt that it was important not to overlook the growing importance of good practice in the context of fast-moving business models.
- 2.6 We note these important examples and acknowledge the potential role of good practice in meeting public objectives in some areas. We do not explicitly focus on good practice in this statement because wherever it achieves regulatory objectives, this presupposes no need for centralised regulatory solutions, although it may play a role in meeting citizen and consumer interest. We believe that the likely effectiveness of good practice in meeting regulatory objectives should be assessed on a case by case basis.

## Self-regulation

- 2.7 We define self-regulation as a situation in which industry administers a regulatory solution to address citizen or consumer issues without formal oversight from government or regulator. In particular, there are usually no explicit legal backstops in relation to issues administered by a scheme to guarantee enforcement.
- 2.8 It is often considered that self-regulation may present a more flexible, targeted and less costly option than statutory regulation, and that it benefits from industry expertise. Several respondents to our consultation also noted that it promotes a sense of ownership and responsibility, encouraging the industry to resolve the issue.
- 2.9 The Mobile Broadband Group suggested that self-regulation has further benefits compared with formal regulation in that it: allows more organisations to take part; is more conducive to innovation and competition; encourages companies to take risks in adhering to high standards; can provide low entry point for regulation that builds over time; and makes participants answerable for their own action.
- 2.10 We agree that in many cases self-regulation can offer an effective option; however, this needs to be considered on a case by case basis. Broadly, the success of self-regulation depends on whether industry incentives are aligned with the interests of citizens and consumers, as we discuss in Section 3. Also, in some cases, an

industry-led scheme may be more costly to run than if the same task were performed by a regulator in-house.

- 2.11 In our consultation document we referred to the Internet Watch Foundation (IWF) as a successful example of industry self-regulation<sup>2</sup>, where considerable efforts have been made to standardise procedures, in a format that is recognised by law enforcement agencies, for the reporting and taking-down of abusive images of children. The scheme has also been successful in increasing the membership of commercial organisations and increasing public awareness of its activities. As the IWF noted in its response, this has required an ongoing determination and collective commitment from many stakeholders to address a common goal.
- 2.12 Another successful example of self-regulation is in the area of mobile content. The UK code of practice for the self-regulation of new forms of content on mobiles was published in January 2004 and included a series of undertakings from mobile operators regarding young people's access to, and the classification of, commercial content. The resulting Classification Framework was published in February 2005. This Framework is provided by the Independent Mobile Classification Body (IMCB), a subsidiary limited company of the premium rate phone regulator PhonepayPlus. We completed a review of the scheme in August 2008<sup>3</sup>. We found the scheme to be effective in restricting young people's access to inappropriate content, and that the Code and Framework are understood and readily adopted by the operators. This is an example where industry incentives are aligned to those of the public, where the scheme covers all relevant suppliers, and where a clear approach has been developed to tackle the issue.
- 2.13 In their responses, stakeholders suggested a number of other examples of self-regulation in the communications industry, including the non-broadcast element of the Advertising Standards Authority, the Portman Group, the Press Complaints Commission, preference services by Direct Marketing Association and the Internet Advertising Sales House code.

## Co-regulation

- 2.14 Co-regulation combines elements of self- and statutory regulation, with the industry and public authorities administering a solution in a variety of combinations. The aim is to harness the benefits of self-regulation in circumstances where regulatory oversight is required for some elements of the solution, with the government or regulator usually retaining some backstop powers.
- 2.15 In our consultation we referred to the Dutch NICAM (Nederlands Instituut voor de Classificatie van Audiovisuele Media) scheme for audiovisual media classification as a positive example of co-regulation. NICAM is widely known, adopted and respected. Despite its widely-recognised success, EURALVA has suggested in its response that the scheme did not cover every instance of content available to Dutch viewers, and that there are significant costs associated with the running of the scheme. As we indicated above, we recognise that self- or co-regulation may at times be more costly

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<sup>2</sup> We consider the IWF to be a form of self-regulation given that it has been established and run by industry without formal oversight of any government body or regulator, and there are no legal backstops specifically in relation to the operation of the scheme (although there are legal provisions in place in relation to content administered by the scheme, with enforcement carried out by the police).

<sup>3</sup> Our final report can be accessed at [http://www.ofcom.org.uk/advice/media\\_literacy/medlitpub/ukcode/ukcode.pdf](http://www.ofcom.org.uk/advice/media_literacy/medlitpub/ukcode/ukcode.pdf)

to run than if they were undertaken by a regulator; but it may still be desirable to benefit from industry's experience and commitment.

- 2.16 In the UK, the initial work on the implementation of the Audiovisual Media Services (AVMS) Directive<sup>4</sup> sought to encourage a co-regulatory approach. The Department of Culture, Media and Sport (DCMS), responsible for the implementation of the Directive, has recently consulted on options for the regulation of video on demand.<sup>5</sup> The Government has expressed a strong preference for a co-regulatory regime that would build on existing self-regulatory schemes for VOD services, and introduce new backstop powers to underpin the new regime. To facilitate this, the DCMS is working closely with the Advertising Standards Authority (ASA), the Association for Television on-Demand (ATVOD) and the Independent Mobile Classification Body (IMCB), as well as ourselves, industry players and other stakeholders.
- 2.17 Several stakeholders were particularly supportive of co-regulation in their responses. For example, the Association for Interactive Media & Entertainment (AIME) said it was best-placed to secure consumer protection in a way that also promoted a confident business environment. Scottish & Southern Energy (SSE) noted that co-regulation offers more flexibility, reduced burdens on industry and on Ofcom, and provides an easier route to communicate policy objectives to market participants.
- 2.18 The BSG and Yahoo! suggested that co-regulation will only be successful if the regulator can demonstrate that it has a genuinely hands-off approach, restricting itself to approval of codes and intervention as a last resort.
- 2.19 We believe that different roles are appropriate for a regulator in different cases. Where industry incentives to act are sufficiently strong, the regulator's role may be limited, for example, by a form of back-stop powers. In other cases a more direct involvement may be required, with only some parts of the solution delegated to the industry. Decisions on the split of responsibilities should be based on the analysis of the specific issue at hand, as discussed in Section 3.
- 2.20 Finally, several stakeholders highlighted that co-regulatory solutions may evolve over time, and that the balance of industry and regulatory involvement in specific cases may change. We agree with these comments, and note that changes may be initiated by either industry or regulator, for example, where it becomes clear that the existing set-up does not deliver the objectives, where market circumstances change, or where it becomes apparent that a lower level of formal involvement would be sufficient.

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<sup>4</sup> The AVMS Directive was adopted in December 2007. It revises and updates the Television without Frontiers Directive which coordinates national regulations in a number of fields relating to the provision of cross-border broadcasting services. These include establishment criteria, advertising, sponsorship, tele-shopping, protection of minors, public order, right of reply, and the promotion of European programmes. Member States are required to ensure that television broadcasters under their jurisdiction comply with the programme standards set out in the Directive, although they can also impose additional domestic requirements. The AVMS Directive extends the scope to cover video on demand services, and introduces a two tier approach to regulation, imposing a stricter regime on television broadcasting services. Advertising rules have been liberalised (including a relaxation of the product placement regime), and broadcasters have been allowed greater flexibility as regards both amount and insertion of advertising. The Directive also recognises the benefits and encourages the use of self and co-regulation, supplemented by the promotion of media literacy, as effective means of implementation.

<sup>5</sup> Consultation closed on 31 October 2008 and is available from:  
[http://www.culture.gov.uk/reference\\_library/consultations/5309.aspx](http://www.culture.gov.uk/reference_library/consultations/5309.aspx)

## Statutory regulation

- 2.21 State intervention has two main forms: direct obligations imposed by legislation or government regulations, or the direct enforcement of general legal requirements by a sectoral regulator. Statutory regulation may be particularly effective in certain market conditions, for example, where:
- one large player commands significant market power and where self-regulation would not be effective;
  - the issue at hand is unlikely to affect companies' commercial success or their reputations; or
  - the structure of the industry (e.g. a large number of diverse players with different interests) does not lend itself to a co-ordinated industry response.
- 2.22 In addition, as BT pointed out in its response, statutory regulation can in some cases be more predictable and therefore more attractive for the regulated companies.
- 2.23 However, statutory regulation may also have disadvantages. As a number of stakeholders highlighted, it may in some circumstances be inflexible or too slow to react, and may lack the benefit of industry expertise. It may be over-prescriptive and result in disproportionate costs, eventually borne by consumers in the form of higher service or product prices.

## A continuum of approaches

- 2.24 Each regulatory approach has advantages, and different solutions are appropriate in different circumstances. Importantly, forms of self- and co-regulation defy a simple classification and are better viewed as part of a continuum, for a number of reasons:
- Statutory involvement is rarely completely absent from a regulatory solution, and may range from informal pressure, to light co-regulation (e.g. backstop powers), to engagement in implementing schemes, through to more extensive forms of co-regulation where only some aspects of the solution are delegated to industry;
  - Pure forms of self-regulation are rare - the experience of the last five decades across many sectors is that schemes often emerge from a threat of state-based intervention. Our own research has found that most self-regulatory schemes have been established, at least in part, in response to the perceived threat of statutory regulation;
  - As stakeholders' feedback highlighted, the appropriate combination of industry and regulatory involvement in addressing an issue may change over time; and
  - An approach to fulfilling a broader public goal is often based on a combination of measures, with some elements of a solution defined by legislation and implemented via statutory instruments, and others possibly relying on self-regulation.

## The continuum of approaches – degrees of formal intervention



## Market change, convergence and the need for a transparent approach

- 2.25 In our consultation, we highlighted that convergence and globalisation are leading to significant change in the markets we regulate, for example:
- new products and services are continuously coming to the market, many of these are converged or bundled offerings, or previously unregulated services;
  - many new players are entering the market, while traditional players are extending activities into new areas;
  - overseas-based companies increasingly provide services in the UK communications market; and
  - growing adoption of digital services is transforming people's communications needs and behaviours.
- 2.26 All these developments raise new challenges for regulation. Not only must it address new and increasingly complex market structures, but the objectives of regulation are more complex than ever before as the needs of citizens and consumers are changing profoundly. For example, while many are adopting new services, others continue to rely on more traditional services from long-established providers; different parts of society are thereby placing different expectations on regulation. Moreover, citizens and consumers are no longer simply the recipients of commercially-provided services – many are also creating new content and services, making these available to millions of people via the internet.
- 2.27 Many stakeholders agreed with us that convergence is placing new challenges on regulation. Industry respondents argued that this suggests a greater role for self- and co-regulation in the future, to benefit from more flexibility, industry expertise, timely solutions and reduced administrative burdens. Some industry stakeholders suggested that self-regulation should be the default preference whenever possible.
- 2.28 Consumer stakeholders on the contrary thought that the volatility of changing markets invites a more cautious approach. The Voice of the Listener and the Viewer (VLV) argued that judgements based on assessing market conditions are no guarantee that citizen and consumer objectives would continue to be met, and that we should retain backstop powers in all but the most exceptional circumstances. EURALVA also expressed concerns about the ability of industry solutions to play a part in achieving socially-desirable goals. Both argued that Ofcom's primary duty is to meet citizen and consumer objectives with the most appropriate approach, and that we should not have a bias towards self-regulation.
- 2.29 These differences of opinion highlight that there can be no right answer for all cases, and that regulatory flexibility and careful consideration of alternatives remain key to delivering our regulatory objectives. Specifically in response to EURALVA and VLV, we note that we have explicit duties in relation to assessing regulatory approaches, as explained in paragraph 2.2 above. The steps we proposed to determine the most appropriate options are aimed at furthering the interests of citizens and consumers, in line with our statutory duties and objectives and other regulatory principles, such as proportionality.
- 2.30 There are a number of areas where we may be required to make assessments of whether either self- or co-regulation is appropriate, as shown in Figure 2 below.

**Figure 2: Areas where we may need to assess the role of self- or co-regulation**

Types of issues	Examples
Areas within our existing duties that are currently secured by statutory regulation and where we may consider it appropriate to move to a self- or co-regulatory approach	<ul style="list-style-type: none"> <li>• The TV Advertising Code standards enforcement, where Ofcom moved from a full statutory footing to a co-regulatory approach administered by the ASA/BCAP</li> </ul>
Areas where we are specifically required by legislation to support the development of self- or co-regulatory schemes	<ul style="list-style-type: none"> <li>• Regulation of premium-rate services</li> </ul>
New issues emerging in the areas within our duties, where no solution is yet in place	<ul style="list-style-type: none"> <li>• Information about broadband speeds</li> <li>• Provision of VoIP services</li> <li>• Information about quality of service to consumers</li> </ul>
New issues in areas which are outside our remit but where industry or Government invite us to provide expertise and support	<ul style="list-style-type: none"> <li>• Industry discussions on addressing illegal peer-to-peer file-sharing of copyrighted content</li> <li>• Online behavioural advertising</li> </ul>

2.31 We believe that, in all of these areas, determining whether a self- or co-regulatory solution is likely to be effective requires a clear and objective approach. Our new principles, set out in detail in the following sections, will help us to approach this transparently, objectively and systematically, while taking additional factors into account on a case-by-case basis.

## Section 3

# Making an initial assessment: an incentives-based approach

## The purpose of assessment steps and general feedback from stakeholders

- 3.1 In our consultation we proposed a set of analytical steps for Ofcom to follow when assessing the potential role of self- or co-regulation in areas where we may be required to do so. We recognised that industry-led solutions are most likely to succeed where the private incentives of companies (to maximise profits and shareholder returns) are aligned with broader public objectives.
- 3.2 We therefore proposed to assess companies' collective and individual incentives to solve the issue in a way that matches the needs of citizens and consumers, the potential for companies not to participate or to free-ride on an agreed solution, and the ability of industry to establish clear objectives for a potential scheme.
- 3.3 The majority of respondents agreed that it was helpful for us to have objective and transparent principles to guide our analysis. Most supported our proposed approach and agreed that it was important to understand the underlying industry incentives. However, many also expressed reservations as to whether it was possible to define principles that are applicable in all cases.
- 3.4 We agree that there cannot be a universal solution for all cases. For example, a mature industry, in which the participants are likely to have sufficient resources, and experience, and in which any 'shakeout' of rogue traders has already happened, may be more able to administer effective self-regulation. But our analysis of existing schemes, in the UK and abroad, shows that it is possible to identify a set of high-level factors to determine when industry solutions are likely to be effective.
- 3.5 Several stakeholders highlighted the ongoing need to engage with industry on specific cases, and warned against applying the assessment steps rigidly. We welcome this feedback, and will use the assessment steps as a high-level analytical underpinning to guide our analysis, and will supplement these with additional factors as appropriate, in consultation with relevant stakeholders.
- 3.6 The VLV argued that such factors as 'collective industry incentives to participate' and 'free-rider issues' are contingent on the nature of the market and its participants at a particular time, and there is no guarantee that these conditions would persist. We agree with this feedback, and believe that to ensure that any solution continues to be appropriate, industry and/or the regulator should carry out periodic reviews. This is reflected in our institutional criteria for schemes presented in Section 4.
- 3.7 Many industry respondents highlighted that the process of making an initial assessment must be clearly defined, and based on the involvement and cooperation of industry. As discussed above, we intend to engage extensively with all relevant stakeholders (those representing industry as well as citizens and consumers) when determining whether to apply self- or co-regulation. Any specific proposals for discharging our existing duties or for establishing new schemes in the areas within our remit will be subject to impact assessment analysis.

- 3.8 Several industry respondents suggested that our approach was too focused on enforcement and that greater emphasis on encouraging voluntary compliance was needed. We would like to note that our approach does not discourage voluntary compliance - on the contrary, we are highly welcoming of it where it can address issues effectively. Where it is clear that members of a proposed scheme are likely to comply voluntarily, then additional enforcement measures will not be needed. However, where it becomes apparent that incentives to comply are weak, formal mechanisms would be needed to deliver on regulatory objectives.
- 3.9 Several stakeholders, including the ISPA, the Newspaper Society and the Advertising Association, argued that pure self-regulatory initiatives should not be subject to any regulatory assessment. We would like to refer stakeholders to Figure 2 which sets out the circumstances where we may need to make assessments, for example when considering delegation of our responsibilities to industry, or where new issues emerge in the areas where we have duties. In these cases we need to consider whether self-regulation is likely to work, before introducing any formal measures.

### Specific comments on the steps

- 3.10 The IAB argued that self-regulation evolves over time, and that significant participation from industry should not be required at the outset, referring to examples such as the IWF and CAP/ASA. We fully acknowledge the evolutionary nature of industry solutions. However, when making assessments we would need to be sure that significant participation is likely to develop within a time-frame that makes self- or co-regulation appropriate, or whether formal regulation would offer a more timely solution.
- 3.11 Professor J.J. Boddewyn pointed out that in addition to companies, one should also consider the incentives of government, consumer associations and the public at large to co-operate when designing a solution. We agree that a multi-stakeholder approach is important, in particular when developing objectives and rules for schemes, and have reflected this in the final assessment step. We will consider the degree to which this is applicable in relation to other steps on a-case-by-case basis, as often the industry may be able to develop a solution without explicit support from public bodies.
- 3.12 SSE suggested that the assessment steps should include the possibility of mandating a form of co-regulation by means of a General Condition, if the circumstances warrant it. We will consider a co-regulatory approach where the high-level obligations are set out in the General Conditions and the detailed approach is worked out by industry (perhaps in consultation with Ofcom) if it is appropriate. For example, we took this approach in Quality of Service standards with Topcomm (we note that this is currently under review). Whether this is appropriate will depend on the particular circumstances. We have reflected this in Step 3 below.
- 3.13 Several respondents, including BT and Microsoft, highlighted the importance of clarity of definitions, objectives and approach, and of considering whether explicit standards can be established by the industry. We agree that these are important concerns and have explicitly included these in Step 5.
- 3.14 The VLV suggested that Steps 1 and 2 should be reversed, making the achievement of citizen and consumer goals the first consideration. We agree that this is the most important consideration against which different regulatory strategies should be measured. But to be able to compare approaches, we must first establish whether an industry solution would be feasible, by assessing the industry's collective incentives.

- 3.15 EURALVA and the International Consumer Policy Bureau (ICPB) stressed the importance of considering the incentives of all the relevant companies in the marketplace (including those based abroad), to participate in industry solutions. EURALVA specifically argued that Ofcom has responsibilities to non-UK consumers and that we should consider the effect of regulatory changes on UK-based services that are directed at other markets. We note that we do take the interests of non-UK consumers into account, where appropriate, in line with the country of origin principle, set out in the Electronic Commerce Directive (Directive 2001/31/EC) and the Audiovisual Media Services Directive (Directive 2007/65/EC).
- 3.16 Microsoft suggested that we should consider the impact on harmonisation in the European market. We agree that this is often an important consideration. However, the extent of harmonisation is, in many cases, subject to EU-level and UK legislation. For example, in some countries constitutional and administrative law makes it more difficult to apply self- or co-regulation. In addition, given the global nature of the communications markets, we believe that these issues should not be limited to EU considerations but should also take other relevant markets into account.
- 3.17 The Radio Centre suggested that there appeared to be some overlap in the steps that we proposed. We have therefore sought to clarify each step in the updated text below.

### Steps in considering the likely success of self- or co-regulation

- 3.18 Having considered stakeholders' responses, we decided to adopt the key steps as shown in Figure 3. Our descriptions of these steps, below, take into account stakeholders' feedback.

#### Figure 3: Steps in assessing the appropriateness of self- or co-regulation

1. Do the industry participants have a collective interest in solving the problem?
2. Would the likely industry solution correspond to the best interests of citizens and consumers?
3. Would individual companies have an incentive not to participate in any agreed scheme?
4. Are individual companies likely to "free-ride" on an industry solution?
5. Can clear and straightforward objectives be established by industry?

- 3.19 **Do the industry participants have a collective interest in solving the problem?** We will consider whether there are collective incentives for companies to participate in a scheme. This includes determining the degree of alignment of industry incentives with those of the public, the benefits of a self-regulatory solution compared to the likely cost of participating in a scheme, and the distribution of benefits between industry players. We will establish whether the industry has a real incentive to resolve the issue, rather than just a publicly-stated intention— i.e. are private commercial incentives aligned to the industry's publicly-stated incentives? Where such incentives do not exist, a purely self-regulatory solution is less likely to succeed. But a form of co-regulation may be appropriate if weaknesses in incentives can be strengthened through statutory regulation.

- 3.20 **Would the likely industry solution correspond to the best interests of citizens and consumers?** Once the collective incentives of companies have been established, the next step is to ask whether the likely industry solution will tackle the problem in a way that meets the citizen and consumer interest effectively, taking into account our statutory duties and obligations and other regulatory principles, such as proportionality. We will take existing regulatory impact assessment guidelines into account as part of this analysis. Where a self-regulatory solution is not deemed appropriate, co-regulation may be suitable, for example, because it would draw on industry expertise, and be quicker to implement than a full statutory solution.
- 3.21 **Would individual companies have an incentive *not* to participate in any agreed scheme?** If we establish, that, in theory, a self- or co-regulatory solution will deliver the objective, we should consider how many companies are likely to opt out and the implications of this for the scheme's effectiveness. If these factors were significant we would also consider whether measures could be taken to ensure participation. This might include mechanisms for raising public awareness of the benefits of contracting with providers who are members of the scheme, or more direct forms of enforcement action to ensure participation. Where co-regulation is seen as the best solution, we will consider whether it should be enforced by a General Condition, in the event of a breach of the code or other specific rules of the established scheme.
- 3.22 **Are individual companies likely to 'free-ride' on an industry solution?** Even where most or all of the relevant communications providers joined a particular scheme, we should consider the incentives for member companies to cheat – for example, because their real incentives (as opposed to publicly stated ones) are not aligned with the objectives of the scheme. We should then consider how far this would be detrimental to delivering the scheme's objectives, and what monitoring and enforcement measures could be put in place for the scheme to be effective.
- 3.23 **Can clear and straightforward objectives be established by industry?** A scheme is more likely to be effective if companies can readily sign up to the objectives, and where the rules of participation are easy to understand. We should therefore consider whether measurable objectives and simple rules can be established for the operation of the scheme. This includes considering the complexity of the citizen and consumer objective, the diversity of the companies potentially taking part, the number and complexity of the services covered, and the availability of expertise in designing a solution, including support from industry experts, consumer representatives and public bodies.
- 3.24 The above steps will be used as a guide when determining whether self-regulatory solution is likely to deliver the desired outcome, and if not, whether a co-regulatory mechanism can correct weaknesses in incentives. For example, where it is clear that some companies will not join an industry scheme, the regulator can introduce measures to inform citizens and consumers about the scheme. This will encourage companies to join and/or enable people to avoid harm by using participating members. Where it becomes clear that neither self- or co-regulation are likely to succeed, we will consult on formal regulatory remedies.

## Section 4

# Criteria to consider in implementing self- or co-regulation

### Purpose of the institutional criteria and general feedback from stakeholders

- 4.1 Our consultation suggested a set of institutional criteria to consider when designing self- and co-regulatory schemes. These were based on an analysis of a broad range of schemes in the UK and abroad, within and outside the communications sector, as well as our own experience over the past four years. The criteria will help us draw on best practice when contributing to the design of specific schemes.
- 4.2 Stakeholders' responses generally agreed that a set of objective criteria would be useful. Many also thought that not all of the criteria would always be required. We recognise that not all the criteria will always be necessary. We therefore agree that each criterion will need to be weighted against the objectives of the scheme, to ensure that it is both fit for purpose and proportionate to the issue in hand. We will consider the criteria on a case-by-case basis, and take additional case-specific factors into account where necessary.
- 4.3 Several stakeholders broadly agreed with our proposals, but pointed out the evolutionary nature of industry solutions, saying that best practice criteria cannot always be met at the outset. For example, Yahoo! argued that our proposed approach would set too high a hurdle for new schemes to overcome, and may act as a barrier to new forms of self-regulation. The Advertising Association pointed out that these criteria are based on the most sophisticated models that exist, and it may be difficult for fast-developing markets to adhere to them.
- 4.4 Microsoft noted that our proposed factors were useful but that it would be difficult to be objective because regulation always involves interpretation. Several respondents suggested that the effectiveness of industry solutions should be considered in relation to formal regulation, which, they argued, can be slow, poorly targeted and inflexible.
- 4.5 A minority of stakeholders thought that it was impossible to set objective criteria for the institutional design of self- and co-regulatory schemes. For example, ISPA suggested that conformity to a specific model is not realistic, given the varied nature of the communications industry, the unique features of each body, and that different institutional structures may be appropriate for each case.
- 4.6 We note this feedback and agree that in many cases industry solutions improve over time. We also entirely agree that there is an ongoing need for flexibility. However, we believe that it is useful to refer to a set of best-practice criteria when designing new schemes. We think it would be unwise to start from a blank page every time, in the light of all the evidence on successes and failures of industry solutions to date. We believe that it is useful for us to employ best-practice criteria as a high-level guide, to enable an objective and systematic approach, and to ensure that we learn from best practice to fulfil our statutory duties and obligations effectively, in particular in relation to citizens' and consumers' interest.
- 4.7 The communications operator Thus suggested that pure self-regulatory solutions would not require the regulator to apply any criteria, and decisions should be left to

the industry. We note that in areas outside our remit we do not need to make judgements on industry schemes, unless invited to do so by the industry or government. However, these criteria are relevant to our assessment of new issues arising in areas where we have duties, as well as when determining the potential role for self- or co-regulation in areas where formal regulation currently applies.

- 4.8 The ICPB, on the contrary, suggested that Ofcom should provide for formal public recognition of self-regulatory schemes that meet its standards. We have considered this issue in the course of this project, and, given the diverse nature of individual schemes and their roles, we do not believe it would be appropriate for Ofcom to act as a reviewing body for the schemes in the sector.
- 4.9 Many respondents asked us to clarify the differences between the application of criteria to self- and co-regulation, and the associated regulatory burdens of each type of regulation. The Newspaper Society, in particular, felt that different criteria are needed for self- and co-regulation, arguing that the latter embeds statutory controls.
- 4.10 While we agree that different criteria may be applicable in different circumstances, we do not consider that regulation is readily segmented into discrete boxes. As a number of stakeholders pointed out in their responses, both co- and self-regulatory solutions evolve over time, and different combinations of industry and regulatory involvement may be appropriate at different stages of market development. As described in Section 2, we view regulation as a continuum of approaches that stretches from individual contracts between suppliers and customers right through to full statutory regulation. This view is consistent with the expert literature in self- and co-regulation and is also reflected in the RAND study produced for the European Commission in relation to co- and self-regulation of the internet<sup>6</sup>. We therefore believe it is more useful to consider self- and co-regulation simultaneously, which allows the identification of the most appropriate combination of measures to approach a specific issue.

### Feedback on the criteria

- 4.11 Several respondents thought that **awareness** is not always necessary, and that in any case it grows over time. The IAB cited examples such as the IMCB and the Internet Advertising Sales House (IASH) code, where it thought wide public awareness was less important, and suggested that **transparency** is a more crucial consideration. ITSPA asked for clarification on what activities are expected from schemes in raising awareness. It believed that scheme members should be obliged to provide information in marketing literature and at the point of sale, but did not think that it was always appropriate to publicise schemes more widely, due to the high costs associated with such activities.
- 4.12 We believe that public awareness is a key consideration for the success of most schemes, but one that is important at different junctures for different schemes. If a scheme were to be set up at the wholesale level, for example in relation to smoothing the workings of a particular industrial process (for example, as in the case of the Office of the Telecoms Adjudicator) then widespread public awareness would not be required. But in many other cases, public awareness is crucial for success – for example, to ensure that consumers are aware of their rights, can see which companies are members of a scheme, or where the primary objective of a scheme is to provide information. The appropriate methods for raising awareness should be determined by each scheme.

<sup>6</sup> Please see [http://ec.europa.eu/dgs/information\\_society/evaluation/studies/s2006\\_05/index\\_en.htm](http://ec.europa.eu/dgs/information_society/evaluation/studies/s2006_05/index_en.htm)

- 4.13 The majority of respondents agreed that a **significant number of signatories** would be ideal. But several argued that this should not be an initial requirement, as schemes often start with a few members and grow over time. EURALVA argued that on the contrary, all relevant players should participate, to ensure that the interests of all consumers are protected.
- 4.14 We consider that ideally, all relevant players should be members of a scheme. However, there are examples such as in the area of video-on-demand; not all companies are members of ATVOD, but non-members have alternative arrangements in place. In other cases, such as in alternative dispute resolution (ADR), there is a statutory requirement for providers to participate in an ADR scheme. We will take a case-by-case approach to determining the minimum level of participation required, taking into account the interests of citizens and consumers and other regulatory principles, including proportionality.
- 4.15 On **enforcement measures**, ITSPA asked Ofcom to clarify the extent to which Ofcom believes monitoring and enforcement should be pro-active (for example in the form of “mystery shopping” exercises) or merely reactive, taking action against a member when complaints are brought to the scheme’s attention or when managers become aware of non-compliance. ITSPA thought that sanctions should not always be financial and that charging and fining mechanisms should be agreed by members, rather than dictated by Ofcom.
- 4.16 We consider that for a scheme to be credible it is important that members adhere to the agreed codes. While we believe that any new scheme should follow best practice in this area, appropriate approaches to monitoring and enforcement are likely to differ depending on the nature and purpose of the scheme. In some cases, monitoring based on complaints received or performance against KPIs may be appropriate or even preferred to mystery shopping. Similarly, expulsion from a scheme is a valid approach to enforcement if used appropriately. Where the scheme is self-regulatory, it is for its members to determine the most effective means of compliance. For co-regulation, Ofcom may play a role in determining appropriate enforcement measures depending on the degree of co-regulation and the issue in question.
- 4.17 ICPB pointed out that **redress** should be rapid and should not preclude consumers’ right to go to court. ITSPA asked to clarify how Ofcom sees the relationship between scheme managers and systems of redress.
- 4.18 We agree that redress should not be delayed, provide incentives for industry to prevaricate, or preclude consumers from exercising their rights. In the cases of alternative dispute resolution, this should follow a common approach with redress to the courts as necessary. The relationship between the scheme and systems of redress will depend largely on the individual scheme and its objectives. In cases of co-regulation, we would take account of regulatory best practice in this area to ensure a favourable outcome for citizens or consumers.
- 4.19 Vtesse agreed with the proposed criteria, but stressed that it was essential that **enforcement, redress and anti-collusion** measures protect the smaller communications providers from predatory action. We agree with this feedback, and have therefore included these considerations in our list of criteria. We believe that self-or co-regulation will not usually be suitable in addressing competition issues where there are players with significant market power.
- 4.20 ITSPA asked for clarification in relation to the **proportionate charging** criterion, and whether this should be agreed by scheme participants rather than dictated by Ofcom,

and what Ofcom means by suggesting that “the operation of the scheme should dictate proportionate costs”.

- 4.21 In our view this should depend on whether the scheme is self- or co-regulatory, and in the case of co-regulation, the degree of intervention and oversight by Ofcom that is considered to be appropriate. In cases of self-regulation, the members of the scheme and its secretariat will determine the appropriate charging structures. In cases of co-regulation, Ofcom may be one of the key stakeholders considering the appropriate charging and fining mechanisms with the scheme members. In all circumstances, Ofcom would expect that adopt a multi-stakeholder approach to determining the cost sharing arrangements. We consider that it is important that the funding of the scheme is sufficient to meet its objectives, and that amounts contributed by industry stakeholders are proportionate to ensure that smaller companies are not excluded from participating.
- 4.22 On **costs**, BT suggested that it might be useful for Ofcom to signal at the outset what resource commitment it considers adequate, and that this should be reviewed from time to time. We agree with this, and are happy to share our experience and knowledge of best practice with industry stakeholders where industry requests such advice.
- 4.23 BT also commented on the **involvement of independent members**, suggesting that a mix of independent lay and industry members, both in the scheme’s governing body and in its operating committees, may not always be necessary. Our consultation specifically excluded consideration of technical advisory bodies (e.g. those involved in standards-setting and interoperability, such as the NCC and NGNuk), as these bodies are not primarily designed to address citizen and consumer objectives, which otherwise would be addressed by formal regulation. We feel that in most other cases, the involvement of independent members is desirable.
- 4.24 Several stakeholders proposed **additional criteria**:
- BT proposed that, in the case of co-regulatory schemes, it is important to establish clarity of arrangements, including: terms of reference, funding arrangements, time limits to achieve the objectives, decision-making arrangements and voting rights. We agree that this is an important consideration, and is desirable not only for co-regulatory but also for self-regulatory schemes. We have therefore added a new criterion - “**Clarity of operational processes and structures**” to our list.
  - Yahoo! proposed that we consider the **availability of talent and skills to** establish schemes. We are grateful for this suggestion and consider this an important factor. We have now reflected this in the list, as part of the ‘adequate resourcing’ criterion.
  - ATVOD proposed that it was important to establish: effective sanctions, with clear complaints and redress processes; appropriate and transparent governance procedures; flexibility to adapt to changing market both for users and providers; regular refreshing processes, and clarity and simplicity of use. We agree with these points and believe that these are captured by our list of criteria.
- 4.25 Taking into account stakeholders’ responses, we have expanded the set of criteria to consider when establishing self- or co-regulatory schemes, as shown in Figure 4.

**Figure 4: Good practice criteria to guide the establishment of new schemes**

<ul style="list-style-type: none"> <li>• <b>Public awareness</b></li> <li>• <b>Transparency</b></li> <li>• <b>Significant participation by industry</b></li> <li>• <b>Adequate resource commitments</b></li> <li>• <b>Enforcement measures</b></li> <li>• <b>Clarity of processes and structures</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Audit of members and scheme</b></li> <li>• <b>System of redress in place</b></li> <li>• <b>Involvement of independent members</b></li> <li>• <b>Regular review of objectives and aims</b></li> <li>• <b>Non-collusive behaviour</b></li> </ul>
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- 4.26 **Public awareness:** in many cases the objectives of the scheme are unlikely to be met if consumers and citizens are not aware of its existence and its remit by active promotion. This may be required for a number of reasons, including:
- to ensure that citizens and consumers are aware of their rights, for example, the right of redress other than by complaining directly to the supplier;
  - where the purpose of the scheme is to inform citizens and consumers;
  - where participation in a scheme is likely to have reputational benefits, and where people can make a choice between companies which are members and those which are not.
- 4.27 In some cases, however, public awareness may not be important, for example, in addressing wholesale processes between providers.
- 4.28 **Transparency:** The success of a scheme adopted as an alternative to statutory regulation, will depend on stakeholders' confidence. This will require openness and transparency in operation, and a degree of public accountability in relation to the scheme's performance. As a minimum this should include publishing annual reports – with an element of objective review - on the scheme's progress. Effective arrangements for wide public consultation on any significant issues are also desirable.
- 4.29 **Significant numbers of industry are members:** The private incentives of companies may conflict with the public interest, or may lead an individual company to free-ride on the reputation created by other members. To have an effective impact, a scheme should represent a very high proportion of traders in the market place, or traders representing the vast majority of consumers. It will then be in a position to influence, and act independently of, individual members, to ensure that its influence extends across the industry.
- 4.30 **Adequate and proportionate resource commitments:** Industry members must ensure that there are adequate resources in place to operate the scheme effectively. They should also ensure that the distribution of costs is proportionate and does not preclude smaller and less well resourced players from joining the scheme. Staff resources would need to be sufficient and skilled to cope with the volume and type of work which is likely to arise. Cost commitments should be based on what is required to achieve the objectives of the scheme, rather than on the willingness of industry to contribute. In some cases, the cost of a scheme may exceed the cost of performing the same functions by a regulator, but the benefits (e.g. ensuring industry engagement) may outweigh these cost considerations.

- 4.31 **Enforcement measures:** In many industries, individual companies may have incentives to cheat on their obligations, and the scheme's effectiveness may depend on punishment mechanisms. Schemes may need to have sanctions that provide an incentive to comply. To administer this, the disclosure and transparency of information from members is essential for participants to be able to monitor the effectiveness of the scheme. Where applicable, it is also important to disclose what penalties can be imposed and whether they have been imposed for identified breaches. In the case of co-regulation, some forms of sanction may necessitate Ofcom exercising specific statutory powers. The co-regulatory body should be able to identify circumstances and pro-actively recommend where it would be more appropriate for Ofcom to use back-stop powers.
- 4.32 **Clarity of processes and structures:** when establishing a scheme, it is desirable to develop clear terms of engagement for scheme members at the outset. This should include an agreement on terms of reference, institutional structures, clarity on funding arrangements, time limits to achieve the objectives where such limits are appropriate, decision making arrangements, and voting rights.
- 4.33 **Audit of members and scheme:** Insufficient governance and administration of a scheme is likely to prevent it from achieving its objectives. It is advisable that schemes set and audit Key Performance Indicators (KPIs) to ensure that these are met consistently across the industry. Similarly, relevant KPIs for the scheme itself in meeting its objectives should be identified. Where KPIs have been set, they should be published and regularly reviewed in the light of changing circumstances.
- 4.34 **System of redress in place:** In some cases companies may under-deliver or fall short on promises. Consumers and citizens should have the right to adequate complaint handling standards where they have been dissatisfied by the initial response of a provider. It is desirable for there to be a genuinely independent appeals mechanism that can ensure that complaints are resolved quickly and effectively, and their outcomes disclosed. An effective scheme will have an alternative redress mechanism such as independent arbitration, or an ombudsman scheme, which is easy to access and readily identifiable at the point of need and has even-handed and transparent procedures.
- 4.35 **Involvement of independent members:** There is a clear tension between the desirability of autonomous schemes and the objectives of drawing on the experience, expertise, resources and engagement of the industry within them. The benefits of self-regulation may only be realised if the scheme is respected by other stakeholders including consumer and citizen groups, government and parliamentarians. Consequently a system involving a mixture of independent lay and industry members will be appropriate in both the scheme's governing body and further operating committees. This may not apply to certain types of schemes, for example, those dealing with detailed technical issues where non-specialist participants may have little to contribute, and where the interests of citizens and consumers are not directly impacted by these issues.
- 4.36 **Regular review of objectives and aims:** Schemes are often introduced for particular objectives which may be overtaken by changes in the market or the expectations of stakeholders. Schemes should actively review trends in the market landscape and changes in citizen and consumer needs, and monitor whether their remit and operations are sufficient to meet these.
- 4.37 **Non-collusive behaviour:** it is important that any scheme does not provide a forum for collusion and is compliant with both European and UK competition law. Sufficient

transparency and approval should be built into the design of any solution to demonstrate to third parties that industry members are committed to non-collusive behaviour and agree to comply with the relevant codes.

- 4.38 We would like to reiterate that not all of the above criteria are applicable in equal measure to all schemes. For example, a scheme that aims to facilitate consumer choice in a competitive industry with high customer churn may require more focus on public awareness and less on enforcement. For a scheme looking to improve industry co-ordination and standards it may be more appropriate to focus on an audit of members rather than a system of redress. Across all schemes, however, suitable funding, involvement of independent members in decision making and transparency are likely to be required to ensure effectiveness.
- 4.39 In our consultation, we noted that, in the case of co-regulation, a clear division of responsibilities between the co-regulatory body and Ofcom is critical, to provide clarity and transparency to all those concerned. When new schemes are established or where changes are made to existing ones, it may be appropriate to agree published terms of reference setting out the responsibilities of different parties. Such a document could also address the issue of the body's independence from Ofcom.
- 4.40 BT argued that the degree of Ofcom's approval of the various features of the scheme should vary depending on the degree of co-regulation. We agree with this, and in many cases the supervisory body would consider issues such as the terms of reference and voting structure, time limits for the scheme to meet stated objectives, expected resource commitments and involvement of independent members. In some cases, however, Ofcom may still be required to provide judgement on these issues.
- 4.41 In general terms, we would serve as an enabler and evaluator but would not have responsibility for or powers to, second-guess individual decisions of the co-regulatory body. In general, we expect to approve the co-regulatory body's governance and funding arrangements, and any significant modifications to them. We would expect to approve any codes and/or guidelines which the co-regulatory body publishes. We would also need to have an ability to make directions where it came under a specific legal obligation.

## Section 5

# How Ofcom will apply these principles

- 5.1 Several stakeholders asked how these guidelines will be applied. As we have highlighted throughout the document, we will use the assessment steps and the institutional criteria as high-level principles when considering self- and co-regulation; however, we will examine each case on its merits:
- we will supplement the assessment steps with case-specific considerations, and additional analysis as and when necessary;
  - we will weight the institutional criteria depending on the circumstances of the case, including the citizen and consumer objective, the industry players involved, the stage of development of the relevant market segment, and will consider additional factors as appropriate;
  - in each case, we will engage with stakeholders to ensure that we take all relevant issues into account; and
  - In all cases, self- and co-regulatory solutions will be compared with the merits of formal regulation in tackling the issue effectively.
- 5.2 In practical terms, where a problem has been identified by us, the public, or industry, we will first consider whether any intervention is necessary. We will then consider which approach is likely to achieve the most effective solution, taking into account the principles presented in this document, and carrying out additional analysis and engaging with stakeholders. As currently, we will consult formally on any proposals for changes in regulation, inviting views from all stakeholders and presenting an evidence base and impact assessments of policy options.
- 5.3 Several stakeholders asked us to clarify our position on the timelines for assessing newly-introduced schemes. The aim of our incentives-based approach is to make an assessment *prior to* proposing a particular solution to an issue. Subsequently, where it is determined that a co-regulatory solution is appropriate, the good practice criteria will be considered, as part of the process of establishing the scheme. We believe that time-frames for achieving the objectives should be set on a case-by-case basis (with our involvement depending on the degree of co-regulation in a scheme). These decisions should take account of specific circumstances, such as the urgency of resolving the concern at hand, the base from which the initiative is being built, and the levels of industry and public support, among other factors.
- 5.4 BT suggested that Ofcom conducts analyses of existing schemes from time to time, to ensure that our approach remains up to date, and to help support industry work on best practice in self- and co-regulation. We agree that this is an evolving area, and we will review our approach, to ensure that it remains current.
- 5.5 Thus suggested that given its explicit duties in this area, Ofcom should include some analysis of how it has performed in this area in its annual reports. We would like to note that every year we publish its *Simplification Plan*, which documents our efforts to reduce regulatory burdens and our ongoing work in this area<sup>7</sup>.

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<sup>7</sup> Please see the latest report at <http://www.ofcom.org.uk/about/account/simp/>

## Suggestions for new schemes

5.6 In their responses, stakeholders proposed a number of new schemes, including:

- EURALVA argued that Ofcom should devise co- or self-regulatory schemes for the regulation of advertising on UK-licensed television services which are broadcast in a non-English language to non-UK European countries. EURALVA argued that such schemes could possibly be licensed by Ofcom, but should be based in the country of reception of the relevant broadcasting service

*UK-licensed broadcasters are only obliged to conform with UK rules (Ofcom codes and the co-regulatory regime under BCAP) even if the services can be received in other countries within the European Union. This is in line with the 'country of origin' principle (broadcasters are subject only to the rules of the country in which they are established), as set out in the Television without Frontiers Directive (Directive 89/552/EC) and amended by the Audiovisual Media Services Directive (Directive 2007/65/EC).*

- ISPA felt that there was scope for Ofcom to delegate its alternative dispute resolution duties (defined in the Communications Act) to the industry, which it suggested was well placed to own and administer self-regulatory codes. Yahoo! also felt there was potential scope for exploring self-regulatory solutions in this area.

*We note that we are currently undertaking a Review of Alternative Dispute Resolution and Complaints Handling Procedures which is considering how we discharge our duties with respect to ADR. ISPA is welcome to participate in that consultation, which includes discussion of the criteria that we will use when we undertake our future review of our approval of the ADR schemes. We are not proposing that ADR be wholly self-regulated by industry through codes of practice. Section 54 of the Communications Act requires that approved ADR schemes should be independent of communications providers. However, we would be happy to consider submissions by ISPA and Yahoo! on that point.*

- ITSPA noted, in relation to the mandatory VoIP code of practice, that as VoIP services become mainstream and consumer awareness grows, a move toward co- or self-regulation in this area could be considered.

*We acknowledge that circumstances can change over time, and that issues that at one time had been seen as essential to address with formal regulation could, at a later date and in the right circumstances, be suitable for a co- or self-regulatory approach. This statement sets out our high-level approach to determining when industry solutions may be appropriate, and as importantly, when they may not. In the example given by ITSPA of the mandatory code of practice for providers of VOIP services, there are areas that could in the future be handled by self- or co-regulation as VOIP becomes more mainstream and there is increased awareness about its characteristics. In particular, the provision of information on the characteristics of the service to consumers might be suitable for a self- or co-regulatory scheme. However, there are some areas where co- or self-regulation is unlikely to be an appropriate answer, in particular where the potential for consumer detriment is high, for example, issues relating to accessing emergency services and the provision of caller location information. We welcome further discussion on where ITSPA feels self- or co-regulation might be used.*

- Microsoft suggested that self- and co-regulatory solutions could play a future role in the area of accessibility. It suggested that, given the climate of innovation in communications, prescriptive rules in this area would risk becoming obsolete quickly, while costs associated with formal regulation would result in higher prices and reduced product choice. It suggested that the creation of market incentives to meet the needs of

people with disabilities, and allowing self-declaration of conformity as part of a co- or self-regulatory solution would be preferable in this area.

*We have a duty to encourage others to develop easy-to-use communications equipment that is widely available to consumers, but we do not have any powers to support this. We held a conference on usability (which embraces accessibility, but is not limited to it) in June this year, aimed at encouraging debate on how to promote usability and to explore the themes of inclusive design and design for all<sup>8</sup>. One idea raised by a number of stakeholders was that of a usability labelling scheme. We have recently carried out some initial, high-level research into the practical issues involved in setting up a self/co-regulatory labelling scheme; this is in line with Microsoft's response to our consultation. We would be happy to discuss this in due course with Microsoft as well as with other stakeholders.*

- There were two suggestions for changes in the regulation of premium rate services. The Premium Rate Association (PRA) argued that current regime should be reviewed to allow for greater reliance on industry. AIME believed that a new co-regulatory body should be established in the premium charged interactive media and entertainment sector.

*Ofcom notes that PhonepayPlus started (as ICSTIS) as a self-regulatory body which, through Ofcom backstop powers and incorporation through the Communications Act, emerged as a co-regulatory body. In December 2007, a Framework Agreement between Ofcom and PhonepayPlus changed the nature of the relationship between the two organisations. Given this, Ofcom does not consider it appropriate or necessary to review the institutional set up for the regulation of this sector at the current time. However, PhonepayPlus will review its Code of Practice during 2009 with a view to publishing a new Code in 2010. That, along with Ofcom's review of the scope of premium rate regulation, will provide ample opportunity for interested parties to debate the role and make-up of regulation in this market.*

- The Radio Centre argued that an industry-led solution could be employed to regulate local commercial radio programming, and set out proposals on how this could work in practice.

*The issue of self- and co-regulation, with particular regard to localness, was addressed within our 'Future of Radio – The Next Phase' statement, published in November 2007<sup>9</sup>. That document, in line with the present statement, argued that self- or co-regulation are only possible where the interests of industry and of consumers are aligned. For example, in the case of advertising, the issue of consumer protection is aligned with that of the reputational risk to advertisers and broadcasters. In the case of localness on radio, the interests of industry (profit maximisation) are not obviously aligned with the needs of citizens and consumers for local services. In the longer term, as the process of digital migration matures, there may be a case, as the Radio Centre argues, for some form of co-regulation of content issues. But at present that case has not been made and the alignment of industry and consumer and citizen interests is not obvious. We remain open to ideas on this subject, but we do not propose to take this issue further at this point.*

- SSE proposed a co-regulatory body to oversee customer switching between suppliers of 'mass-market' end customer communications products such as basic telephony and

<sup>8</sup> A report from this event can be found at <http://www.ofcom.org.uk/research/usability/usability08/>

<sup>9</sup> The latest published report is available on <http://www.ofcom.org.uk/about/accoun/simp/> We plan to release our next report before the end of 2008.

broadband services. It believes that such a body would promote and preserve consumer interests when moving between different providers and premises as technology and markets develop, and would allow new entrants and innovative products to attract new customers via a well-established centrally-governed switching process.

*We agree the development of migrations processes requires co-operation and co-ordination between the various industry players, and we consider that the proposal for a co-regulatory body to oversee consumer switching has some merit. Indeed, we would observe that a similar model to that proposed already exists in relation to end-user migrations between broadband and narrowband (fixed-line) products through the Office of the Telecommunications Adjudicator ('OTA') who lead cross-industry effort on delivery of improvements for migrations and home movers scenarios.*

*We will be consulting further on the area of cross-product migrations and, in particular the case for greater harmonisation of switching process for consumers switching their communications services during the early part of 2009. As part of this, we will look at the range of potential options to take forward this work, including the extent to which industry may be in a position to take the lead in developing switching processes that would help the consumer experience of switching.*

# Glossary

Below we list the key terms and abbreviations used in the document.

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**Communications Act** Communications Act 2003, which came into force in July 2003

**Co-regulation** Schemes that involve elements of both self- and statutory regulation, with public authorities and industry collectively administering a solution to an identified issue. The split of responsibilities may vary, but typically government or regulators have legal backstop powers to secure desired objectives.

**Self-regulation** A regulatory solution where industry collectively administers a centralised solution to address citizen or consumer issues, or other regulatory objectives, without formal oversight from government or regulator. There are no explicit ex ante legal backstops in relation to rules agreed by the scheme (although general obligations may still apply to providers in this area)

**Statutory regulation** Objectives of a regulatory solution and rules of engagement are defined by legislation, government or regulator, including the processes and specific requirements on companies, with enforcement carried out by public authorities.

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<b>ADR</b>	Alternative Dispute Resolution, services that provide consumers with a means to resolve problems where no agreement can be reached through the service provider
<b>AIME</b>	Association for Interactive Media & Entertainment
<b>ASA</b>	Advertising Standards Authority
<b>ATVOD</b>	Association for Television on-Demand
<b>AVMS</b>	The EU Audiovisual Media Services Directive
<b>BCAP</b>	Broadcast Committee of Advertising Practice
<b>BSG</b>	Broadband Stakeholders' Group
<b>CAP</b>	Committee of Advertising Practice
<b>CISAS</b>	Communications and Internet Services Adjudication Scheme, an ADR service approved by Ofcom.
<b>DCMS</b>	The Department of Culture, Media and Sport
<b>EURALVA</b>	European Alliance of Listeners' and Viewers' Associations
<b>IAB</b>	Internet Advertising Bureau
<b>IASH</b>	Internet Advertising Sales House

<b>ICSTIS</b>	Independent Committee for the Supervision of Standards of Telephone Information Services. Now called PhonepayPlus.
<b>ICPB</b>	International Consumer Policy Bureau
<b>IMCB</b>	Independent Mobile Classification Body
<b>ISPA</b>	Internet Service Providers' Association
<b>ITSPA</b>	Internet Telephony Service Providers' Association
<b>IWF</b>	Internet Watch Foundation
<b>KPIs</b>	Key Performance Indicators
<b>NGNuk</b>	An industry co-ordination forum working on technology, commercial and regulatory issues in Next Generation Networks
<b>NICAM</b>	Nederlands Instituut voor de Classificatie van Audiovisuele Media
<b>Otelo</b>	Office of the Telecommunications Ombudsman, an alternative dispute resolution (ADR) service approved by Ofcom.
<b>PhonepayPlus</b>	Regulator for products or services that are charged to users' phone bills or pre-pay accounts
<b>PRA</b>	Premium Rate Association
<b>QoS</b>	Quality of Service
<b>RAND</b>	A non-profit institution providing policy research and analysis
<b>SSE</b>	Scottish & Southern Energy
<b>VLV</b>	Voice of the Listener and the Viewer
<b>VOD</b>	Video on Demand, a service or technology that enables TV viewers to watch programmes or films whenever they choose to, not restricted by a linear schedule
<b>VoIP</b>	Voice over Internet Protocol, a technology that allows users to send calls using Internet Protocols, using either the public internet or private networks

## Annex 1

# Summary of consultation responses

Full versions of non-confidential responses are published on Ofcom's website, at <http://ofcom.org.uk/consult/condocs/coregulation/responses/>

**Q1 - Do you agree that there is a need for Ofcom to have a straightforward means of making an initial assessment of when to adopt a self- or co- regulatory approach rather than to rely solely on its powers as a statutory regulator?**

The majority of respondents agreed with us that we should have an effective method for assessing whether it is appropriate to adopt a self- or co-regulatory approach to a developing issue within the markets we regulate. Many pointed to the fast pace of convergence in the communications markets, arguing that it was a challenge for regulation to keep pace, and that regulation needs to adapt more quickly and benefit from industry expertise. A number of respondents, including Yahoo!, noted that Ofcom's assessments should be open to scrutiny by stakeholders.

Noting our bias against intervention, many respondents agreed that Ofcom's starting point should be to consider whether intervention is necessary at all, and if it is, whether self-regulation would prove effective in addressing an issue. Furthermore, several respondents noted that we should make explicit:

- the boundaries and limitations of our powers and role;
- the reasons behind our decision to update the 2004 criteria
- the triggers which would prompt us to undertake an assessment of whether to apply self- or co-regulation; and
- the process by which we would assess the regulatory approach to be taken.

The ICPB highlighted the importance for citizen and consumer confidence that it is clear which self-regulatory schemes Ofcom sees as meeting appropriate standards, thereby making it unnecessary for the regulator to intervene.

The VLV submitted that Ofcom's primary statutory obligation; to further the interests of citizens and consumers, overrides any orientation towards a particular regulatory strategy. VLV added that initial assessments would inevitably be based on judgements of a market ecology that is subject to frequent and volatile change, which may result in problems for citizens and consumers.

EURALVA also expressed concerns about the ability of industry solutions in the converging communications marketplace to replace statutory regulation in achieving socially-desirable goals. EURALVA and VLV argued that Ofcom should not have a bias towards self-regulation.

A few respondents questioned our intentions in carrying out this consultation, and several thought that our statutory remit does not cover the assessment of self-regulatory schemes. Several also noted that schemes tend to start out small but then grow, and were concerned that our assessments might discourage such schemes at their outset. The Radio Centre thought that Parliament must be the rightful place to set the principles underpinning

regulation of the media, and also argued that Ofcom should have greater flexibility to adapt to market changes.

BT's response argued that statutory regulation can be more attractive, in cases when:

- the benefits of non-compliance to each party outweigh the cost of compliance;
- few players derive benefits; or
- the distribution of benefits is skewed disproportionately between parties.

BT also said that statutory regulation can be more predictable and provide more certainty for stakeholders.

### **Q2 - Do you believe that it is possible to define a set of objective criteria for determining co- and self-regulation?**

Respondents generally supported the principle of having a set of objective criteria for determining co- and self-regulation. However, the overwhelming majority thought that not all of our proposed criteria would be applicable on all occasions. BT noted that decisions would still have to be made on a case by case basis, while the Premium Rate Association (PRA) said that the purpose of any change should be set in advance, unambiguous in its aims and free from any motive other than to result in better industry self-regulation and consumer protection.

Many stakeholders said that it was important to be flexible in using the criteria, and that there should be no 'blueprint' to assess every new scheme as it is established. Yahoo! argued that such an approach would set too high a hurdle for new schemes, and would act as a barrier to new forms of self-regulation. Similarly, ISPA argued that the Internet Watch Foundation (IWF) and the Advertising Standards Authority (ASA) would have failed to meet the criteria in their early days.

Other respondents were more pessimistic, noting that it may be difficult to develop objective criteria as industry-led schemes emerge in different places and circumstances, with different stakeholders and motivations. Microsoft added that the difficulty in defining objective criteria stems from the fact that regulation always involves interpretation. Microsoft thought that such criteria need to be situation-specific, precise, clearly stated, unambiguous, and as exhaustive and verifiable in application as possible.

Some respondents requested more clarity in the distinction between self- and co-regulation and the associated regulatory burdens of each type of regulation. The Newspaper Society felt that different criteria were needed for self- and co-regulation, arguing that the latter embeds statutory controls.

The IAB asked for clarity on how the new criteria differ from the 2004 ones and on how Ofcom would use them when assessing schemes. The Broadband Stakeholders' Group (BSG) noted that by setting out the criteria applicable to both co- and self-regulation Ofcom seemed to be moving away from the criteria issued in 2004, where the focus was more on the establishment of co-regulatory schemes.

### **Q3 - Do you agree with Ofcom's proposed incentives-based approach to co- and self-regulation?**

Respondents broadly supported our proposed incentives-based approach to co- and self-regulation, but some thought that there was some overlap in the five steps. Many

respondents highlighted that such assessments must be clearly defined and based upon the involvement and cooperation of the industry. Several stakeholders saw the provision of a positive framework, which aligns private commercial incentives with public interest incentives, as key to increasing the likelihood of a scheme's success.

EURALVA and the International Consumer Policy Bureau (ICPB) stressed the importance of considering the incentives of all companies in the marketplace, including those based abroad. EURALVA argued that Ofcom has responsibilities towards non-UK consumers and should consider any effect on these consumers of changes in the regulation of UK-based services directed at other markets.

Professor J.J. Boddewyn pointed out that, in addition to the incentives of business firms, we should also consider the incentives of governments, consumer associations and the public, whose cooperation is also essential.

Microsoft suggested adding the following factors to our framework for making initial assessments of whether to apply self- or co-regulation:

- the expertise and credibility of the self- or co-regulatory body;
- the extent of any government support;
- the availability of a regulatory backstop (e.g. an industry ombudsman);
- the degree to which explicit standards can be established by industry; and
- the impact on harmonisation in the European market.

BT thought the following factors should also be considered:

- the extent to which there is consensus on the definitions, objectives and approach(es) to achieving outcomes; and
- the extent to which intervention will do more good than harm.

A number of respondents asked us to clarify its proposals on how to decide whether self- or co-regulation should be adopted in any given situation.

Some respondents thought that self-regulation needs more flexibility, and that seeking to codify these incentives and set rigid criteria could be counter-productive. Some noted that self-regulatory schemes are most effective when they evolve over time; and that governance structures should be addressed by the schemes rather than determined by government or the regulator.

The Newspaper Society advocated that industry participation in self-regulatory schemes should be sought by voluntary cooperation, as opposed to the threat of legislation. The BSG pointed out that the industry's experience of self-regulatory schemes needs to be taken into account.

Some additional advantages of self-regulation, listed by the Mobile Broadband Group (MBG), included its belief that the integrity of a scheme will be defended by those parties who have invested money, time or energy in it. The MBG also argued that if the signatories allow the scheme to fall into disrepute, they have only themselves to blame, and the lack of a safety net in self-regulation is an advantage.

A few respondents noted that self-regulation was inappropriate where the cost of compliance outweighed citizen and consumer benefit. Mechanisms that increased the cost of compliance were thought likely to reduce the incentives of industry players to participate.

The Internet Watch Foundation (IWF) welcomed Ofcom's reference to it as a positive example, but emphasised that this had been the result of considerable effort and cooperation, by many public, private and voluntary players, over ten years.

However, the VLV thought that the IWF was not a satisfactory example of self-regulation, noting that "its success is dependent upon tough laws that prohibit any form of possession or distribution of child abuse images with strong sanctions for transgression".

AIME noted that co-regulation is best placed to achieve the protection of consumers when it promotes a confident business environment with agreed rules or codes of practice.

Commenting on the Dutch co-regulatory scheme NICAM (*Nederlands Instituut voor de Classificatie van Audiovisuele Media*) for audiovisual media classification, EURALVA suggested that the scheme did not cover every instance of content available to Dutch viewers, and that the scheme is relatively expensive to run.

In discussing the role of Ofcom, BT stressed that we need to ensure that good governance arrangements are in place in co-regulatory schemes (Terms of Reference, funding, time limits, decision-making arrangements, voting rights).

The SSE believed that "Ofcom is also able to evolve its role in relation to co-regulatory bodies as circumstances change and/or experience is gained of their operation – as it has done recently in its review of the PhonePayPlus code."

A few responses referred to BCAP as an example of a scheme where industry players can own the code for broadcast advertising standards, and the presence of a backstop power helps to provide further incentives for parties to co-operate and reach a sensible outcome.

Others noted that co-regulation will be successful only if Ofcom can genuinely demonstrate that it has a hands-off approach, limited to code approval and intervention as a last resort.

Some parties have suggested that Ofcom should have taken account of a broader range of examples in its consultation, including areas where it chose not to go down the co- or self-regulatory route.

A number of concerns were raised in relation to our proposals, including:

- **Flexibility:** the IWF argued that our approach is potentially inflexible - noting that self-regulation usually starts from a point where no regulation existed - and rigid criteria may hinder it. The IWF also admitted that it itself still falls short on some of the criteria proposed.
- **Timescales:** describing self-regulation as an evolutionary process, Yahoo! noted that a period of 12 months would not be long enough for the industry codes to be drafted, implemented and assessed. The BSG maintained that Ofcom should give a clear indication of the timescale required for the assessment process to take place, adding that it takes time for self-regulatory schemes to be seen as effective.
- **Market changes:** the VLV argued that such criteria as 'collective industry incentives to participate' and 'free-rider issues' are contingent on the nature of the

market and its participants at a particular time. It therefore concluded that an initial assessment in favour of self- or co-regulation is no guarantee that the original conditions will persist.

- Participation: several stakeholders, including the IAB, thought that non-participation from some companies would not imply failure - referring to examples such as the IWF and CAP/ASA.
- Use of General Conditions: SSE noted that Ofcom's proposed assessment steps do not go far enough in terms of considering situations where co-regulation could be enforced by means of a General Condition. SSE suggested that Ofcom should amend Step 3 of its proposed approach to add the possibility of mandating a form of co-regulation if the circumstances warrant it.
- Role of good practice: The IAB criticised the consultation document for failing to mention the growing importance of good practice, noting that this is particularly useful in sectors with a novel or fast moving business model, with complex value chains or where services are very diverse. As examples, it referred to the best practice guidelines by the Home Office taskforce on Child Protection on the Internet and, more recently, the labelling good practice sponsored by the BSG.
- Voluntary co-operation: several respondents argued that Ofcom's approach was too focused on enforcement, and that they would welcome a greater emphasis on compliance.

#### Q4. Do you agree with the subsequent factors Ofcom is proposing to consider for the institutional design of self- or co-regulatory schemes?

Many respondents agreed with Ofcom's proposed factors to consider the institutional design of self- or co-regulatory schemes. However, many argued that flexibility is key and that the weighting of each factor may vary depending on the objectives of the scheme in question.

Microsoft noted that these criteria were useful, but that many of these should influence not only the design, but also the initial assessment of whether to employ co- or self- regulation.

Several respondents thought that the criteria were sensible for mature markets like telecoms and broadcasting, but not necessarily for new markets in the communications sector. The Advertising Association argued that in fast-developing markets various criteria (such as KPIs, appeal mechanisms, the involvement of independent bodies) may be too burdensome, too costly and therefore unfeasible. Similarly, Yahoo! argued that self-regulation in nascent and fast-moving sectors is unpredictable and demands a different approach.

Others suggested that the industry adopting self-regulation should draw up the codes or other ways by which it voluntarily agrees to be regulated, without any requirement for external endorsement of the process or its content; and that the industry should devise and maintain the system's administration. Yahoo! argued that "*Top down' approaches based on what a third party considers to be the right approach, are more likely to stall or fail to grow because the industry has little sense of ownership or responsibility*".

Professor Boddewyn submitted that in some fundamental sense, industry has to remain in control, however hybrid the self-regulatory system may become by involving outsiders; and thought that some of its deliberations must remain confidential because the industry itself is divided and/or needs time to develop consensus about new standards.

Respondents also noted that some self-regulatory schemes – such as the non-broadcast side of the ASA – have been set up by industry participants, without any intervention by public authorities.

Respondents also made a number of specific comments on the criteria, including:

- Public awareness / visibility of schemes: A few respondents pointed out that schemes can be successful without having high levels of public awareness and that, in any case, public awareness is something that grows over time. Some respondents thought that awareness was not always a pre-requisite but that transparency was essential.
- Participation: The majority of respondents agreed that a significant number of signatories would be ideal. Several argued, however, that this should not be a requirement at the outset, as schemes often start with a few members and grow over time. But EURALVA argued that, all relevant players should participate, to ensure maximum consumer protection.
- Proportionate cost: Several respondents noted that any regulation should ensure maximum efficiency, and minimum cost to the industry parties affected.
- Enforcement measures: ITSPA thought that sanctions should not always be financial and that charging and fining mechanisms should be agreed by members rather than dictated by Ofcom.
- Audit of members and scheme: It was argued that the efficacy of any self-regulatory approach should not be measured against an image of a perfect self-regulatory solution, but rather against mandatory regulation, which can be slow, poorly targeted and inflexible.
- System of redress in place: ICPB pointed out that redress should be rapid and should not preclude consumers' right to go to court.

Respondents considered that a number of other factors were important, including:

- The availability of talent to establish a new scheme (Yahoo!).
- The extent to which Ofcom's evidence gathering, impact assessments and policy formulation consider Article 10 - Freedom of expression. (Newspaper Society).
- The potential for setting up an intermediary body between the scheme and the industry - such as a finance board (as exemplified by Otelo) - on which the industry could be represented) (ICPB).
- Regular refreshing processes (ATVOD).
- Clarity and simplicity for the protection of the user (ATVOD).

**Q5 - Do you have suggestions for possible co- and self regulatory schemes within the UK communications sector?**

Respondents made a number of suggestions for co- or self-regulatory schemes within the UK communications sector:

- AIME noted that the premium charged interactive media and entertainment sector would be ideally served by a co-regulatory body, with OFT and Ofcom having backstop support and Ofcom represented at Board level.
- EURALVA suggested that Ofcom should devise co- or self-regulatory schemes for the regulation of advertising on UK-licensed television services which are broadcast in a non-English language to non-UK European countries. EURALVA argued that such schemes could be licensed by Ofcom but be based in the country of reception of the relevant broadcasting service.
- ISPA thought there was scope for Ofcom to delegate ADR authority to the industry.
- The Radio Centre's response included details of its proposal for a new industry-led approach to the regulation of local output on commercial radio. It envisaged the scheme to be designed so as to reduce the overall complexity and financial cost of regulation for the industry, supported by a revised statutory framework.
- The SSE provided a detailed suggestion for a co-regulatory body to oversee customer switching between suppliers of mass-market customer communications products such as basic telephony and broadband services.
- Referring to the premium-rate industry, the Premium Rate Association noted that as a stepping stone to future self-regulation, it would welcome the introduction of a co-regulatory scheme, to provide the industry with a greater degree of autonomy while it finds its 'regulatory feet'.
- ITSPA hoped that, as VoIP becomes mainstream and consumer awareness grows, a move to co- or self-regulation in VoIP services would become possible. ITSPA said it would work to ensure that its members complied with the 999 and other obligations.
- Microsoft indicated that co- or self-regulation is preferable for solutions to online accessibility issues for people with disabilities.

Respondents also made other comments in response to this question, including:

The Advertising Association is running an industry-wide Digital Media Group to agree how to future-proof the ASA system for the fast-moving digital advertising environment. It envisaged that any changes will be made within the entirely self-regulatory part of the ASA system.

- The MBG thought that an anomaly exists whereby communications provider A, supplying value-added products and services charged to a mobile account, is regulated under the premium rate code, whereas communications provider B supplying products and services charged to residential multi-service account (such as TV, internet and telephony) is not. MBG added further that in drafting the new Communications Act, Parliament should consider giving Ofcom greater encouragement to promote self-regulation in areas within its remit.

## Other comments

The ICPB made several suggestions on the process of assessing co- and self-regulation:

- that Ofcom should provide for formal, public recognition of self-regulatory schemes that meet its standards;

- that more consideration needs to be given to which of Ofcom's statutory powers might be appropriately delegated to co-regulatory schemes;
- that Ofcom should consider how, if at all, co- and self-regulation initiatives should deal with overseas-based market players;
- that Ofcom should put resources into developing robust methodologies for quantifying regulatory costs and benefits for citizens and consumers, paying particular attention to quantifying the time spent by consumers on dealing with problems; and
- that Ofcom should carry out or commission a study on the optimal market conditions and industry structures for effective co- and self-regulation.

BT also thought that in setting up a scheme the supervisory body should also consider:

- terms of reference and voting structure;
- time limits to meet objectives;
- providing an indication as to the expected resource commitments; and
- the fact that placing independent members on a scheme is not always necessary e.g. if a scheme is purely technical.

Looking ahead, BT also suggested that Ofcom should conduct a regular stock-take of such schemes, to build up and maintain a process for identifying common features and the reasons for differences. This could then feed into the development of a framework for assessment of the success of these and similar schemes.

We also received a link to the RAND study for the European Commission in the response from Dr. Chris Marsden. The study examined a range of national schemes, including the IMCB, ATVOD, ICSTIS, Nominet and IWF in the UK, as part of an evaluation of potential co- and self-regulatory solutions for online services. Similarly to our view - that a spectrum of options is available when addressing particular issues -, the RAND study proposes a 'Beaufort scale of self-regulation' based on the degree of government intervention. While the published study was an evaluation of schemes, it veered toward a view that there was merit in considering co-regulation rather than purely self-regulation in many instances.