

Better Self- and Co-Regulation

Improving the quality of public-private cooperation

Activity Report on action#5 of the Communication A renewed EU strategy 2011-14 for Corporate Social Responsibility¹

1. BACKGROUND

Since the *2001 White Paper on European Governance*², the European Commission has acknowledged the need to develop and improve the practice of self- and co-regulation, in combination with formal legislation, in order to serve better the definition and achievement of EU policy objectives³. If well designed and applied, the result of self- and co-regulation "*is wider ownership of the policies in question by involving those most affected by implementing rules in their preparation and enforcement. This often achieves better compliance, even where the detailed rules are non-binding.*"⁴

In the *2003 Interinstitutional Agreement on better law making*⁵ ("*2003 IIA*"), self- and co-regulation are defined⁶. Furthermore, the rationale and the conditions for making use of self- and co-regulation have been confirmed and developed, notably in the section "*Use of alternative methods of regulation*"⁷. In this section, the principles that need to govern self- and co-regulation are set out. They include consistency with Community law, transparency, representativeness and added value for the general interest.

Consequently, in the Commission Communication *Better regulation for Growth and Jobs in the European Union*⁸, the Commission highlights that making full use of the alternative forms of regulation will allow respecting better the principles of subsidiarity and proportionality, and therefore requires that alternatives such as self- and co-regulation should systematically be considered as an option in all impact assessments.

¹ COM(2011) 681 final.

² COM(2001) 428.

³ *Ibid.*, p.20: "(...) **legislation is often only part of a broader solution** combining formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation within a commonly agreed framework."

⁴ *Ibid.*, p. 21.

⁵ OJ C 321, 31.12.2003.

⁶ §22 "Self-regulation is defined as the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)." §18"Co-regulation means the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations)."

⁷ *Ibid.*, paragraphs 16-23.

⁸ COM (2005)97 final.

In line with this approach, the *Impact Assessment Guidelines*⁹ ("IA Guidelines") set out that self- and co-regulation is to be systematically examined in any impact assessment. In Annex 1 of these Guidelines, principles applying to how self- and co-regulation is to be implemented are outlined. They include transparency, openness, representativeness, accountability of the monitoring arrangements. It is also recalled that, "*the Commission has committed to undertake monitoring of self-regulatory agreements*"¹⁰. But the benchmarks for Commission assessments of self- and co-regulation initiatives are still quite informal, and as a result, services and self- and co-regulation practitioners still tend to favour ad hoc improvisation over systematic evidence-based good practices.

Under the fifth action of the action plan set out in the *2011 Commission Communication A renewed EU strategy 2011-14 for Corporate Social Responsibility*¹¹, the Commission committed to "[l]aunch a process in 2012 with enterprises and other stakeholders to develop a code of good practice for self- and co-regulation exercises (...)"¹² This report sets out the outcome of this action.

2. EXPERIENCE AND LESSONS

Experience with self- and co-regulation across different sectors of the EU policies has been acquired. Let's mention, for example, the "*EU Alcohol and Health Forum*"¹³, the "*EU Platform for Action on Diet, Physical Activity & Health*"¹⁴, or the "*Online Behavioural Advertising*"¹⁵. They progressively attempt to improve their modes of implementation in order to optimise the efficiency of the interventions and ensure they live up by the standards expressed in the 2003 IIA and in the Annex 1 of the IA Guidelines.

In the 2006 EASA Round table¹⁶, which combined a concrete self- and co-regulation experience, with an academic expert input, three lessons can be drawn:

1. The definitions of self- and co-regulation, as put forward in the 2003 IIA are not watertight and there is a grey area of action that is not quite as purely autonomous as self-regulation is deemed to be according the 2003 IIA definition, and yet has none of the characteristics required in that Agreement for an action to qualify as co-regulation.

2. The principles called for in the IIA, i.e. transparency, openness, representativeness, accountability, etc... are not "nice-to-have" but they are imperatives for success of these

⁹ SEC(2009) 92.

¹⁰ *Ibid.*, Part III, Annexes, pp. 23 and 24.

¹¹ COM(2011) 681 final.

¹² *Ibid.*, p. 10.

¹³ http://ec.europa.eu/health/alcohol/forum/index_en.htm

¹⁴ http://ec.europa.eu/health/nutrition_physical_activity/policy/index_en.htm.

¹⁵ <http://www.youronlinechoices.eu/>

¹⁶ <http://www.easa-alliance.org/>

actions, and their respect can best be ensured if some key design principles are followed up strictly and faithfully by the participants engaged in such actions.

3. These design principles are not comprehensive and definitive: they require improvements by those who share the wish to improve the efficiency and effectiveness of self- and co-regulation.

These lessons match global experience of self- and co-regulation, where a literature emerges giving clear endorsement of these key elements as necessary conditions for legitimacy and effectiveness¹⁷.

3. PROCESS

Following the issuing in October 2011 of the Commission's strategy for CSR for the period of 2011-2014, a first draft of best practice principles was elaborated with the title "*Code for Effective Open Voluntarism: Good design principles for self- and co-regulation and other multistakeholder actions*". This draft, elaborated between December 2011 and April 2012, was done with the contribution of experts and submitted to a public consultation.

The public consultation took place between June 14 and September 30. Over fifty answers were received, mainly from the business and NGO sectors. A substantive majority of respondents support the need for best practice principles (though not a code *per se*) and expressed a willingness to join a Community of Practice on self- and co-regulation¹⁸. The "*Principles for Better Self- and Co-regulation*" in Annex takes into consideration the results of the public consultation.

4. OUTCOME

Based on the results of the public consultation, the outcome of this initiative is twofold:

- setting out, in a snapshot, evidence-based **best practice principles** for self- and co-regulation action. This should help actors involved in self- and co-regulation to do better and get better recognition, respect, and credibility for their efforts. It should help to ensure that self- and co-regulation exercises achieve their intended societal, environmental and governance goals more effectively and more efficiently.

¹⁷ Zadek, Simon (2008) "Collaborative Governance: the New Multilateralism for the 21st Century", in *Global Development 2.0*, Brookings Institute, Washington DC. Zadek, Simon and Sasha Radovich (2006) "Governing Collaborative Governance: Enhancing Development Outcomes by Improving Partnership Governance and Accountability", Working Paper 23, *Corporate Social Responsibility Initiative*, Harvard Kennedy School, Cambridge, Mass. Zadek, Simon (2006) "The Logic of Collaborative Governance: Corporate Responsibility, Accountability, and the Social Contract", Working Paper 17, *Corporate Social Responsibility Initiative*, Harvard Kennedy School, Cambridge, Mass. Zadek, Højensgård and Raynard (eds.) *Perspectives on the New Economy of Corporate Citizenship*, The Copenhagen Centre, Copenhagen (2000).

¹⁸ An overview of the results of the public consultation is available online:

http://ec.europa.eu/information_society/newsroom/cf/document.cfm?doc_id=1043.

- to underpin sustained progress in support of this vision, by suggesting a **Community of Practice** among stakeholders.

1. The "**Principles for Better Self- and Co-regulation**" (in Annex) have been developed by open consultation at the European Commission's initiative. They are free for use.

The best practice Principles reflect a global literature of good practice emerging from different initiatives in the broader field of cooperative voluntarism. They offer a benchmark for effective self- and co-regulation, but are not final or comprehensive. They are designed to offer guidance in cases where two or more actors (public or private) decide to work together to improve the *status quo*, by resolving a problem or exploiting an opportunity.

They strike a balance between the need for flexibility and freedom of initiative, on the one hand, and need for accountability and efficiency of self- and co-regulation actions to deliver on their societal goals. By definition, the best practice Principles are not designed to cover all activities of any given entity. They are relevant to corporate social responsibility (CSR) in the sense that self- and co-regulatory initiatives are often a means by which enterprises seek to better meet their social responsibility. Multinational enterprises are invited to follow these best practice Principles in the spirit of the OECD¹⁹

The best outcomes would be those where the use of these best practice Principles improves the credibility of self- and co-regulation.

Standardisation is a key and special form of self-regulation: it is an inherently multi-stakeholder and voluntary. Standardisation takes place within formal national, European or International standardisation organisations (NSO, ESO, ISO) or within platforms formed by the interested parties themselves (SDOs: sectorial / regional footprint, etc.). The way it is operated at EU level is subject to regulation. These best practice Principles do not interfere in any way with the newly adopted Regulation on European Standardisation²⁰, nor with any specific arrangements applying to standardisation. The same applies to social dialogue.

These best practice Principles are entirely without prejudice to the Commission's right of initiative, to the exercise of legislative and regulatory discretion, notably regarding the choice of appropriate instruments for legislation or regulation, which remains to be judged case by case, and to the Commission's competence as guardian of the Treaty, which covers the right to initiate infringement proceedings. Given the current situation, and the programme of global and European regulatory reform under way, it is usually thought inappropriate to consider self- and co-regulation approaches for financial sector rule-making.

¹⁹OECD Guidelines for Multinational Enterprises; Recommendations for responsible business conduct in a global context. Adopted in May 2011. <http://www.oecd.org/dataoecd/43/29/48004323.pdf>

²⁰ PE-CONS 32/12.

The Commission services will use these best practice Principles as one building block in the review of the IA Guidelines that has been announced in the context of the Communication on EU Regulatory Fitness.²¹

2. The public consultation has unveiled a basis for consensus and constructive dialogue between business and civil society's organisations on the basis of the current best practice Principles. It is important to widen that basis in light of best practice experience and develop a culture of better self- and co-regulation across the EU. Furthermore, as there is no closed and established school for stating benchmarks, these best practice Principles should be considered in an open and resilient manner, open for adaptation and improvements.

This will be done by setting up a **Community of Practice** that would gather all stakeholders interested in promoting, experiencing and improving the Principles for Better Self- and Co-regulation, whether EU-based or not, as well as experts interested in supporting the vision and bringing a contribution to this endeavour. This should be done in partnership and synergy with existing initiatives and platforms²².

The Community of Practice could work through the development of an on-line platform, including a curated collection of best practice literature and case studies and support capacity-building in their use. Financial support to the initiation and running of the Community of Practice could be provided through existing programmes, if compatible within their scope and according to their intervention rules.

CONCLUSION

The Commission services will lead a pilot Community of Practice for the best practice Principles. It intends to initiate this pilot Community of Practice with stakeholders of the internet/ICT sector, as well as any other actors with a broader interest. It is envisaged that such a pilot would provide by end 2014 the practical experience to decide how far any more elaborate arrangement could be needed to support a more permanent dialogue.

Annex: Principles for Better Self- and Co-Regulation

²¹ COM 2012 (746) final

²² <http://www.eesc.europa.eu/?i=portal.en.self-and-co-regulation#/boxTab0-2>

ANNEX

Principles for Better Self- and Co-Regulation

1. Conception

1.1. Participants

Except in cases where the competitive nature of an initiative makes this inappropriate, participants should represent as many as possible of potential useful actors in the field concerned, notably those having capacity to contribute to success. In case some organisations, notably SMEs, do not have the capacity to commit directly to the action, they may be represented by a relevant umbrella organisation.

Where, at launch, not all possible parties have come on board, later engagement should remain possible, and the conditions for it should be clearly stated. Participants are each fully accountable and respected for their specific contributions.

1.2. Openness

Envisaged actions should be prepared openly.

The preparatory phase should include the involvement of any interested parties: public authorities, enterprises, legislators, regulators and civil society. Public authorities should be ready to convene, moderate or observe, as most helps the process and if deemed appropriate.

The initial blueprint, or "concept agreement", for any action should be multi-stakeholder and developed in a concerted and collaborative way involving open exchange between interested parties. Where the field is too large to be effectively managed, the leaders of the action may select those mainly having capacity to contribute to success. Others wishing to support the initiative should be able to join deliberations with interested parties on terms that contribute to the process of decision-making.

The preservation of a similar degree of open governance in the operation of any resulting agreement is equally desirable. The initiative and its constitutive texts must therefore be widely publicised and easily accessible.

1.3. Good Faith

Participants of different sizes and types have different contributing capacities. The different capabilities of participants, including the situation of SMEs, and smaller non-profit organisations, should be taken into account when designing the envisaged action.

Participants should bring to the preparatory process all information available to them that can contribute to a full analysis of the situation. Similarly, in launching an action, participants should ensure that their activities outside the action's scope are coherent with the aim of the action.

Both in developing and in executing self- and co-regulatory actions, participants are expected to commit real effort to success. They retain the possibility to withdraw, should the action fail to reach the agreed objectives.

1.4. Objectives

The objectives of the action should be set out clearly and unambiguously. They should start from well-defined baselines, both for the issue on which change is being pursued and for the commitments that participants have made. They should include targets and indicators allowing an evaluation of the impact of the action undertaken.

1.5. Legal Compliance

Initiatives should be designed in compliance with applicable law and fundamental rights as enshrined in EU and national law. Participants are encouraged to have recourse to existing guidance²³ provided by public authorities. In case of doubts, an assessment clarifying, inter alia, impact and complementarity with the *acquis* and with the Charter of Fundamental Rights should be conducted.

2. Implementation

2.1. Iterative improvements

Successful actions will usually aim for a prompt start, with accountability and an iterative process of "learning by doing". A sustained interaction between all participants is required. Unless the action covers a short time-span, annual progress checks should be made, against the chosen objectives and indicators, as well as any available broader background data.

2.2. Monitoring

Monitoring must be conducted in a way that is sufficiently open and autonomous to command respect from all interested parties. Each participant shall monitor its performance against the agreed targets and indicators. Monitoring results are shared by each actor for discussion with the participants as a whole, and are made public. A monitoring framework or template will be commonly agreed. The results of the monitoring will be aggregated where possible. This should be done in a way that is transparent and objective.

2.3. Evaluation

Evaluation will allow participants to assess whether the action may be concluded, improved or replaced. The participants regularly and collectively assess performance not only against output commitments, but also as to impact. This should identify any short-fall in expected collective impact, any scope to improve the efficiency or effectiveness of the action, and any other desirable improvements.

2.4. Resolving disagreements

Disagreements inevitably arise involving either participants or others. As part of the iterative process of improvement, such disputes should receive timely attention, with a view to resolving them. These procedures may be confidential.

In addition, complaints by non-participants should be submitted to a panel of independent assessors which consist of majority of non-participants. The outcome of their work is made public. Non-compliance should be subject to a graduated scale of sanctions, with exclusion included and without prejudice to any consequences of non-compliance under the terms of the Unfair Commercial Practices Directive.

2.5. Financing

Participants to the action will provide the means necessary to fulfil the commitments. Public funders or others may in addition support the participation of civil society organisations lacking fully adequate means themselves to play their appropriate role. Such financial support should be made publicly known.

²³ [Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements](#), Official Journal C11, 14.1.2011, p. 1