RESEARCH REPORT 17

SELF-REGULATION AND THE REGULATORY STATE

~ A SURVEY OF POLICY AND PRACTICE

Ian Bartle
Peter Vass

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PREFACE

The CRI is pleased to publish Research Report 17 on *Self-Regulation and the Regulatory State: A Survey of Policy and Practice* by Ian Bartle and Peter Vass. The survey involved a wide range of organisations, covering regulators and the regulated, and we are grateful to all of them for their participation and contribution (the organisations are listed overleaf). Our research included a review of the academic and practitioner literature on the subject. The review complemented the survey, and has provided various theoretical and historical foundations for our interpretations and conclusions.

The impact, and potential, of the 'new wave' of self-regulation has surprised us, and one tentative conclusion is that current trends reflect a move towards a new regulatory 'paradigm' or exemplar. The policy and practice implications are quite profound - reconciling an extensive role for the regulatory state with light-touch regulation based on securing industry led, self-regulatory solutions. Self-regulation has for all intents and purposes become 'embedded' within the regulatory state - and our survey shows that it reflects various forms of public-private 'partnership', perhaps best reflected in the general term 'co-regulation'. It is clear to us that such a regulatory model has to be founded on transparency and accountability for it to inspire confidence and be sustained; transparency and accountability which applies equally to both the regulators and the regulated. Effective compliance regimes are an integral part of this process. Through this, roles and responsibilities are better understood, control can be effectively exercised through the provision of information, and trust can be developed.

The report sets out the reasoning for our conclusions, drawing on the evidence of our survey. Our conclusions are put forward for debate, and we would welcome comments on the report. Comments should be addressed to:

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The views of the authors are their own, and do not necessarily represent those of the CRI or any of the organisations who participated in the survey or contributed to this research. In this regard we would like to gratefully acknowledge the financial support for the research which we received from BT plc.

Peter Vass
Director, CRI
October 2005

PARTICIPANTS IN THE SURVEY

1. Interviews

1. Energy Networks Association
2. National Audit Office (NAO)
3. Ofcom
4. Energis
5. Which? (Consumers Association)
6. BT
7. Ofwat
8. Civil Aviation Authority (CAA)
9. Anglian Water
10. Energywatch
11. Network Rail
12. Financial Services Authority (FSA)
13. Office of Rail Regulation (ORR)
14. Royal Mail
15. Department of Trade and Industry (DTI)
16. Rail Passengers Council (RPC)
17. Carphone Warehouse
18. Law Society
19. Mobile Operators Association (MOA)
20. Qualifications and Curriculum Authority (QCA)
21. Association of Train Operating Companies (ATOC)

2. Written responses

1. Office of Fair Trading (OFT)
2. Better Regulation Task Force (BRTF)
3. National Consumers Council (NCC)
4. WaterVoice
5. Environment Agency (EA)
6. Better Regulation Executive (BRE)
7. Financial Reporting Council (FRC)
8. Wessex Water
9. United Utilities
10. Three Valleys Water
11. Water UK
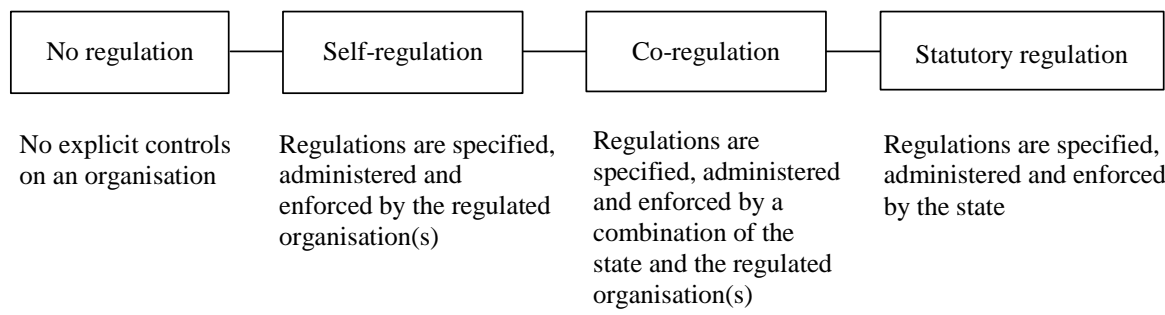12. Wanadoo
13. Ofgem

CONTENTS

OVERVIEW

In Britain and elsewhere self-regulation is increasingly being promoted as an important instrument of regulation. The Communications Act 2003 specifies a duty on the communications regulator, Ofcom, to promote it. It is also often associated with the 'better regulation' agenda which has influenced debates and new regulatory policies in a wide range of sectors.

There is a long history of self-regulation in Britain stretching back to the early 19th century and before. The predominant story in the 20th century, however, has been one of a shift away from self-regulation towards various forms of statutory regulation. This reflects a shift from the 'laissez faire' state of the 19th century to the 'providing' or 'welfare' state of the mid to late 20th century, and to a certain degree, the 'regulatory state' of the current era. In many ways, however, the regulatory state and recent trends in political economy represent an aversion to extensive state intervention of the providing state and are more in line with notions of deregulation. Recent trends also suggest a 'new wave' of self-regulation.

The central focus of this report therefore is on the nature and policy implications of this new trend in self-regulation. Particularly important is whether the recent trends in self-regulation align with deregulation and represent a shift back to the laissez faire state, or whether something new can be discerned, something akin to 'self-regulation within the regulatory state'.

Classifying self-regulation

The nature of self-regulation is often understood as a point on a spectrum (below) between no regulation and classic statutory regulation.

No regulation	Self-regulation	Co-regulation	Statutory regulation
No explicit controls on an organisation	Regulations are specified, administered and enforced by the regulated organisation(s)	Regulations are specified, administered and enforced by a combination of the state and the regulated organisation(s)	Regulations are specified, administered and enforced by the state

This one dimensional view of regulation and the place of self-regulation within it forms the basis of the more sophisticated conceptualisations of regulation and self-regulation taken by a number of practitioner organisations, such as the UK's Better Regulation Task Force (BRTF) and the National Consumer Council (NCC), and internationally, the Organisation for Economic Cooperation and Development (OECD), the European Commission and the Australian government. It is often difficult, however, to categorise regulatory schemes within a simple one-dimensional scheme. This reflects the complexity and multi-dimensional nature of regulation which many academic studies illustrate. Despite this, for the purposes of understanding the variety of regulatory regimes in practice, it has been found necessary to abstract from the complexity and reduce it to a single dimensional spectrum of five categories of self-regulation. This is credible as 'the role of the state' in regulation is seen to be the most important factor and broad categories of embedded self-regulation can be discerned.

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These categories are:

- **'Co-operative'**: co-operation between regulator and regulated on the operation of statutory regulation;

- **'Delegated'**: the delegation of the implementation of statutory duties by a public authority to self-regulatory bodies;

- **'Devolved'**: the devolution of statutory powers to self-regulatory bodies, often thought of as 'statutory self-regulation', ie, the specification of self-regulatory schemes in statute;

- **'Facilitated'**: self-regulation explicitly supported by the state in some way but where the scheme itself is not backed by statute;

- **'Tacit'**: close to 'pure' self-regulation – self-regulation with little explicit state support, but its implicit role can be influential.

The research included a survey of a range of organisations (governmental, regulators, regulated organisations and other stakeholders) on the nature of self-regulation and co-regulation, their forms, objectives and benefits. The survey revealed a wide range of views on the nature of self-regulation and co-regulation. Perceptions of the nature of self-regulation varied predominantly on two dimensions - the organisations involved and the role of public authorities and law. The different perceptions within each dimension are discussed in chapter 5. The notion of co-regulation at a general level is understood as a joint arrangement which the idea of 'co' implies. The survey revealed three general perceptions of the arrangement:

- governmental/public authority *with* regulated organisation/s. This was the most common perception of the joint arrangement;
- regulated organisation/s *with* non-governmental actors;
- governmental/public authority *with* a second governmental/public authority. This was the least common perception of the joint arrangement.

Within each joint arrangement a number of different forms were perceived.

Advantages of self-regulation

The survey also revealed a variety of views on the possible advantages of self-regulation or co-regulation. Many of them were considered (often tacitly) in terms of their advantages over statutory or direct regulation, while a smaller number were considered vis-à-vis no regulation. Advantages over statutory/direct regulation include:

- knowledge and expertise of all parties used more effectively;
- flexible and adaptable;
- lower regulatory burden on business;
- more commitment, pride and loyalty within a profession or industry;
- lower costs to the state;
- the market can work better.

Advantages over no regulation include:

- overcome market or conduct failures and prevent harms to, for example, the consumer and the environment;
- improve corporate governance and reporting, address issues such as corporate social responsibility and ethical trading.

A number of those surveyed, however, were cautious about the advantages of self-regulation and co-regulation. Key reasons for caution are the necessity to ensure that regulatory and self-regulatory schemes:

- act in the public interest and not just private interest – for example, self-regulation and 'lighter touch' regulation might make anti-competitive practices easier to sustain;
- meet (and be seen to meet) statutory objectives;
- perform effectively – often a very difficult task given the huge diversity in the form of such schemes;
- have effective systems and processes of transparency and public accountability.

Self-regulation 'embedded' in the regulatory state

One conclusion of the survey is that despite its long history and wide currency there is a diversity of views on the nature of self-regulation and its objectives and advantages. While self-regulation is a widely used and established term, co-regulation is not. Although known to most of those surveyed, co-regulation has little practical currency outside the communications sector. This, and the diversity of views, raises the question of whether such a term could achieve common currency. The report illustrates over 40 examples of co or self-regulatory schemes. They are placed in the five categories outlined above; however, not all examples easily fit in the assigned category and there is much diversity within the categories. This is a reflection of the complex and multi-dimensional nature of regulatory regimes.

The examples show the important though varied role of the state across almost all areas. The role of the state is legally defined and central in the categories 'co-operative', 'delegated' and 'devolved'. In the 'facilitated' category, there is a clear and explicit role for the state, but the scheme itself is not statutorily defined. The role of the state might be the active promotion of self-regulatory schemes which serve public interest purposes. Much less obvious and less explicit, but nevertheless evident, is the role of the state in 'tacit' self-regulatory schemes which are close to common notions of 'pure' self-regulation. The state's role in these schemes is manifest in at least two ways. First, the schemes are often triggered by governmental action of some form, which itself is often a response to a clear public interest problem. A second effect is proximity to statutory regulation: there are examples of the voluntary enhancement of statutory regulation, possibly for commercial reasons but also to ward off the possibility of more regulation.

The report therefore concludes that the traditional view of self-regulation as an activity remote or removed from the interests of the regulatory state is an anachronism. While there are still examples of pure self-regulation of the traditional form, the examples indicate that even here it is reasonable to assert that the regulatory state exhibits at least a 'passive' interest in it; a passive interest which would be engaged should there be any 'shock' (or 'event') which activates the interest of the regulatory state. Such shocks typically lead to a new state of regulatory affairs involving greater state involvement. The context of self-regulation today is therefore one of

'enclosure' by the regulatory state. Where self-regulation operates, it operates with the sanction, or support or threat of the regulatory state. The modern regulatory state has become all-pervading in the ambit of its attentions, and self-regulation has now to be seen in this new context - simply as one of the 'instruments' available to the regulatory state.

The role of the state in regulation is, however, more nuanced than simply one of more or less intervention, and the examples illustrate this. While certain regulatory functions and tasks are undertaken by industry, functions which relate to monitoring, transparency and accountability are often retained by the public authority or even enhanced. In communications, for example, while some of statutory functions have been undertaken by other bodies, such as the Advertising Standards Authority (ASA), the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS), and the telecommunications ombudsman, Otelo, Ofcom itself has closely monitored and reported on their activities. In environmental regulation, while some tasks, such as techniques to ensure compliance, inspection and reporting, are undertaken by industry, these tasks are closely overseen by the relevant regulator. In cases of 'co-operative' regulation, while many tasks are undertaken by industry often in working groups, they are closely monitored and overseen by the regulator. Non-statutory forms of regulation are also subject to close monitoring and oversight by public authorities. For example, the energy and water regulators, Ofgem and Ofwat, oversee the self-regulation of consumer debt and marketing, the OFT oversees the codes of practice it has approved; and the Financial Services Authority (FSA) and the Treasury oversee self-regulatory schemes in financial services such as the consumer code for banking.

Subsidiarity: a new regulatory paradigm?

A new regulatory paradigm can therefore be envisaged involving a form of regulatory 'subsidiarity', whereby the detailed implementation and achievement of regulatory outcomes can be delegated ('downwards') to industry bodies and private sector agreements. This is, however, accompanied by increasing public regulatory oversight based on systems control, transparency and accountability. Thus representation of the regulatory state as 'the governor of the machine' has to be accompanied by a 'better regulation' agenda. This is to both control the activities of the regulatory state, which has become 'all-embracing', and to provide the necessary legitimacy to a representative democracy which operates through technocracy rather than decision-making by direct participative methods of democracy. The new wave of self-regulation should not therefore be seen so much as a 'deregulatory' agenda, but as a more efficient and effective mode of operation for the regulatory state - a 'better' regulatory agenda. Accountability of both the regulators and the regulated, through transparency of process and reporting, is the essential mechanism required to maintain the new regulatory paradigm or settlement. From the regulated companies' point of view, it requires effective compliance regimes by industry to ensure that public interest outcomes are achieved and performance builds public confidence and consent.

Compliance regimes within the regulated industries play two roles. First, they help secure outcomes which meet regulatory objectives and, secondly, the reporting requirements help hold both the regulator and the regulated to account - the latter for delivering (or not) outcomes which retain (or not) public confidence in self-regulatory arrangements, and the former for their design, monitoring and maintenance of a core regulatory system which secures (or not) public confidence. Compliance regimes are a 'joint product' for the regulator and the regulated.

Clear arrangements have to be made, therefore, for effective relations between the regulators and the regulated in designing and maintaining self-regulatory systems which meet public interest regulatory requirements and deliver good outcomes. Such arrangements need to be 'institutionalised'. Multiple indicators are likely to be relevant to judging whether self-regulatory arrangements are delivering good outcomes - and the framework for analysis and interpretation has to be clear, given that indicators such as complaints and press articles might not always be well-founded.

The policy implications of the research findings emerge naturally from the fact that good regulation is built on effective accountability. Developing regulation within a co-regulatory framework is an example of how the practice of regulation evolves to achieve better cost-effective outcomes, but is dependent, if public confidence is to be secured and maintained, on good regulatory governance. Industries which have the opportunity to self-regulate must demonstrate that they can be trusted with it (through the rigorous application of compliance regimes and reporting of performance), and regulators must demonstrate that their regulation is cost-effective and in the public interest (through the rigorous application of the principles of better regulation and accountability for performance through, in particular, the preparation of sound regulatory impact assessments). This requires explicit processes to secure transparency. Good regulatory governance not only controls the application of existing regulatory policies but helps avoid potential policy fiascos.

Transparency requires that:

- regulators should be explicit about how self-regulatory arrangements are used to meet their public interest obligations and duties, having regard to the application of risk-based regulation and the compliance regimes necessary to achieve that;

- the mechanisms for monitoring and performance measurement of self-regulatory arrangements should be explicit, which requires a variance analysis between expected and actual outcomes;

- the statutory framework for self and co-regulation should be well understood and 'fit for purpose'. At present, its role comparatively among the sectoral regulators is rather uncertain;

- regulators should promote a better public understanding of the role of self and co-regulation. This might include (i) studies by bodies such as the BRTF, the Better Regulation Executive (BRE) or the National Audit Office (NAO) which aim to harmonise or standardise the understanding of self-regulation within a co-regulatory framework - and whether codification in legislation or general terminology would be helpful; (ii) developing forums for debate, whereby regulators and/or the regulated can exchange both ideas and expose themselves to accountability for the on-going operation of self and co-regulatory systems.

1. INTRODUCTION

In Britain and elsewhere self-regulation is increasingly being promoted as an important instrument of regulation. It is often associated with the 'better regulation' agenda pursued by the British government, other western governments and international organisations such as the OECD and the EU. In recent years in Britain it has cropped up in a variety of guises and places. In the communications white paper 2000 it was noted to be an important instrument in regulation; the Communications Act 2003 specifies a duty on the communications regulator, Ofcom, to promote it where appropriate; and since 2003 it has been a substantial work area of Ofcom.[1] Other utility regulators (such as the energy regulator Ofgem) occasionally mention it as a dimension of the better regulation agenda. The Office of Fair Trading (OFT) is also particularly interested in the self-regulation of trading, marketing and consumer standards. Self-regulation has often been discussed and developed in conjunction with 'co-regulation' which in general is taken to mean a combination of statutory and self-regulation. In addition, there are numerous initiatives of regulators, regulated companies and their industry associations (eg, in energy, water, financial services and railways) have the appearance of self-regulation or co-regulation though these terms are not often used.

There is a long history of self-regulation in Britain which can be traced to the 19th century and earlier.[2] Self-regulation became the principal means of regulating the large number of trades, industries and professions which developed during and after the industrial revolution. Diversity of form and organisation has been a defining feature of self-regulation and it is very difficult to develop a classification which adequately captures the myriad forms. Many systems of self-regulation which developed in the 19th century lasted well into the 20th century and some up to this day. Recent trends suggest that this long history is being reinforced by a 'new wave' of self-regulation.

The arguments most often put forward in support of self-regulation are based on expertise and efficiency.[3] [4] Industry practitioners, it is argued, have more expertise and technical knowledge than public officials and are more able to foster contacts within the industry and keep knowledge up-to-date. Practical rules are more easily developed which can lead to greater effectiveness and compliance. Closely related is efficiency, it is argued that there will be lower costs in obtaining information. Disputes are also more likely to be settled informally without recourse to the law or to the quasi legal processes of a governmental regulatory agency. From the state's perspective regulation is also more efficient as the regulatory costs are borne by the industry rather than by the state. Self-regulation nevertheless is generally preferred by industry as they have more autonomy and freedom from state intervention.

The latter half of the 20th century has, however, witnessed a significant decline in self-regulation in Britain (Moran, 2003). Phenomena such as the rise of the regulatory agency with statutory powers and the general trend towards the 'regulatory state' are well known. There has also been

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[1] Communications White Paper, 2000; Communications Act 2003; Ofcom (2003), Promoting Effective Self-regulation, Criteria for Transferring Functions to Co-regulatory Bodies, Consultation Document, December; Ofcom (2004a), Criteria for Promoting Effective Co and Self-regulation, Statement, June.

[2] Baggott R (1989), Regulatory Reform in Britain, The Changing Face of Self-Regulation, Public Administration, 67, pp435-454; Moran M (2003), The British Regulatory State, High Modernism and Hyper-Innovation, Oxford, Oxford University Press.

[3] Ogus A (1994), Regulation, Legal Form and Economic Theory, Oxford, Clarendon Press.

[4] Baldwin R and Cave M (1999), Understanding Regulation, Theory, Strategy and Practice, Oxford, Oxford University Press.

a trend towards more 'punitive' regulation in which criminal sanctions feature strongly.[5] In recent years in Britain corporate disasters and collapses (eg, rail crashes, BCCI, Equitable Life) have led to calls for stronger corporate regulation and competition law (Enterprise Act 2002) includes more punitive approaches to punishment and compliance.

There are many reasons for the decline of self-regulation including an increasingly complex and globalised economy and society, increasing risk aversion and the need to regulate to promote competition. Social and economic change, however, have not always resulted in less self-regulation. In some areas self-regulation has increased (eg, voluntary agreements are becoming more significant in environmental regulation) and self-regulation at the transnational level has increased significantly (eg, in international banking, employee working conditions and the internet).[6]

The decline in self-regulation can also be connected to its weaknesses. One of the most important weaknesses is that self-regulation might lead to collusion and anti-competitive behaviour.[7] Another weakness is the possibility of 'regulatory capture' which involves the control of regulation by parties not pursuing the public interest. Processes of self-regulation might be closed with little participation by outside interests and little accountability through democratic political processes. Another disadvantage is that not all members of a sectoral self-regulatory scheme may subscribe to regulatory standards and the public may be unaware of this (Baldwin and Cave, 1999, p128). Self-regulation also has the perception of being 'soft' and may not achieve its objectives.[8] The experience of local loop unbundling in telecommunications in Britain can be perceived as an example of the failure of self-regulation. In 2000 there was controversy over the lack of access to the local loop - Oftel's initial light touch strategy and the hope of negotiated industry agreements failed and it was pressurised to take a more pro-active role.[9]

This late 20th century decline in self-regulation is, however, somewhat paradoxical in that it coincides with the era of 'deregulation' and liberalisation. Although they are not identical, there is a congruence between deregulation and self-regulation: they both represent an aversion to state intervention which became dominant in the late 20th century. An expectation therefore is that they would coexist and rise and fall in unison. The 'new wave' of self-regulation might be a response to this paradox but the weaknesses of self-regulation mean that care is required in the transition. It has been recognised, for example, 'that a more effective route to compliance lies through more proactive stimulation of the self-regulatory capacities of companies' but there are 'dangers that flow from excessive trust … [which] will not lead corporations to act in a wholly public spirited manner' (Baldwin, 2004, p381). There is a 'fear that regulatory processes, as a result, will lack legitimacy and prove unfair, exclusive and inefficient' (ibid).

The modern trend of self-regulation will therefore not simply be a rerun of 19th century 'laissez faire' self-regulation. There are prominent issues of public accountability, effectiveness, efficiency and legitimacy, which mean that self-regulation is likely to be allied to public processes to ensure the achievement of these objectives. Self-regulation is therefore more likely

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[5] Baldwin R (2004), The New Punitive Regulation, Modern Law Review, 67:3, pp351-383.
[6] Hemphill T A (2004), Monitoring Global Corporate Citizenship, Industry Self-regulation at a Crossroads, Journal of Corporate Citizenship, 14, Summer 2004.
[7] OECD (2002a), United Kingdom, Challenges at the Cutting Edge, Paris, OECD, p61.
[8] OECD (2002b), Regulatory Policies in OECD Countries, From Interventionism to Regulatory Governance, Paris, OECD, p55.
[9] Michalis M (2001), Local Competition and the Role of Regulation, The EU Debate and Britain's Experience, Telecommunications Policy, 25, pp759-776.

to become one of a number of tools which might be deployed in particular circumstances and accompanied by varying forms of governmental regulation as appropriate.

A fundamental question therefore is, what is nature of the new wave of self-regulation? This leads to a number of related questions:

- Why is self-regulation being promoted and to what extent can it meet public interest objectives?

- To what extent do the new forms draw on, update and modify traditional forms of 'self-regulation'?

- Is there a clear, common and consistent understanding of the new forms of self-regulation across a range of interested parties (eg, governmental actors, regulators in various sectors, regulated companies, users and consumers)?

- Should self and co-regulation be explicitly promoted (and possibly specified in legislation as duties on the regulators) by government and regulators across a wide range of sectors?

This report addresses the above questions by, first, setting out the background of the recent trends in self-regulation (the 'new wave') primarily by drawing on practitioner literature from organisations such as the BRTF, OECD, NCC and European Commission. Second, setting out the history and background of self-regulation, particularly drawing on the academic literature. Third, investigating the practice of self-regulation (or activities which resemble self-regulation even if the term is not used) in a number of regulated sectors: notably, communications (including telecommunications, media, broadcasting and the internet), energy, water, railways and financial services. Finally, considering the policy implications and making recommendations.

2. SELF-REGULATION: AN ALTERNATIVE MECHANISM IN THE MODERN REGULATORY STATE

Since the 1990s several key governmental and international organisations have increasingly aspired to promote more self-regulation. In the modern regulatory state, self-regulation is more and more being presented as an important alternative mechanism to strong statutory regulation. The OECD notes that in Britain there is 'return swing of the self-regulation pendulum' and self-regulation has increasingly being promoted 'not only for economic regulation, but also for regulation within government itself' (OECD, 2002a, p61). For the latter the government aspires to greater 'enforced self-regulation' in which there is more formal and external regulation for poor performers but good performers are rewarded with a lighter regime.[10] The OECD is critical of what it perceives of as 'regulatory inflation' and calls for the use of alternative and more flexible regulatory approaches. It argues for a change in the conventional 'perception of a choice between "regulation" (representing orthodoxy) and "alternatives" (representing policy risk)' (OECD, 2002b, p53). It also argues for a move away from traditional command and control approaches to less prescriptive alternatives which include self-regulation and co-regulation (OECD, 2002b, pp135-142).

In Britain the Better Regulation Task Force (BRTF) has pursued a similar agenda. The task force was set up in 1997 to advise the government on improving the quality of regulation and an aspect of the work included an assessment of alternatives to regulation as direct government intervention and self-regulation was identified as one approach. A short interim report in 1999 identified the main advantages and disadvantages of self-regulation and outlined the characteristics an effective system of self-regulation should have (in terms of the BRTF's principles of better regulation - transparency, accountability, targeting, consistency and proportionality).[11] The following year a more detailed report was published focusing more broadly on the 'alternatives to state regulation'. Although the many examples they assessed differed from conventional statutory regulation, it was felt that the term 'self-regulation' was inappropriate because, in a large variety of ways the state played some kind of role in the regulatory scheme.[12] The key message from the report is that policy makers should not assume that any one model will be fully effective and that the government should develop guidance for policy makers on alternatives to state regulation.

In 2003 the BRTF extended its challenge to policy makers and regulators to be more innovative in the way regulatory objectives are achieved.[13] Its report considered in more detail alternatives to 'classic regulation' including incentive based schemes, information and education, and, making a comeback, 'self-regulation' and its partner 'co-regulation'. Echoing the OECD's concerns about 'regulatory inflation' the BRTF's recent focus has been more specifically on reducing 'regulatory creep' and the burden on regulation.[14] The necessity for compliance can also increase the costs and burdens of classic regulation. It is clearly important to ensure that a

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[10] Hood C, James O and Scott C (2000), Regulation of Government, Has It Increased, Is It Increasing, Should It Be Diminished?, Public Administration, 78:2.
[11] BRTF (1999), Self-regulation, Interim Report, October.
[12] BRTF (2000), Alternatives to State Regulation, July.
[13] BRTF (2003), Imaginative Thinking for Better Regulation, September.
[14] BRTF (2004), Avoiding Regulatory Creep, October; BRTF (2005), Regulation - Less is More, Reducing Burdens, Improving Outcomes, March.

new piece of classic regulation can be complied with without excessive burden (BRTF, 2003, p15) and it is possible that compliance may be more readily achieved with alternative regulatory instruments.

The National Consumer Council (NCC) in Britain has also taken a close interest in self-regulation for a number of years. The NCC's approach is based on the 'presumption that consumers are the best judges of their own interests' and 'despite the evidence of significant consumer dissatisfaction in particular areas' … most consumers are satisfied most of the time.[15] Nevertheless, regulation of some form is required when issues apply such as: inadequate competition; fraud or deception; imperfect information; safety; dispute resolution; externalities such as pollution; social objectives such as taste and decency; and vulnerable consumers. The most appropriate regulation can vary from highly self-regulatory schemes, (voluntary codes of practice) to schemes with a strong statutory element which might include the specification of objectives in a statute, approval by governmental body and codes having the force of law. In the late 1990s and 2000s the NCC has pursued an agenda of promoting effective or 'credible' self-regulation and 'better business practice' which it sees can improve consumer protection and generate public confidence.[16]

In Britain, in a small and uncertain way, legislation has begun to specify duties on regulators to promote self-regulation. The most prominent example is the Communications Act 2003. The general duties of Ofcom specify the requirement that Ofcom must have regard to 'desirability of promoting and facilitating the development and use of effective forms of self-regulation' (Section 3 clause 4c). Section 3 also specifies that Ofcom must have regard to the principles of good regulatory practice and activities targeted only when action is needed. Section 6 specifies that Ofcom must review regulatory burdens. In addition, and with some connection to self-regulation, section 121 specifies that Ofcom can approve codes (presumably specified by a self-regulatory body) for the regulation of premium rate services.

In other legislation (Enterprise Act 2002, Energy Act 2004) there are some parallels but they are less specific about self-regulation. The Energy Act 2004 simply places duties on the regulator to have regard to the principles of better regulation and good regulatory practice (section 178). The interpretation of this by Ofgem clearly indicates the connections to the BRTF's initiatives and developments in communications. In its 2005-2010 corporate strategy and plan, although Ofgem makes little reference to self-regulation, there is much on reducing the burden of regulation and facing the 'better regulation challenge'.[17] The Enterprise Act 2002 specifies a function of the Office of Fair Trading (OFT) to promote 'good consumer practice' (ie, conduct of suppliers of goods and services to consumers) which can include the approval or withdrawal of approval of consumer codes of practice (section 8). The OFT seems to have a specific interest in self-regulation. Although the Act does not specifically mention self-regulation, OFT has interpreted it to include the responsibility to promote 'better trading practices by self-regulation through approved Codes of Practice'.[18] OFT's interest in self-regulation preceded the Enterprise Act. For example, in 2001 the Director General noted that in relation to consumer codes of practice 'our regime for codes of practice is deliberately challenging. We aim to put the "self" back into self-regulation'.[19] The emphasis on 'self', however, seems somewhat out of line with the OFT's 'tougher approach' to consumer protection.

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[15] NCC (2000a), Models of Self-regulation, An overview of Models in Business and the Professions, November.
[16] NCC (2003), Self-regulation, The National Consumer Council's Position, March; NCC (2000b), Better Business Practice, How to Make Self-regulation Work for Consumers and Business, December.
[17] Ofgem (2005a), Ofgem Corporate Strategy and Plan.
[18] Office of Fair Trading (2003), Annual Plan, p6.
[19] Office of Fair Trading (2001), Press Release, OFT Confirms Tougher Approach to Consumer Codes, July 11.

At the EU level, self-regulation is also seen as an element of its initiative to improve governance since 2000 and its 'better regulation' agenda. As a result of the increasing disenchantment and disconnection of the Europeans with EU institutions, one of the four key strategies of the Commission in 2000 was a programme for the reform of governance. A key outcome of this was the White Paper on governance published in July 2001 and the programme also included a number of working groups, one of which focused on 'better regulation'.[20] To be sure, the main focus of the working group's report was on 'co-regulation' and it is noted that 'self-regulation is a tool of the private sector. Much of self-regulation has nothing to do with public policy' (Commission, 2001b, p7). Nevertheless the report stressed that better regulation can be achieved by drawing on a wide range of tools and that 'co-regulation is an approach in which a mixture of instruments is brought to bear on a specific problem, typically involving both primary legislation and self-regulation' (Commission, 2001b, p6). Co-regulation is seen to combine the flexibility of self-regulation and the binding nature of legislation. There was a similar coverage of self and co-regulation in an interinstitutional agreement on 'better lawmaking' which was ratified in December 2003.[21]

The encouragement of self-regulation as a possible regulatory mechanism is not limited to Europe. The Australian government, for example, has since the 1990s promoted self-regulation for consumer protection, particularly 'high quality industry based codes of conduct'.[22] The initiative derived partly from the government's commitment to reduce 'the regulatory burden on business, particularly small business'. Nevertheless, it recognises that effective self-regulation might require legislation in some cases, and a 'regulatory spectrum' is identified from 'no regulation' to 'legislation' (DIST, 1998, pp6-8). In a related initiative in the late 1990s the government established a 'Taskforce on Industry Self-regulation' which included investigations of the circumstances when self-regulation is likely to be most and least effective. There is also a parallel in Australia with the growing significance of self-regulation in the British communications sector. The vision of the Australian Communications Authority (ACA), for example, is 'an efficient, competitive and increasingly self-regulated communications sector which meets the needs of the Australian community'.[23] As in Britain there has been a merger of regulators with the ACA merging with the Australian Broadcasting Authority to form the Australian Communications and Media Authority (ACMA) (merged on 1 July 2005). The ACA notes that the 'decision to merge the two organisations also recognises the work done over the last seven years in putting a strong self-regulatory regime in place'. The work on self-regulation is connected to the Telecommunications Act 1997, (part 1 section 4) which stated that 'the Parliament intends that telecommunications be regulated in a manner that: (a) promotes the greatest practicable use of industry self-regulation …'. The newly established ACMA states on its website that its main responsibilities include 'promoting self-regulation and competition in the telecommunications industry, while protecting consumers and other users'.[24]

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[20] European Commission (2001a), European Governance, A White Paper, Brussels, 25/7/01, COM(2001)428; European Commission (2001b), Report of the Working Group 'Better Regulation', (Group 2c), Brussels, May.
[21] European Commission (2003), Report from the Commission, Better Lawmaking 2003, Brussels, 12/12/03, COM(2003)770.
[22] Department of Industry, Science and Tourism (1998), Codes of Conduct. Policy Framework, Canberra, Consumer Affairs Division, March.
[23] www.aca.gov.au
[24] www.acma.gov.au

3. THE FALL AND RISE OF SELF-REGULATION

Self-regulation is not a new phenomenon in Britain. For decades Britain has been perceived as a 'haven for self-regulation' (Baggott, 1989) and its recent increasing salience may simply reflect its rediscovery. It was particularly in the 19th century after the establishment of industrial society that many recognisably modern systems of self-regulation became established. Moran (2003) identifies three significant areas of industrial life in which systems of self-regulation became dominant: industry, particularly factories and the railways; the professions, notably medicine, law, engineering and accountancy; and finance and the activities of the City of London. It is true that the state did have a role in the regulation of these areas - in the 19th century there were many Acts of Parliament to govern these areas. The Factory Act 1833, the Medical Act 1858 and the Companies Act 1862 are three of the more significant. However, rather than giving rise to strong statutory systems of regulation, the legislative acts were limited mainly to setting up a framework for the regulation of a particular area. Legislation typically specified the framework (ie, the need for some ordering of conduct and possibly procedures and institutions for administration), but once created the main characteristics of regulation were co-operation, conciliation and self administration and, notably in the professions, 'collegial solidarity' (Moran, 2003, p51). These systems of self-regulation became 'embedded' within Britain's modern industrial society and were the distinctive features of regulation well into the 20th century. Financial services, notably the Stock Exchange, the insurance and banking sectors developed a long history of self-regulation and professions such as engineering, law and medicine long maintained their autonomy with their own organisations and rules to regulate their sectors (Baggott, 1989).[25]

This traditional style of self-regulation in Britain has been described as 'club government' or regulation by gentlemen (Moran, 2003). Regulation was conducted by a small, close knit and socially exclusive British elite - the 'old boy network' - in which there were informal, but effective, systems of communication and control (Baggott, 1989, p443). While the power of key social groups within modern industrial society was influential, self-regulation can also be traced to a deep rooted non-state tradition in Britain which has tended to be limited to an 'independent and sovereign political community' rather than 'a public institution acting in the name of public authority and the general interest' in the continental tradition.[26] One manifestation of this is the British constitutional framework which is unwritten and convention based.

The second half of the 20th century, notably the last two decades thereof, has witnessed a significant trend away from self-regulation. Despite the dominant ideas of deregulation and market liberalisation, there has been a distinctive increase in the role of the state in the regulation of many areas of modern life including a wide range of economic and industrial areas, health, education, culture and sport. One major study describes this trend as one of 'freer markets, more rules'.[27] The regulation of the privatised utilities and the rise of the regulatory agency is one conspicuous manifestation of this. In financial services, although the 1986 Financial Services Act was presented as 'self-regulation within a statutory framework' (MacNeil, 1999), the Act involved 'codification, juridification and institutionalisation' and represented a clear shift away from self-regulation (Vogel, 1996, p116). The decline of self-

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[25] MacNeil I (1999), The Future for Financial Regulation, The Financial Services and Markets Bill, The Modern Law Review, 62:5, pp725-743.
[26] Dyson K (1980), The State Tradition in Western Europe, Oxford, Martin Robinson, pp42-43.
[27] Vogel S (1996), Freer Markets, More Rules, Ithaca and London, Cornell University Press.

regulation encompasses a wide range of areas including the regulation of governmental activities such as education and health, the regulation of the professions, and cultural and sporting activities (Moran, 2003). To be sure, the regulatory and self-regulatory landscape is vast and complex, and the transformations that have occurred have not been consistent and uniform across all these areas. For example, in a survey of 19 areas of regulation up to the late 1980s, Baggott (1989) notes that two areas (health and safety, and agriculture) have moved towards self-regulation, 7 areas (housebuilding standards, advertising standards, the tobacco industry, trading standards, engineering, accountancy, press standards) have stayed predominantly self-regulatory, while the remaining 10 areas (insurance, securities and investment, banking, safety of medicines, waste disposal, chemical pollution, pesticides safety, the medical profession, solicitors and the prices of medicines) have moved towards more statutory based regulation. This is clearly a varying picture though the overall trend is towards more statutory regulation.

In the 1990s and early 2000s the trend away from self-regulation in many areas appears to have gathered pace (Moran, 2003). The Financial Services and Markets Act 2000 marks the end of any pretence of self-regulation with the functions of nine regulatory bodies (some of which were 'self-regulatory organisations') taken over by a state agency, the FSA.[28] In the accountancy profession changes such as the establishment of the Financial Reporting Council (1990) and the Accountancy Foundation (2002), represent both an increase in the role of the state in the profession and a reduction the autonomy of the profession (Moran, 2003, pp80-81). In the legal profession the Courts and Legal Services Act 1990 increased the level of state involvement as the Bar Council and Law Society were designated as 'authorised bodies' and subject to external controls. In addition, it has recently been proposed to set up a 'Legal Services Board' to oversee the profession. In governmental activities such as education and health 'New Public Management' has become an established technique. Although this involves the increasing use of market mechanisms for the provision of public services, it has been paralleled by an increase in regulation and regulatory bodies in the 1990s (Hood et al, 2000). There has also been a radical transformation of the regulation of sporting activities. Sport is traditionally seen as a 'pointless' activity (thus few public interest objectives involved) and it has been highly autonomous in its regulation. In the late 1990s Sports Councils for the different UK nations (eg, Sport England) were established as public institutions with a duty to develop a national strategy for sport. The techniques and language of New Public Management, such as target setting, were used increasingly in the search for what increasingly seemed to be the public interest objectives of high performance in sport at elite level and increasing participation at the general level.

Reasons for the decline in self-regulation are varied and complex and only a brief indication can be given here. Social changes such as a decline in trust and deference, an increasingly risk averse society together with a variety of scandals, crises, and apparent abuses of power (notably in financial services and in the professions such as medicine and law) have all contributed to increasing public pressure for stronger and better regulation. There is also a general public scepticism about self-regulation and there is rarely public pressure for the establishment of systems of self-regulation (Baggott, 1989, p445). Globalisation, notably in financial services, has also stretched the effectiveness of gentlemen's 'club government' to breaking point (Moran, 2003). As the City of London has become infused with market players from around the globe, the long established informal systems of communication and control are no longer effective and self-regulation becomes untenable.

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[28] House of Commons (1999), Financial Services and Markets Bill, Research Paper 99/68, 24/06/99.

A return of self-regulation?

It is important to recognise, however, that the trends in Britain and elsewhere in the last two decades have not simply been uniformly towards more statutory regulation and less self-regulation. In fact, in some areas and in some ways there has been a distinct shift towards self-regulation. One such area is the transnational level. Although globalisation appears to have put national systems of self-regulation under strain, it is leading to pressure for greater regulation of transnational activities and there is evidence that these are being achieved by self-regulation. Drawing on a major study of global business regulation,[29] Moran (2003, p162) notes 'that much of business regulation has not only now migrated to the global level, but has in many cases reconstituted itself there in a self-regulatory mode'. The lack of a single powerful political institution or actor (ie, like the national state) at the global level together with the dispersal of the key actors means that learning and standard setting takes place in a more informal mode reminiscent of the process of self-regulation at national level. 'Private interest government' has been examined and perceived mainly at the national level but private authority in global governance (or self-regulation by industry associations and non-governmental organisations) has grown significantly in the past two decades and is often overlooked.[30]

Some examples can illustrate the emerging forms of transnational self-regulation and their connection to globalisation. The internet is one of the most prominent manifestations of globalisation and its transnational governance exhibits some features of self-regulation. For example, the global organisation ICANN (Internet Corporation for Assigned Names and Numbers set up in 1999) is primarily administered and controlled by industry actors, though state actors and the EU have an involvement. In a very different area, self-regulatory codes of conduct have been developed in the apparel industry in order to eliminate the exploitation of sweatshop labour. This is an example of a number of transnational areas in which codes have been developed through co-operation and negotiation between industry players, trade unions and other interested NGOs. These are not pure systems of self-regulation as they have been encouraged and backed at critical times by governmental actors: 'a mixed system of public-private regulation is a hallmark of successful industry self-regulation initiatives' (Hemphill, 2004, p93).

In Britain and other countries there has also been increasing questioning of the extent of statutory regulation and increasing focus on self-regulation and deregulation. In the utility industries there is a debate on the need for increasing regulation; it is sometimes argued that regulators and regulation tend to overregulate and thwart competition and regulators should be abolished.[31] In telecommunications in particular some see that there are too many rules which are no longer relevant and should be scrapped especially as it is an increasingly competitive industry.[32] In telecommunications in Britain in the 1990s there was some evidence that the regulator OFTEL stepped back a little, for example, in the regulation of interconnection charges, and began to see itself more as a telecommunications competition authority indicating a move back towards self-regulation with competition matters overseen by a general competition

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[29] Braithwaite J and Drahos P (2000), Global Business Regulation, Cambridge, Cambridge University Press.

[30] Ronit K (2001), Institutions of Private Authority in Global Governance, Linking Territorial Forms of Self-Regulation, Administration and Society, 33:5, pp555-578.

[31] Egan B L (1996), Abolish the FCC, Telecommunications Policy, 20:7, pp469-474; Robinson C (1999), After The Regulatory Review, in Beesley M. E.(ed) Regulating Utilities, A New Era, London, Institute of Economic Affairs and London Business School.

[32] Mårtenson G (1998), The Impending Dismantling of European Union Telecommunications Regulation, Telecommunications Policy, 22:9, pp729-738.

authority.[33] In 1999-2001 Oftel's strategy towards local loop unbundling was to encourage self-regulation but this failed and the continuation of strong regulation by Ofcom in communications is an indication of the difficulty and limitations of increasing self-regulation. In a different area, environmental regulation, there has been a more distinct shift from the belief in and promotion of command and control regulation to self-regulation. In particular, voluntary agreements (eg, to increase energy efficiency or to improve environmental information provision) have become an important mechanism alongside the more traditional command and control approach and the incentive based approach (primarily by the use of taxes).[34]

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[33] Scott C (1998a), The Juridification of Regulatory Relations in the UK Utilities Sectors, in, Black J and Muchlinski P (eds), Commercial Regulation and Judicial Review, Oxford, Hart; Scott C (1998b), The Procedualisation of Telecommunications Law, Telecommunications Policy, 22:3, pp243-254.
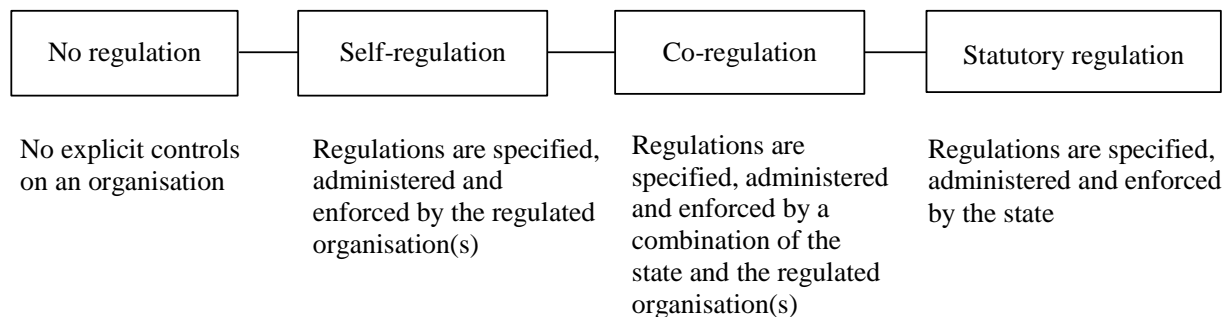
[34] Lyon T P and Maxwell J W (2003), Self-regulation, Taxation and Public Voluntary Environmental Agreements, Journal of Public Economics, 87, pp1453-1486; Jordan A, Wurzel R K W and Zito A R (2003), 'New' Instruments of Environmental Governance, Patterns and Pathways of Change, Environmental Politics, 12:1, pp3-24.

4. THE NATURE OF SELF-REGULATION

On the face of it, self-regulation appears straightforward. It is the regulation of the conduct of individual organisations, or groups of organisations by themselves. Regulatory rules are self-specified, conduct is self-monitored and the rules are self-enforced. It differs from the condition of no regulation in that there is an explicit attempt to regulate conduct. Pure self-regulation also implies no external (the state or other stakeholders) involvement or control in the regulatory process and the conduct of the regulated organisations. This can be contrasted with strong statutory, or 'command and control' regulation in which the state, by a variety of means, specifies the regulations and monitors and enforces the conduct of the regulated organisations. Very often, however, regulatory schemes have a mixture of self and statutory elements and the term 'co-regulation' is frequently used for regulatory schemes in which there is a combination of self and statutory elements.

In essence therefore, a first level model of self-regulation can be outlined in a single dimension of in which the extent of state involvement varies from none to full involvement. This is depicted in **Figure 1** below.

Figure 1: A simple single dimensional regulatory spectrum

No regulation	Self-regulation	Co-regulation	Statutory regulation
No explicit controls on an organisation	Regulations are specified, administered and enforced by the regulated organisation(s)	Regulations are specified, administered and enforced by a combination of the state and the regulated organisation(s)	Regulations are specified, administered and enforced by the state

Practitioner models of self-regulation

This representation of self-regulation with a unidimensional regulatory spectrum is the basic approach adopted by a number of practitioner organisations. In reports by organisations such as the BRTF, NCC, European Commission, OECD and Australian government, there are often different elements in the spectrum of different aspects are emphasised. They are also accompanied by extended discussions of the schemes, their advantages and disadvantages, illustrating with numerous examples.

Better Regulation Task Force

In the BRTF's 2003 report 'Imaginative thinking for better regulation' the elements of the spectrum are described as alternative 'types of regulatory tools'. Although not specified by the BRTF as a diagrammatic spectrum, **Figure 2** represents the different types of regulatory tools.

This spectrum includes two categories 'information and education' and 'incentive based structures' over and above the simple spectrum above, and co-regulation is seen to be a sub-category of self-regulation. The two new categories can be seen as 'softer' (information and education) and 'harder' (incentive based structures) mechanisms to influence behaviour. They are also examples of how compliance can sometimes be more readily achieved by 'softer'
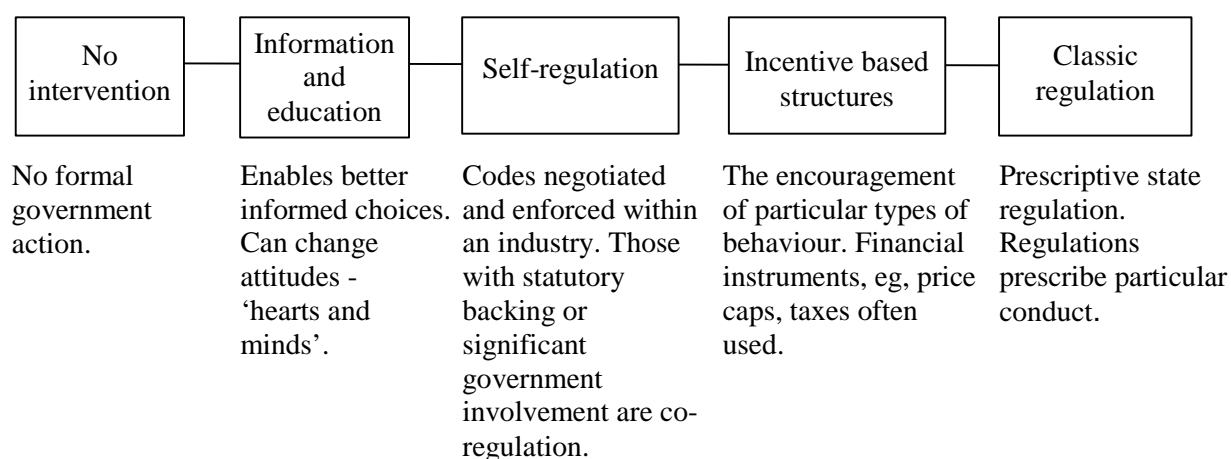
approaches. The softer education and information approach, if successful, is more likely to change attitude, become more deeply rooted and compliance more likely (for example, campaigns on drinking and driving). Incentives which derive from instruments, such as taxation, might be seen as 'harder' as there is clear action involved. They can change behaviour but might be more contingent and superficial, as they are dependent on the specific incentives in particular circumstances.

Self-regulation, according to the BRTF, is voluntary rules developed by those who have to comply to them. They are often developed in their own interest, eg, the provision of good quality goods can be commercially beneficial. 'Codes of practice' are the most common form of self-regulation while 'voluntary standards' and 'voluntary accreditation' schemes are other forms. Co-regulation is seen to be codes of practice which 'have a statutory backing or other significant government involvement'.

Although self-regulation implies no role for the government while co-regulation implies a governmental role of some form, in practice there is a degree of uncertainty of the role of the government in both forms and a grey area between the two. The role of the government in self-regulation according to the BRTF might, for example, involve 'formal approval of codes of practice' or be 'inspired by the threat of classic regulation'. This seems at least to approach co-regulation. An example the BRTF gives also illustrates the grey area. The regulation of the architects profession by the Royal Institute of British Architects is given as an example of self-regulation. They have their own code of professional conduct and the institute is run by the profession. However, the Architects Act 1997 requires that there is a code of practice and set of procedures for registration and practice as an architect. This appears to be more like self-regulation with 'statutory backing', ie, the BRTF's definition of co-regulation.

Figure 2: Regulatory spectrum: (adapted from BRTF)

No intervention	Information and education	Self-regulation	Incentive based structures	Classic regulation
No formal government action.	Enables better informed choices. Can change attitudes - 'hearts and minds'.	Codes negotiated and enforced within an industry. Those with statutory backing or significant government involvement are co-regulation.	The encouragement of particular types of behaviour. Financial instruments, eg, price caps, taxes often used.	Prescriptive state regulation. Regulations prescribe particular conduct.

National Consumer Council

The National Consumer Council (NCC) has also defined a regulatory spectrum but it focuses primarily on different forms of self-regulation (NCC, 2000a) as shown in **Figure 3**. It is nevertheless similar to the above as it is a spectrum from the 'purest' form of self-regulation, ie, unilateral codes developed by a single business, to legal codes which involve legislation and are not strictly not self-regulation.

Figure 3: Self-regulation spectrum (adapted from NCC)

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┌─────────────────────────┐
│      Legal codes        │
└─────────────────────────┘
┌─────────────────────────┐
│     Official codes      │
│       & guidance        │
└─────────────────────────┘
┌─────────────────────────┐
│   'Recognised' codes    │
└─────────────────────────┘
┌─────────────────────────┐
│  Trade association codes │
│   approved by the OFT    │
└─────────────────────────┘
┌─────────────────────────┐
│    Negotiated  codes     │
└─────────────────────────┘
┌─────────────────────────┐
│ Unilateral sectoral codes│
└─────────────────────────┘
┌─────────────────────────┐
│    Customer charters     │
└─────────────────────────┘
┌─────────────────────────┐
│   Unilateral codes of    │
│        conduct           │
└─────────────────────────┘
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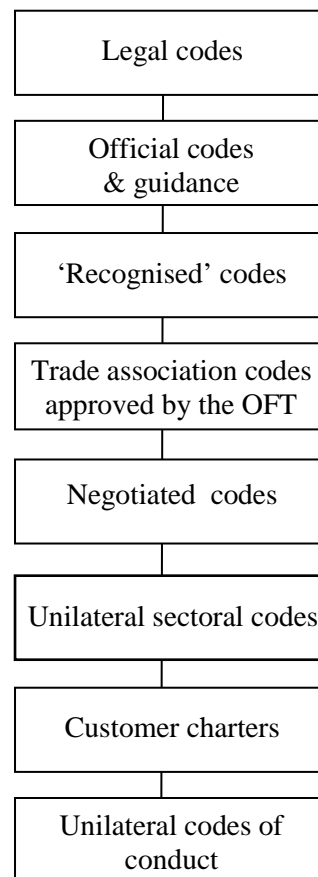
At the pure self-regulatory end of the spectrum 'unilateral codes of conduct', according the NCC, are when an individual business 'decides to adopt and implement specific policies which amount to some form of self-restraint on its conduct towards its customers.' The objectives of this often have a mix of private and public interest. They can provide a competitive advantage, deflect the concerns of government, or pursue goals of social responsibility.

One step along the spectrum 'customer charters' adopted by an individual business involve a 'formal exercise covering all aspects of its dealings with customers, though still stopping short of collective participation of other companies'. It is a 'formal public commitment to combine compliance with legal obligations with customer service initiatives'.

A 'unilateral sectoral code' is a 'code of practice or similar set of rules unilaterally adopted by a trade or profession, without any consultation or discussion with the outside world'. While the NCC notes that this 'has all the characteristics of "genuine" self-regulation – entirely voluntary, self imposed and collective' in practice it is 'almost extinct'. It is close to classic self-regulation of the professions but it is 'more or less unthinkable' that a professional organisation would operate in such an isolated way today.

'Negotiated codes' are more common in the modern world and are 'codes of self-regulation which have been negotiated, or at least discussed (either formally or informally) between an industry body on the one hand, and government and consumer organisations on the other. They also include schemes in which the other organisations are involved in the administration of the codes.

'Trade association codes' approved by the OFT are a variant of negotiated codes including the codes developed by the trade association in consultation with and approved by the OFT. These are becoming more significant as the OFT has a duty to promote good consumer practice and an important way in which it does this is by encouraging and approving codes of practice.

'Recognised codes' are 'codes which have some form of statutory foundation or recognition'. It includes legislation which empowers the Law Society and the General Medical Council to make 'practice rules' for solicitors and doctors.

'Official codes and guidance' refer to 'a government department or regulatory agency issuing a code of guidance (often elaborating on statutory provision), which has had self-regulatory input'. The enforcement of such codes is through civil or criminal action in the courts.

The final category, 'legal codes', is 'perhaps not true self-regulation at all, but business interests are likely to have a strong influence in negotiating the content'. They are imposed by government or public authority under statute but do not have the full force of law ie, they often explain or supplement legislation but are not a substitute.

Co-regulation is not specifically defined in this spectrum by the NCC but they see it in general as self-regulation which is 'underpinned by legal regulation'. They quote the Australian government's document on codes of conduct (DIST, 1998) which defines co-regulation as 'a process where industry develops and administers a code and the government provides the ability to enforce it through legislative backing'.

Australian government

The Australian government has also developed another variant of the regulatory spectrum shown in **Figure 4**.

Figure 4: Australian government's regulatory spectrum

No regulation	Self-regulation	Quasi regulation	Co-regulation	Legislation
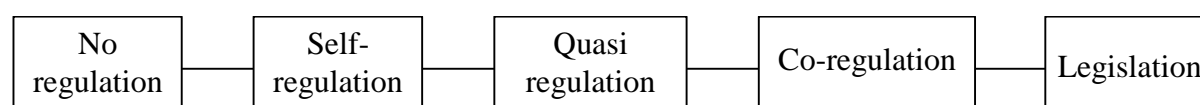
The category 'no regulation' is seen as important by the Australian government as it 'supports a fair and informed marketplace where consumers' interests are protected without excessive regulation'. Although the government will regulate when necessary in the public interest, it generally favours the 'minimum effective regulation to achieve the desired outcomes'. Self-regulation and less interventionary approaches are therefore considered before stronger and more direct regulation.

Self-regulation is taken to be where 'business sets its own standards of conduct and enforces those standards without any government involvement either in drafting the standards, promoting the standards or in enforcing the standards'. 'Pure self-regulation' would include voluntary codes. Self-regulation is often used 'to correct a bad public image, to forestall legislation or to give an industry a competitive advantage'.

The next step along the spectrum is 'quasi regulation' which refers 'to those situations where industry adopts or uses codes of conduct in which government involvement extends to matters such as drafting its provisions or endorsing a code, but the enforcement of the code is left to the industry'. A key difference between quasi regulation and self-regulation is that government

involvement in the former implies that legislation may be introduced if industry does not satisfactorily comply with the code.

Co-regulation is when 'industry develops and administers a code and government provides the ability to enforce the code by giving it legislative backing in some way'. The category 'legislation' is seen to be appropriate when less interventionary are found to be inadequate in solving a problem, or in areas where there is a clear and important public interest, such as safety.

OECD

The OECD, in its discussions on improving regulatory design, notes similar alternative regulatory mechanisms as BRTF (OECD, 2002, pp51-57). Regulatory alternatives include: performance based regulations; process based regulations; co-regulation; economic instruments; information and education; guidelines; and voluntary approaches. The OECD specify a 'spectrum of regulatory and non-regulatory policy instruments' based on the degree of government intervention in a particular sector (**Figure 5**). Self-regulation and co-regulation are not specifically defined within the spectrum. Co-regulation is said to be when the 'regulatory role is shared between government and industry. It is usually effected through legislative reference or endorsement of a code of practice' (OECD, 2002, p137). Self-regulation is not specifically defined but is implicit within 'voluntary approaches' to regulation.

Figure 5: Spectrum of regulatory and non-regulatory policy instruments (adapted from OECD)
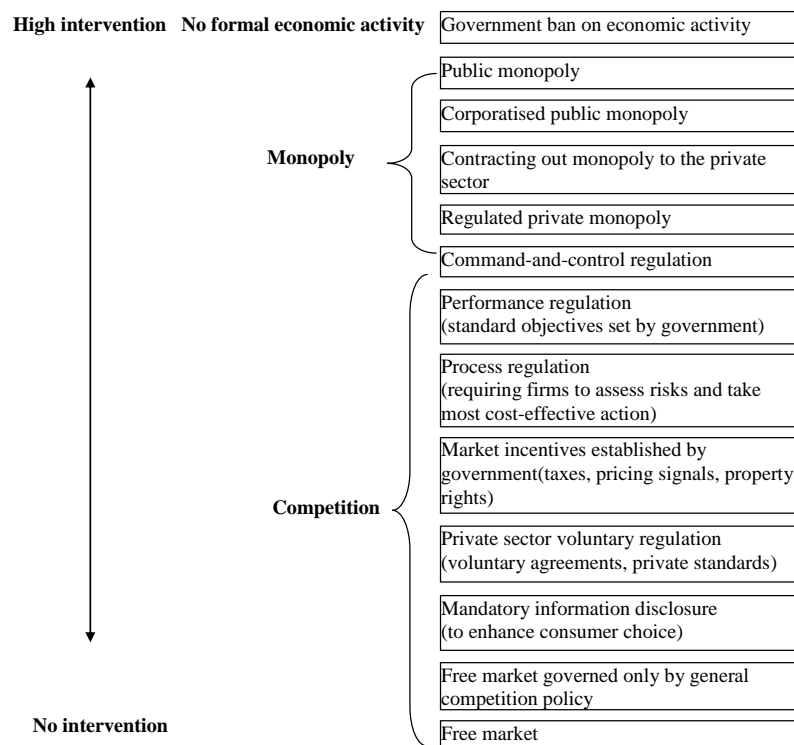
European Commission

The European Commission has similarly discussed alternative regulatory instruments. In an inter-institutional agreement on 'better law making' in 2003, co-regulation was defined as '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, NGOs or associations)'. Self-regulation was defined as 'the possibility for economic operators, the social partners, NGOs or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practices or sectoral agreements)' (European Commission, 2003, p11).

Academic perspectives

Although the different practitioner depictions share some commonalities, there are variations in the perceptions of self-regulation and co-regulation and particularly their place within larger regulatory schemes. These variations reflect the complexity of the concepts and their place within academic analyses. It has been noted, for example, that 'self-regulation remains a rather vague and elusive concept' (Baggott, 1989, p436). The reality of regulation is that there is a multiplicity of forms which do not fit easily into a small number of discrete categories. In practice there is some form of state involvement in most regulatory schemes even many of those which are characterised as predominantly self-regulation (Baldwin and Cave, 1999, p126). State involvement may vary from tacit threats of state action to close monitoring and enforcement by a state agency. There is not, therefore, a clear contrast or choice between self-regulation and regulation by state agency (Baldwin and Cave, 1999, p136), rather there is a spectrum of institutional arrangements 'containing different degrees of legislative constraints, outsider participation in relation to rule formulation or enforcement (or both) and external control and accountability' (Ogus, 1994, p376). Even the category 'no regulation' is more complex than it appears. When there are no explicit self or state regulatory codes, the conduct of organisations is often constrained (tacitly regulated?) by unwritten norms and practices, which draw, for example, on general societal and moral values, and the economic model (eg, 'shareholder' or 'stakeholder' capitalism) in which the organisation operates.[35]

The changing nature of financial regulation in Britain is a good example of the regulatory continuum (Moran, 2003). At one extreme in the 19th century the state's role in the regulation of the City was very limited. It amounted to little more than informal words in the ears of the right people (in elite London clubs) that some form of control of conduct was required. Codification tended to be tacit and sanctions amounted mainly to ostracisation - ie, the threat of expulsion and actual expulsion; law, beyond normal criminal and civil law, played little role. Although by the mid 1980s financial regulation was still seen to be primarily self-regulatory, regulation became much more institutionalised and the state had a much more distinctive role. Codification was mainly the responsibility of 'self-regulatory organisations' but the state was closely involved in the process. Codes were endorsed by the state and had the force of law.

The latter appears to be more like 'co-regulation' but this is also a rather intangible concept. Definitions of co-regulation are often very general. Regulation can be perceived on a spectrum 'ranging from detailed government command and control regulation to "pure" self-regulation, with different points in the continuum encapsulating various kinds of co-regulation' (Gunningham and Rees, 1997, p366). The OECD notes that 'under co-regulation the regulatory role is shared between government and industry. It is usually effected through legislative reference or endorsement of a code of practice'. Another definition of co-regulation is 'industry-association self-regulation with some oversight and/or ratification by government' and possibly participation by 'public interest groups'.[36]

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[35] Gunningham N and Rees J (1997), Industry Self-Regulation, An Institutional Perspective, Law and Policy, 19:4.
[36] Ayres I and Braithwaite J (1992), Responsive Regulation, Transcending the Deregulation Debate, p102, Oxford University Press.

The one dimensional view of regulation from the weaker systems of self-regulation or even no regulation to strong state regulation is reflected in the work on regulatory enforcement and compliance by Ayres and Braithwaite (1992). In a 'pyramid of enforcement strategies' (**Figure 6**) regulatory approaches vary from the least interventionary, 'self-regulation' at the bottom of the pyramid, through 'enforced self-regulation' and 'command regulation with discretionary punishment' to the most interventionary form, 'command regulation with nondiscretionary punishment' (Ayres and Braithwaite 1992, p39). The point of the pyramidal form is that compliance is more likely if the least interventionary forms of regulation (at the bottom of the pyramid) are the normal approach with the clear threat of stronger intervention further up the pyramid if the less interventionary forms fail. The pyramid also illustrates the uncertain role of the state in self-regulation. Does it simply take a rather benign backseat role only intervening in the last resort? Or does it lurk menacingly in the background and eager to intervene at the first indication that public interest objectives are not being met?

Figure 6: Pyramid of enforcement strategies (Ayres and Braithwaite, 1992)
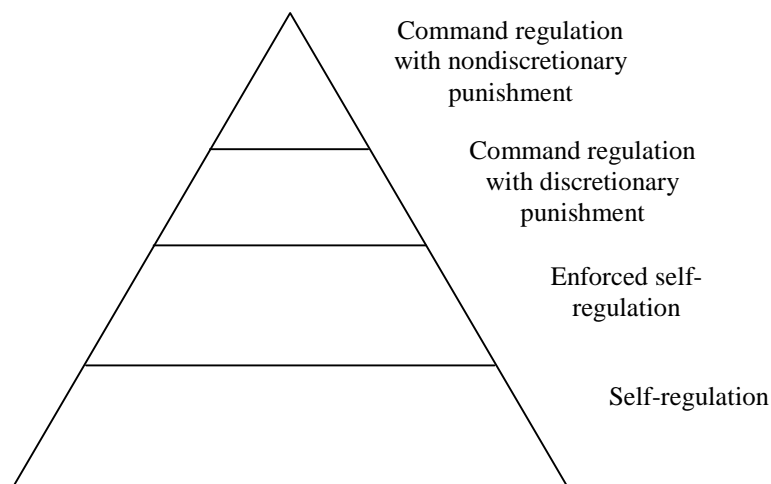
The complexity is compounded by questions about whether a single dimensional conception is adequate. Baggott (1989) specifies three dimensions of self-regulation: the level of formality; the degree of legalisation; and the extent of outsider participation. In the first dimension regulation varies from the informal (regulation undertaken by the regulated organisation) to the formal (a state specified, highly institutionalised process including a state regulatory authority). The second dimension varies from voluntary (little or no statutory base) to a highly legalised system. The third is the extent of outsider participation which varies participation only by the regulated organisations to extensive outsider participation including state/regulatory agency representatives and third parties such as public interest groups. Gunningham and Rees (1997, pp364-365) also identify three dimensions though these are specifically of self-regulation and differ from those of Baggott. First, they distinguish between individual self-regulation and self-regulation by groups, in effect this is a dimension of the extent of applicability of self-regulation. Second, they distinguish between economic self-regulation (control of markets) and social self-regulation (protection of people and the environment from industrial or other activity). Third, they distinguish between the degree of state involvement in self-regulation which can vary from 'voluntary self-regulation' (no state involvement) to 'mandated full self-regulation'.

The distinction between social and economic regulation raises an important aspect of regulation which goes beyond its form: the purpose of regulation. Fundamentally, the purpose of regulation can be divided into a public interest and a private interest, and again a spectrum is evident from a strong private interest to a strong public interest. The public interest most commonly comes to mind when considering the purpose of regulation. Both economic and social regulation are

normally considered to be in the public interest. Economic regulation controls monopoly and promotes competition and thus seen to maximise public economic welfare while social regulation protects people and their environment and thus aims to maximise the welfare of society as a whole. Private interest regulation appears less obvious but is undertaken when regulation is to the benefit of the regulated organisation or group of organisations though not necessarily or directly beneficial to society at large. It may be undertaken by a business when there is a clear commercial advantage, for example the creation of a reputable brand. Many aspects of private interest regulation do, however, contain an element of a positive public advantage. Technical standards, such as communications network interoperability have a commercial benefit in enabling companies to sell a networked product but also the public benefit of a fully interconnected 'network of networks'.

It can be conceived that regulatory forms move in tandem along these different dimensions thus in effect they are similar to the single dimensional schemes discussed above: generally, 'the more formal self-regulation ... the greater the extent of outside participation involved, and the greater the possibility that the self-regulatory organisation in question will have legal powers and/or statutory status (Baggott, 1989, p438). Regulatory schemes appear to move along these three dimensions involving a gradual departure from self-regulation into the territory of state enforcement and possibly regulatory bodies with statutory powers. It might also be supposed that weaker, less formal self-regulatory schemes are (or should be) associated with those in which the private interest matters are more dominant than the public interest. Similarly, strong statutory regulation might be associated with the situation when there is a strong public interest.

However, recognition of the multi-dimensional nature of regulation is important as movement along the different dimensions does not always occur in tandem. For example, different aspects of the regulation of the medical profession in Britain appear at different positions in the state - self-regulatory spectrum.[37] The regulation of the profession can be divided into three dimensions: the source of regulation (ie, from where the impetus for its formation came); the composition of regulation (ie, regulatory institutions and their representation); and the regulatory codes (ie, the extent to which they derive from statute and/or state body or from an organisation of the regulated). The General Medical Council (GMC) is the main body for the regulation of medical professionals in Britain and on each of these three dimensions it is situated at very different places along the spectrum as shown in **Table 1**. On the first dimension, the GMC stems clearly from governmental decisions and statute and is therefore at the governmental end of the spectrum. On the second dimension, the composition of the main institution of regulation, the GMC, is predominantly from the profession, ie, the profession end of the spectrum. The third dimension is between the two: rules draw from a mixture of statute and GMC written codes of practice. The UK regulation of the medical profession is thus a 'mongrel variety' which, on various dimensions, displays features of both strong statutory regulation and strong self-regulation. Without presenting other examples, it can be supposed that in different ways other sectors and areas will manifest similar multi-dimensional complexity.

Table 1: State and self-regulation of the medical profession in Britain

	Government-led	Profession-led
Source	GMC	
Composition		GMC
Rules	GMC	

Source: Moran and Wood, 1993, p92.

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[37] Moran M and Wood B (1993), States, Regulation and the Medical Profession, Buckingham, Open University Press, p92.

A brief glimpse at some examples also shows that the public-private interest dimension of regulation is not clearly linked to the statutory-self-regulation dimensions of regulation. Taking two examples, the medical profession already noted and the regulation of telecommunications services. There is clearly a very strong public interest in the regulation of the medical profession yet, on some dimensions at least, it is characterised by a high degree of self-regulation. In contrast, the public interest in telecommunications, although clearly important in some areas, cannot be said to be as strong. For example, mandatory codes of practice have been developed for the sales and marketing practices for fixed line services. On the key dimensions of regulation this is highly statutory: although there was some industry involvement, it was specified, administered and enforced primarily by the regulator, a state agency.

Capturing the true complexity of regulation and self-regulation therefore requires a multi-dimensional scheme in which the various aspects of regulation vary from highly self-regulatory to strong statutory regulation. A key division is between form (the nature of regulation) and function (its objectives). Various general objectives of regulation are summarised on a spectrum from private interest to public interest (**Table 2**). Many aspects of regulation, of course, can serve both a private interest (commercial benefits) and a public interest (good consumer codes of practice). However, they can also conflict. Regulation in the public interest to prevent anti-competitive practice can clash with the (legitimate) private industry interest of organising to developing good practice or the (illegitimate) private interest of market control by collusive behaviour.
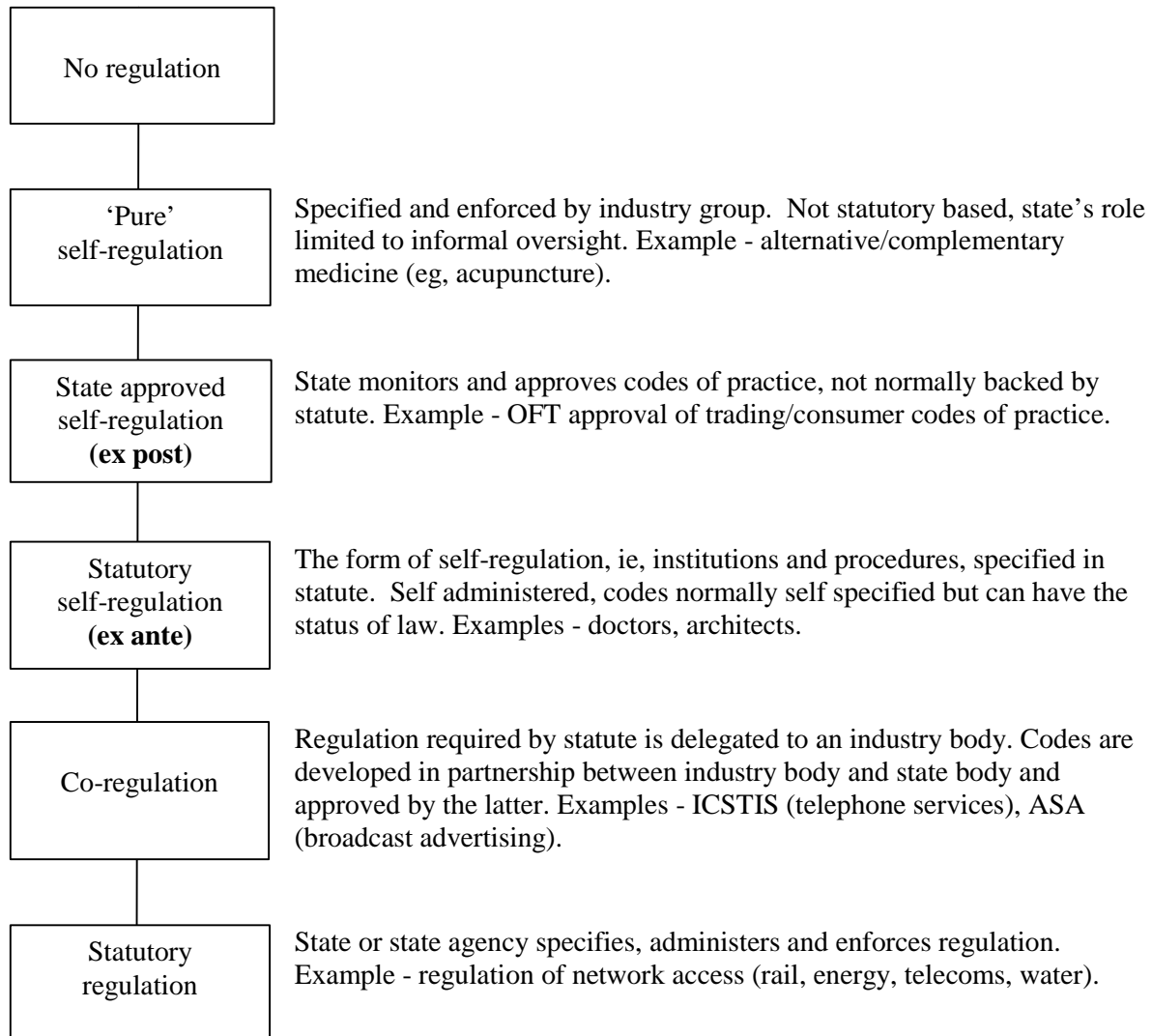
Table 2: Function: Objectives - why regulate?

Private interest	← →	Public interest
- business case - avoid statutory regulation		- economic regulation (monopoly/restrictive practices)
		- social regulation (safety/environment/consumer)
	- technical standards (interoperability/performance/quality)	

There are several aspects of the form of regulation most of which concern who regulates and is regulated and by what means and how are they organised (**Table 3** below). Firstly, there is the question of who is the subject of regulation which can vary from a single organisation, to a sub-group within a sector to all who engage in a particular activity. Then there are a number of different aspects of regulating. There is: who called for regulation and/or a regulatory regime, and how were the called for? Who specifies the regulatory rules and codes, and how are they specified? Who enforces regulation, and how? Who monitors the conduct of the regulated and how? What institutions/organisations are in place to administer the regulatory process? Again these can vary on a spectrum from a single (private) organisation, through a group of regulated organisations possibly including third party private organisations (stakeholders such as consumer or environmental groups), towards a variety of state organisations.

Table 3: Form: who and what, and how?

	Informal ←————————————————————→ Formal		
Who is subject of regulation?	Single organisation	Industry sub group (some of industry)	Industry group (all in an industry)

	More self-regulation ←————————→ Less self-regulation Voluntary ←————————→ Statutory		
Who called for/demanded regulation, and how? **Who specifies regulation, and how?** **Who enforces regulation, and how?** **Who monitors conduct and regulation, and how?** **Who administers regulation (institutions)?**	Single regulated organisation (Voluntary) Regulated industry group/subgroup	Others in industry Third parties (eg, consumer/environmental groups)	Government agency Government department
What is role of law and courts?	<u>Minimal</u> <u>Maximal</u> No more than normal civil/criminal law (company law)	Law demands a regulatory regime Law demands written codification	Written codes have force of law

Another important aspect of regulation is the role of law and the courts. This again can vary from minimal at the self-regulatory end of the spectrum towards maximal at the strong statutory end of the spectrum. The role of the law in the former is no more than normal civil and criminal law while at the latter end of the spectrum all rules and codes have the force of law, and decisions by regulators can be challenged in court. In Britain the latter process is limited to 'judicial review' in which the process, though not the substance, of certain public decisions can be challenged in court. In other countries, such as Germany, the role of law and courts is stronger and the substance of decisions by governmental and public authorities as well as the process can be challenged.

These multi-dimensional forms illustrate the potential complexity of self-regulation and regulation and the scope for almost endless variation, and subtle variations between apparently similar schemes. Although this can aid the understanding of variation, it is too complex for the categorisation of actual examples and for ease of understanding of the main different forms. A simpler set of categories is required which captures some of the diversity discussed in this chapter together with the ease of understanding that the simple one dimensional form offered at the beginning of the chapter. The scheme in **Figure 8** is one way of introducing some of the

variations of state-self-regulation with the inclusion of two categories - state approved self-regulation, (an essentially *ex post* process in which regulation is approved (or not) after its development, and statutory self-regulation (an *ex ante* process in which the state defines by statute a set of self-regulatory institutions and procedures for the production of regulation).

Figure 8: Various categories in the regulatory spectrum

No regulation	
'Pure' self-regulation	Specified and enforced by industry group. Not statutory based, state's role limited to informal oversight. Example - alternative/complementary medicine (eg, acupuncture).
State approved self-regulation **(ex post)**	State monitors and approves codes of practice, not normally backed by statute. Example - OFT approval of trading/consumer codes of practice.
Statutory self-regulation **(ex ante)**	The form of self-regulation, ie, institutions and procedures, specified in statute. Self administered, codes normally self specified but can have the status of law. Examples - doctors, architects.
Co-regulation	Regulation required by statute is delegated to an industry body. Codes are developed in partnership between industry body and state body and approved by the latter. Examples - ICSTIS (telephone services), ASA (broadcast advertising).
Statutory regulation	State or state agency specifies, administers and enforces regulation. Example - regulation of network access (rail, energy, telecoms, water).

5. SELF-REGULATION IN PRACTICE

This chapter draws from survey data (interviews and written responses) on the perceived nature of self-regulation and co-regulation and similar mechanisms, including examples and objectives, across a range of sectors. The main sectoral focus is on the utility industries, ie, telecommunications, energy, water, rail, and post but for comparative purposes others areas are included such as educational qualifications, law and financial services.

Self-regulation

Survey data show a number of different perceptions of self-regulation, some of which are complementary, others contradictory. As expected there is no disagreement about the rules aspect of self-regulation: there is some explicit form of codes of practice, standards or guidelines which apply to one or more organisations. Moving beyond this, however, self-regulation becomes less clear with a little less consensus. **Table 4** below summarises the different perceptions of self-regulation.

Prima facie, the 'self' aspect of self-regulation appears straightforward. Those who are subject to the regulation also develop and enforce it. Survey data showed a difference in emphasis on whether self-regulation applied to one organisation, a group of organisations or the whole sector, and if the latter two, whether there is an institution administering the regulation. To be sure, some of those surveyed did not note a significant distinction between these possibilities or noted that some or all could apply.[38] However, some noted that self-regulation often refers to the regulation of a single organisation, and in effect amounts to good corporate governance, though set within a broader framework in which standards are developed.[39] Many used the generic expression 'industry' or 'profession' for self-regulation, often meaning a group of organisations (or individuals) within an industry or profession working together to develop, administer and enforce regulations.[40] Others stressed the importance of an industry organisation or association which is the central actor involved in the tasks of self-regulation.[41] Even stronger is a view that to be effective all participants within an industry must be subject to the self-regulatory scheme.[42] Similarly, it has been stressed that self-regulation is not just the adoption of good business practice but involves some form of independent audit, verification, assessment of compliance and application of sanctions possibly by an industry or professional association.[43]

While some stressed that self-regulatory organisations consist overwhelmingly of the industry or profession,[44] others can be involved. The process of self-regulation can involve 'civil society' organisations, such as those representing consumers, other NGOs and the social partners.[45]

The notion of 'self' also seems to imply a process that is both voluntary and not subject to external (government, legislatory) constraint or involvement. However, again there is a variety of perceptions on this, notably different gradations of governmental and statutory involvement.

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[38] Ofcom, Ofwat, Which?, FSA, ORR.
[39] United Utilities, Royal Mail, Wessex Water.
[40] Network Rail, RPC, Energis, ATOC, NCC, Environment Agency.
[41] BT, OFT, Ofgem, Water Voice, Water UK, BRE.
[42] Ofgem.
[43] Wanadoo, QCA.
[44] Law Society.
[45] Which?, BRTF, BRE.

Many stressed that self-regulation involves no statutory obligation,[46] or at least no governmental constraint in certain areas of regulatory specification and administration.[47] Many, however, viewed that self-regulation is a form of 'soft law' and operates within the 'shadow' of the law, government or regulators.[48] An important spur for self-regulation could be the threat or possibility of legislation or regulation; self-regulation might develop to pre-empt regulation and in the context of oversight and monitoring by a public authority. In a contradiction of the notion that self-regulation is purely voluntary, some others go a step further and say that self-regulation could have a mandatory element, eg, by licence, by high level statutory backing, or by self-regulatory bodies being specified in statute.[49]

Another apparent perception of self-regulation, that it is primarily to meet private interest objectives, is also not reflected in the survey data. Self-regulation can involve a business regulating itself for commercial reasons, possibly by improving public image.[50] However, some explicitly, and several others implicitly, said that self-regulation was about solving a public policy problem, even if it also addresses a private interest problem, such as effective interoperation of networks.[51]

Table 4: Summary of different perceptions of self-regulation

Organisations involved	Role of public authority/ies and law	Objective
1. All members of an industry/profession 2. Collective organisation (industry/trade/professional association) 3. Industry organisation and other non-governmental actors/organisations 4. Several organisations within an industry 5. A single organisation (company)	1. Self-regulatory scheme with statutory backing 2. No statutory obligation but significant role for public authority/ies and law (possibly threat of legislation, or oversight – reviewing, endorsing, approving). 3. No statutory obligation and little role for public authorities and law	1. Public interest 2. Private interest

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[46] NAO, Which?, BT, ORR, Royal Mail, Ofcom, Anglian Water, BRTF, FRC, Wessex Water, United Utilities, Water UK, Three Valleys Water.
[47] Law Society.
[48] Ofcom, BT, CAA, RPC, Carphone Warehouse, NCC.
[49] ORR, ATOC, Ofwat, QCA.
[50] Royal Mail, Ofwat, FSA, RPC.
[51] Energis, Network Rail, Ofcom, Which?.

Co-regulation

Co-regulation was not a term that the majority of those surveyed were familiar with in practice, though most had heard of it and had a perception of its meaning. The most common perception of co-regulation is that involves self-regulation with a statutory element and/or with clear involvement of a public authority.[52] In general, there is some form of 'public intent'[53] and a more formal setting where oversight is seen as necessary or when industry self-regulation has failed.[54] The 'co' or joint element in this involves the industry or profession acting with government in the form of its participation and/or legal authority.

This can be manifested in a number of ways:

• Co-operation between public authority and industry on regulatory matters;[55]
• The delegation of statutory powers by a public authority to an industry or profession-led body, or a self-regulatory organisation undertaking regulatory tasks with a statutory body behind it;[56]
• A public authority sets an industry/profession specific tasks with statutory backing;[57]
• A public authority encourages, reviews, approves or endorses self-regulatory schemes developed by the industry, though normally not backed by full force of statute;[58]

Co-operation involves the close working of companies, associations and regulators in working groups or committees. Industry and regulators often have a shared interest in certain outcomes though it involves some form of obligation and enforcement by the regulator.[59] The latter are not independent entities but often come under the auspices of the sectoral regulator or are groups set up by the industry. Regulations are developed by the group, formalised and made mandatory by the regulator. If these groups are mainly advisory then they are not considered to be co-regulatory, but it has been noted that advisory and co-regulatory groups often shade into each other.[60]

Co-regulation implies a joint arrangement of some sort and that can involve more than just the regulator/governmental authority and the regulated. Co-regulation, for example, can involve the public ('lay' representatives in professional self-regulatory bodies) and civil society organisations and 'stakeholders', such as those representing consumers.[61] An 'in between' position of 'professional-led regulation with public involvement' has also been distinguished.[62] Co-regulation might also refer to the joint working of regulators in areas where there may be closely connected or even overlapping responsibilities such as between the sector non-specific regulatory authorities, such as competition or environmental regulators, and the sector specific regulators.[63]

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[52] ATOC, DTI, Ofcom, BT, BRTF, NCC, Environment Agency, FRC, Ofgem, Wanadoo.
[53] DTI.
[54] RPC, Three Valleys Water.
[55] Energy Networks Association, Network Rail, CAA, Royal Mail.
[56] Ofcom, NAO, OFT, BRE.
[57] Energis.
[58] CAA, Energis, Which?, MOA, DTI.
[59] ATOC.
[60] Energis, Ofcom, FSA.
[61] QCA, Energywatch, Which?, Law Society, United Utilities, Wanadoo.
[62] QCA.
[63] FSA, Ofwat, Environment Agency.

What is immediately evident from this outline of the different interpretations of self and co-regulation is that there is overlap and shading between the two concepts and a clear lack of definitional clarity and consensus. Several of those surveyed made this point,[64] while some others stressed that debates between these two concepts were rather sterile and it is better to concentrate on the use of effective regulatory tools, on objectives and outcomes and on the range of governmental involvement in regulation and self-regulation.[65] Compounding the lack of clarity is the variety of terms in use. Other terms include 'voluntary standards', 'consumer charters' and 'professional-led regulation',[66] while, as noted above, the term co-regulation has little currency in a wide range of sectors. Also many of the perceptions of co-regulation in particular sectors noted here are not referred to by that term. **Table 5** summarises the different perceptions of co-regulation.

Table 5: Summary of different perceptions of co-regulation

Joint arrangement	Governmental/public authority Regulated organisation/s	Regulated organisation/s Non-governmental actors	Governmental/public authority Second governmental/public authority
General form and examples	1. Co-operation and coordination between public authority and industry on matters which lead to statutory regulatory decisions and determinations. 2. Delegation of statutory powers by a public authority to an industry or profession-led body. 3. Public authority sets an industry/profession specific tasks with statutory backing. 4. Public authority encourages, reviews, approves or endorses self-regulatory schemes, though not necessarily backed by full force of statute.	1. 'Civil society' involvement in self-regulatory scheme – such as consumer or environmental organisations. 2. Public or 'lay' involvement in professional self-regulatory schemes.	1. Co-working of non-sector specific authorities/agencies with sector-specific regulators: eg, competition authorities, Environment Agency, Drinking Water Inspectorate, Health and Safety Executive. 2. Co-working of governmental consumer bodies with regulator: eg Energywatch, WaterVoice, Postwatch.

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[64] BT, DTI, Energis, Environment Agency.
[65] Energywatch, BRE, CAA.
[66] Which?, Energywatch, Law Society.

Perhaps the most significant dimension which applies to both self and co-regulation is the role of public authorities and law. **Table 6** shows the overlapping perceptions of this within a single strong-weak dimension of regulation. Also shown is a consolidated spectrum of the different roles of public authority and law which we think best summarises the main different forms of state involvement in regulatory schemes.

Table 6: Perceptions on the role of public authority and law and consolidated categories

Role of public authority and law	Self-regulation	Co-regulation	Consolidated categories
Strong ↑↓ **Weak**	1. Self-regulatory scheme with statutory backing 2. No statutory obligation but significant role for public authority/ies and law (possibly threat of legislation, or oversight – reviewing, endorsing, approving). 3. No statutory obligation and little role for public authorities and law	1. Co-operation between public authority and industry on matters which lead to statutory regulatory decisions and determinations. 2. Delegation of statutory powers by a public authority to an industry or profession body 3. Public authority sets an industry/profession specific tasks with statutory backing 4. Public authority encourages, reviews, approves or endorses self-regulatory schemes. The schemes themselves are not backed by the full force of statute	**1. Co-operative.** Co-operation between regulator and regulated on the operation of statutory backed regulation. **2. Delegated.** Delegation of statutory powers by public authority. **3. Devolved.** Devolution by parliament of statutory powers to a self-regulatory scheme. **4. Facilitated.** The explicit encouragement and support of self-regulatory schemes by a public authority. The schemes themselves are not backed by the full force of statute **5. Tacit.** No statutory backing and little explicit role for public authorities.

Advantages of self-regulation and co-regulation

The survey revealed a variety of advantages of pursuing more self-regulation or co-regulation. Many of the advantages were considered (often tacitly) in terms of their advantages over statutory or direct regulation, while a smaller number were considered vis-à-vis no regulation. A number of interviewees also observed that self-regulation can have problems and precautionary measures are important; in itself self-regulation is no panacea for the problems of direct regulation or no regulation.

Advantages of self-regulation over statutory/direct regulation

An advantage of self-regulation highlighted in different ways by many of those surveyed is that it can enable the knowledge and expertise of all parties in the process to be drawn on more effectively. Regulators are not always in the best position to obtain the necessary information and to know the market situations; it is better to draw on the 'comparative advantages' that the various parties or stakeholders offer.[67] The various stakeholders often know more about markets and technology than government and regulators[68] and particularly in times of technological and economic uncertainty (eg, in relation to investment in new energy networks), more effective assessment of investment requirements can be made.[69] Companies might have more scope to determine efficient and innovative means of achieving regulatory objectives.[70] Self-regulatory schemes which draw on the expertise and interests of various stakeholders can also improve planning processes, such as in the development infrastructures (eg, mobile phone masts).[71] Self-regulation can also encourage industry to develop their own solutions for problems,[72] rather than turning too often to the regulator.[73]

The various self and co-regulatory schemes are often seen as more flexible, adaptable and provide alternatives to conventional direct regulation.[74] Greater freedom and flexibility to decide how best to meet public interest objectives can lead to better compliance, savings for customers, and more innovation.[75] More flexibility can enable a more targeted regulatory approach towards poor performers and those breaking regulatory law.[76] Greater flexibility can also avoid the need for the regulator to get involved in prescribing detailed operational arrangements, and contribute to the 'better regulation' agenda emphasised by several regulators.[77] Co-regulation also enables the flexibility to be accompanied by a degree of legal certainty.[78]

A closely connected objective of self-regulation is the reduction of the regulatory burden on business and the prevention of excessively heavy handed approach by the regulator, at the same time as achieving the regulatory objectives.[79] This should reduce the administrative burdens of regulation and reduce the management costs enabling more time to be spent on productive activities.[80] Customers should benefit from reduced costs to business and improved services.

Self-regulation can also engender more commitment, pride and loyalty within a profession or industry, which can increase efficiency and reduce costs.[81] It can lead to greater awareness by business of negative impacts, such as on the environment, and greater responsibility to reduce them and thus better compliance with regulatory objectives.[82] Self-regulation could also

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[67] CAA, also United Utilities.
[68] BRTF.
[69] Energy Networks Association.
[70] Water UK.
[71] MOA.
[72] Network Rail.
[73] Ofcom.
[74] BRTF, NCC.
[75] Wessex Water.
[76] Environment Agency.
[77] Ofgem.
[78] BRTF.
[79] Ofwat, Environment Agency, OFT.
[80] Water UK, Wessex Water.
[81] QCA, ATOC.
[82] Environment Agency.

strengthen relationships between customers and companies as they will be more responsible to customers for performance.[83]

Self-regulation might also reduce the costs to the state by, for example, saving on enforcement and inspection costs.[84] If effective, self-regulation would reduce the need for regulation and thereby costs without weakening consumer protection.[85] This might lead in time to consumer groups playing a larger role than the regulator in holding companies to account.

Finally self-regulation, as opposed to direct regulation, might contribute to the better working of market.[86] It can underpin the healthy functioning of the market to the benefit of businesses, investors and employees and enhance the UK's economic strength in international markets.[87] In addition, the achievement of regulatory objectives, such as consumer protection, does not always require a hard non-market approach: soft processes and the exploiting market dynamics can often lead to better compliance.[88]

Advantages of self-regulation over no regulation

The advantages of self-regulation over no regulation can also be considered in a similar way to the purposes of regulation itself: ie, to overcome market failure and prevent harms such as those to the consumer, the environment, and those related to decency and censorship.[89] Thus, self-regulation can offer better consumer protection and service across a whole market sector, or across the market players who sign up to a self-regulatory scheme.[90] It can help consumers identify better traders and protect and raise the reputation of those subject to a self-regulatory scheme.[91] From a business viewpoint self-regulation in the form of co-operation among market players can help to ensure a level playing field in terms of compliance costs and achieve best practice where possible.[92]

Self-regulation can also improve corporate governance[93] and address issues such as corporate social responsibility, ethical trading[94] and promote a regulatory regime with high standards of corporate reporting and governance which can improve competitiveness and general prosperity.[95]

Precautions

A number of interviewees have also noted that care and caution is required when considering the benefits of self-regulation. In broad terms there is a need to ensure that self-regulation acts in the public interest and not just the private interest. Although not an argument against self-regulation, it has been noted that procedures are required to ensure 'professional-led' regulation acts in the public interest.[96] Also, and importantly, it has been stressed that care is needed in 'better

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[83] Three Valleys Water.
[84] BRTF, DTI, Environment Agency.
[85] WaterVoice.
[86] DTI.
[87] FRC.
[88] Energywatch.
[89] DTI, Wanadoo.
[90] OFT.
[91] OFT, NCC, Wanadoo.
[92] Wanadoo.
[93] Ofwat.
[94] OFT.
[95] FRC.
[96] Law Society.

regulation' debate to ensure that the promotion of 'lighter touch' regulation does not militate against the public interest in the form of anti-competitive practices.[97] Self-regulatory schemes can become dominated by the large market players and restrict competition and set up market entry barriers.[98] Some of the regulators themselves have also stressed that there can be problems with light touch regulation as well as heavy handed regulation, and that the pursuit of self-regulation may make the regulator appear to be acting with too much discretion which could compromise the achievement of statutory objectives.[99]

Another problem is that there is a large degree of variation in the performance of self-regulatory schemes and it is not easy to assess their effectiveness.[100] The huge variations in the institutionalisation of self-regulation can have an impact in performance. Broadly, if a trade organisation is weak it is more difficult to set up a good self-regulatory scheme and consumers can be vulnerable.[101] It has also been stressed that rather than promoting one or more particular mechanisms it is much more important to have a clear idea of desired outcomes and objectives and have a means of assessing their achievement.[102] In addition, self-regulation might be an easier course of action for the regulator, but it may not necessarily meet objectives.[103]

The achievement of objectives raises the issue of the accountability of self-regulatory schemes. There is, for example, a degree of uncertainty over the level of public accountability of co-regulatory bodies in the communications sector and the activities of these bodies should possibly be subject to clear regulatory impact assessments.[104] It can be supposed that the effectiveness of self-regulatory schemes can be monitored and improved by transparency and good procedures of public accountability such as impact assessments. However, some interviewees have expressed a degree of doubt and scepticism towards the idea that transparency can overcome the problems of the regulator standing back.[105]

Examples: diversity in practice

This chapter illustrates the diversity of practice of self-regulation and co-regulation. It includes an indication of the terminology used, and the currency of the terms self and co-regulation, though in general co-regulation has little currency beyond the communications sector. The complex empirical reality means that the wide range of examples in this survey do not all easily fit into five consolidated categories. **Table 7** summarises the examples, indicating those that can be easily categorised and those which are more difficult. Details of the examples are given in **boxes 1-42** set out in the **Appendix**. The following draws some conclusions from the empirical case material.

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[97] NAO.
[98] OFT, Carphone Warehouse.
[99] ORR, Ofwat.
[100] Energis, Which?
[101] Which?
[102] Energywatch.
[103] Energis.
[104] Ofcom.
[105] DTI, Carphone Warehouse, Royal Mail.

Table 7: Summary of categorisation of examples of self and co-regulation

	Core examples A fairly good fit	Mixed examples Some alignment with the category though not always obvious, and some misalignment
Co-operative	• Energy networks regulation • Electricity trading regulation • Airports regulation • Railways Network Code • Drinking water inspection	• Telecommunications network interoperability • Financial services practitioner and consumer panels • Qualifications and Curriculum Authority • Railway safety and standards • Environmental protection: Pollution Prevention and Control
Delegated	• Regulation of broadcast advertising • Regulation of premium rate telecommunications services • Dispute resolution in telecommunications • Adjudication of access to the telecommunication local loop • Equality of access to BT's network	• National curriculum tests • Proposed reform of regulation of the legal profession
Devolved	• Medical and dental professions • Architects • Law profession	• Royal Mail performance targets • Railway timetabling • Rail passenger's charter • National rail enquiry scheme • Royal Charters: (most universities, some schools, hospitals, many charities, professions)
Facilitated	• Internet Watch Foundation • Safe Sludge Matrix • Energy marketing, debt, disconnection and billing • OFT approved codes of practice • Water consumer debt • Banking and mortgage codes	• Postal service company performance (non Royal Mail)
Tacit	• Press Complaints Commission • Complementary health practitioners • Mobile phone mast planning • Responsible drinking • Travel agents • Media content regulation • Family law solicitors • Water customer voluntary codes • Chemical industries: 'responsible care'	• Rail engineering best practice and manpower plans

Overall, the survey showed a wide range of perceptions on the nature of self-regulation and co-regulation. It is true that at a general level a consensus can be discerned: co-regulation is seen to be when there is a clear and explicit role for public authorities in association with the regulated industry while self-regulation is when regulation is undertaken primarily by the industry. Beyond this, however, there is a diversity of views on various aspects such as the roles of public and regulatory authorities, the role of law and who is subject to regulation (eg a single organisation, a group, or a whole industry). When perceptions are simplified to a single dimension of regulation (the role of law and public authorities) there is not only a diversity of views but an overlap between perceptions of self-regulation and co-regulation. One aspect that is clear is that self-regulation has much more currency in most sectors (all except communications) than co-regulation.

SELF-REGULATION AND THE REGULATORY STATE

As noted, the perceptions of regulation can be simplified to a single dimensional spectrum. The dimension is the role of public authorities and law which is considered to be one of the central aspects of regulation. The examples described in this chapter fit the various categories up to a point: there are often a number of examples which fit neatly but others which do not fit as well. This reflects the problems of simplified classification, as discussed in chapter 4 the reality of regulatory regimes is complex and multi-dimensional.

What the examples do show is the important though varied role of the state across almost all areas. The role of the state is of course legally defined and central in the first three categories above: 'co-operative', 'delegated' and 'devolved'. In the fourth category, 'facilitated', there is a clear and explicit role for the state, though the scheme themselves are non-statutory. The role of the state might be the active promotion of self-regulatory schemes which serve public interest purposes. Examples include: the promotion of self-regulatory codes of practice over a wide range of trades by OFT; the encouragement of self-regulatory schemes in relation to energy marketing, billing, debt and disconnection and water consumer debt by Ofgem and Ofwat; the close working of the Home Office and the Internet Watch Foundation in regulating internet content. It is not simply the establishment of these self-regulatory schemes which is promoted, they are also actively supported and overseen by the government and regulators. For example, the OFT monitors and oversees the code of practice which it has approved, another example is the regulation of financial services, notably the banking code which is developed by the industry but monitored closely by the Treasury and the FSA. If any of the schemes are seen to be failing statutory schemes might be introduced: a notable case was the move from the self-regulatory mortgage code to a statutory scheme of mortgage regulation run by the FSA.

Much less obvious, but nevertheless evident, is the role of the state in 'tacit' regulatory schemes - those close to common notions of 'pure' self-regulation. The state's role in these schemes is manifest in at least two ways. First, the schemes were triggered by governmental action of some form, which itself is often a response to a clear public interest problem. Notable cases include the Press Complaints Commission which was a response to concerns in the 1980s about press content and the Calcutt Report, a government commissioned study into the problem. Another case is the self-regulatory code on mobile phone mast planning which resulted from public concerns about the siting of masts and possible detrimental effects and the government commissioned Stewart Report. A second effect of the state is proximity to statutory regulation: there are examples of what can be seen as voluntary enhancement of statutory regulation, possibly for commercial reasons but also to ward off the possibility of more regulation. Examples of this include, the Portman Group on responsible drinking; enhancement of minimum water customer standards; the chemical industry's 'responsible care' scheme; and the code of practice on handling clients by family law solicitors.

The state's role might even be limited to such action as the commissioning of studies or tacit monitoring. However, even these limited actions can have a significant impact on the nature of the regime. Often implicit within the commissioning of studies and tacit monitoring by the state is a threat of the introduction of state led regulation if the industry does not make significant changes to the ways it regulates itself.

The role of the state in regulation is, however, as suggested in the previous chapter more nuanced, and the examples illustrate this. While certain regulatory functions and tasks are undertaken by industry, functions which relate to monitoring, transparency and accountability are often retained by the public authority or even enhanced. In communications, for example, while some of statutory functions have been undertaken by other bodies, such as the ASA, ICSTIS, and Otelo, Ofcom itself has monitored and reported on the activities of these bodies. In environmental regulation while some tasks such as techniques to ensure compliance, inspection

and reporting are undertaken by industry (eg, Pollution Prevention and Control, and drinking water inspection), these tasks are closely overseen by the relevant regulator. If oversight processes reveal any problems more stringent regulation might be introduced, and vice versa. In cases of 'co-operative' regulation while many tasks are undertaken by industry often in working groups, they are closely monitored and overseen by the regulator. In the case of airport regulation, for example, the CAA has initiated an experiment that it refers to as 'constructive engagement' with industry but it has made clear that if it will judge its success and will return to more conventional techniques if necessary.

Non-statutory forms of regulation are also subject to close monitoring and oversight by public authorities. As noted above, for example, Ofgem and Ofwat oversee the self-regulation of consumer debt, marketing etc, the OFT oversees the codes of practice it has approved, and the consumer code for banking is overseen by the FSA and Treasury.

6. EMERGING CONCLUSIONS: EMBEDDED SELF-REGULATION

The implications of the research findings have been summarised below under seven sub-headings grouped in relation to the context of the regulatory state, the emerging regulatory paradigm involving embedded self-regulation, and the consequential policy implications. We use co-regulation as an 'umbrella' term covering our five categories of embedded self-regulation.

Context - the regulatory state and the better regulation agenda
- Enveloping self-regulation within the regulatory state;
- Characteristics of regulatory regimes;
- Regulatory governance: transparency and accountability for better regulation.

Co-regulation - the new regulatory paradigm?
- Self-regulation within the regulatory state;
- The terminology and classification of self and co-regulation.

Policy implications - developing and sustaining the new paradigm
- Compliance and performance measurement requirements;
- Transparency - building knowledge and awareness.

Context - the regulatory state and the better regulation agenda

Enveloping self-regulation within the regulatory state

- the regulatory state now 'envelops' all forms of self-regulation (creating self-regulation 'within' the regulatory state);

- self-regulation has therefore to be interpreted in the context of meeting (either tacitly or actively) certain public interest objectives.

The literature suggests quite convincingly that the state has evolved considerably over the last 200 years, and three main characterisations (or 'ideal' types) suggest themselves, although, of course, there is much debate and overlap.[106] We could start with the laissez-faire, or 'framework' state of the early nineteenth century; progressing to the social market or 'providing' state of the mid-twentieth century, with its commitment to publicly owned industries and services; then transforming and extending itself into the liberal market, 'regulatory' state of

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[106] "In the closing decades of the twentieth century, fundamental changes took place in the governments of the advanced capitalist democracies. States across Western Europe and much of the Anglo-Saxon world divested themselves of industries that for generations had been publicly owned. Coalitions made up of public agencies and private interests tried systematically to dismantle regulations restricting competition in markets. Inside states, there took place fundamental reorganizations of the core of governing machines with the aim of stripping down the core and reshaping the way governing tasks were defined. In policy fields as diverse as central banking, regulation of the physical environment, regulation of food safety, and regulation of health and safety at work, governments began to set agencies free from partisan political control in an effort to guide policy by technocratic imperatives rather than by the outcomes of partisan, majoritarian politics". Moran (2003), p12.

the late twentieth century to date. The key point for our research is that self-regulation cannot be viewed in isolation from the context of the regulatory state as a whole. The work of Moran has been prominent in this regard and **Table 8** draws from his analysis.

Table 8: Characterisations of the regulatory state

The 'regulatory' state (liberal market)	late 20C/21ˢᵗ	**high modernism**: from government to governance 'steering not rowing'	formality of rational policy-making balanced by the risk of policy-making with hyper innovation
The 'providing' state (social market)	early/mid 20C	**government**: the providing state 'steering and rowing'	publicly owned industries and services, eg, the nationalised utilities and network industries
The 'framework' state (laissez-faire)	19ᵗʰC	**'club' government and regulation**:	informality of rules based on 'class' structures and elites with self-regulation

The traditional view of self-regulation as an activity remote or removed from the interests of the regulatory state is therefore an anachronism. Whilst there are still examples of pure self-regulation of the traditional form, the examples of chapter 5 indicate that even here it is reasonable to assert that the regulatory state exhibits at least a 'passive' interest in it; a passive interest which would be engaged should there be any 'shock' (or 'event') which activates the interest of the regulatory state. Such shocks typically lead to a new state of regulatory affairs involving greater state involvement. The new state (or equilibrium) is then maintained, subject to satisfactory performance or the absence of further shocks to the system. Some analysts have referred to this process as 'punctuated equilibrium', illustrated in **Figure 9**.

Figure 9: Punctuated equilibrium of regulatory states
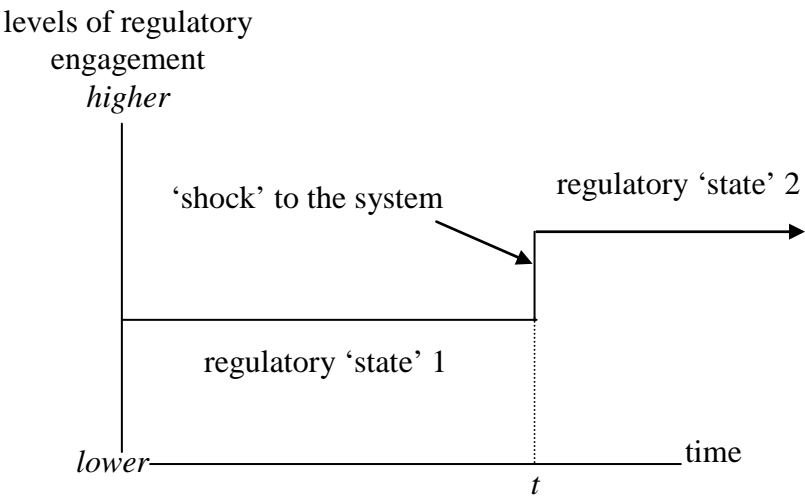
The context of self-regulation today is therefore one of 'enclosure' by the regulatory state. Where self-regulation operates, it operates with the sanction, or support or threat of the regulatory state. The modern regulatory state has become all-pervading in the ambit of its

attentions, and self-regulation has now to be seen in this new context - simply as one of the 'instruments' available to the regulatory state.[107] This might be illustrated in the following way (**Figure 10**):

Figure 10: Two worlds become enclosed

Two domains   **Enclosure**
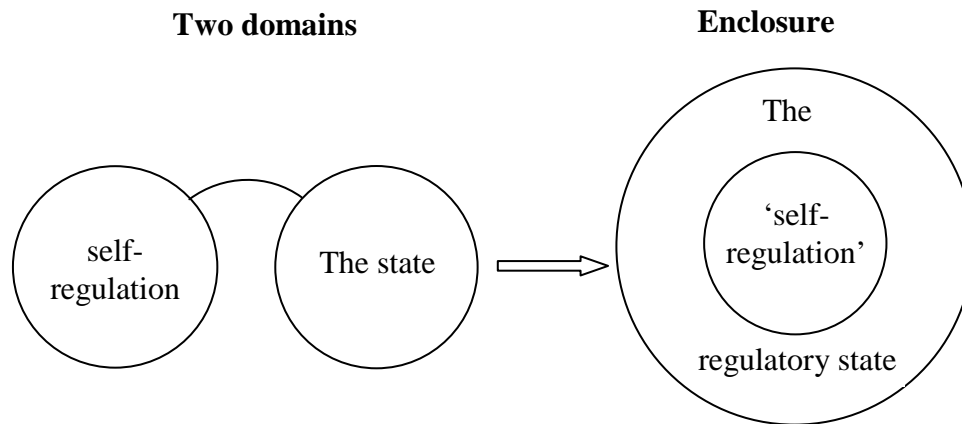
Characteristics of regulatory regimes

• regulatory regimes may be dysfunctional

The literature also shows quite convincingly that regulatory regimes may be 'misaligned' for various reasons, causing inefficiency, perverse behaviours and unintended outcomes. Different regulatory regimes develop according to a variety of pressures.

These pressures and characteristics of the regulatory state have been well analysed by Hood, Rothstein and Baldwin.[108] They sought to answer the question why regulatory regimes varied, and why some seemed poorly aligned with the arrangements which might have been expected based on an objective (or normative) 'public interest' theory of the regulatory state. That theory is typically founded in arguments about market failures, and the methods by which the state can correct for those (hence it is often judged to be econocentric in outlook), but can be generalised to include both market and non-market failures (Baldwin and Cave, 1999). 'Conduct failures' might therefore be a better description. Inequitable distributional outcomes resulting from the market place can be incorporated as a form of 'market failure' because the market has not delivered an outcome acceptable to the community, and thereby the regulatory state seeks to correct for it (for example, by requiring equal opportunities for the disabled or by lump sum transfers of income through social security and welfare systems).

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[107] "…'entrepreneurial governments have begun to shift to systems that separate policy decisions (steering) from service delivery (rowing)'. This image of a new kind of steering state provides the most direct connection between the language of governance and the language of a 'regulatory state'. 'Regulation' is a notoriously inexact word, but its core meaning is mechanical and immediately invokes the act of steering. A regulator governs equilibrium in a physical system - whether the system is as humble as thermostatically controlled domestic central heating or as elaborate as a large mainframe computer. Regulation in this sense is a form of cybernetic control: the regulator is a governor receiving information about the state of the system and its interaction with its environment. If anything could take us to the kernel of the regulatory state, it would be this cybernetic image". Moran (2003), p13.

[108] Hood C, Rothstein H and Baldwin R (2001), The Government of Risk, Understanding Risk Regulation Schemes, Oxford University Press.

Hood, Rothstein and Baldwin's answer was found by asking the question: How does context shape content in risk regulation regimes? They identified three 'shapers' or drivers:

- 'market failure' pressures (eg, monopoly power, externalities, missing markets and public goods);
- 'opinion-response' pressures (eg, public opinion);
- 'interest-driven' pressures (eg, from organised self-interested groups).

All were found to have significant explanatory power for various extant regulatory regimes, thereby harnessing both normative and positive models in describing the distribution of regulatory regimes. **Figure 11** illustrates this, drawn from Diagram 4.1 of Hood et al (p62).

Figure 11: Drivers of regulatory regimes
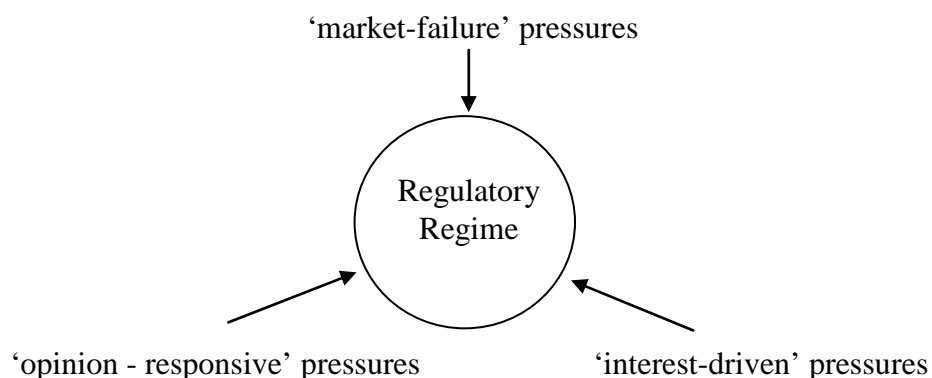
Regulatory governance: transparency and accountability for better regulation

- accountability of both the regulators and the regulated through transparency of process and reporting is the essential operating mechanism required to maintain effective regulation.

The key question is whether the distribution of regulatory regimes remains essentially static, and subject to all three drivers depending on the circumstances, or whether the regulatory state has mechanisms which promote the 'public interest' drivers and militate against the special interest and 'capture' drivers. The UK perspective is that promoting good regulatory governance through effective accountability processes provides those mechanisms, supported by an 'institutionalised' framework of principles of good regulation and internal checks and controls. Codification of the principles of good regulatory governance is therefore essential to creating a climate of expectations about regulatory conduct which provides a discipline on regulators to operate in the 'public interest', and to develop and reform the regulatory framework as necessary to that end.

Table 9 sets out the three elements - regulatory purpose, regulatory means and the regulatory framework - and identifies each of their key characteristics and guiding principles which should inform the design of both the regulatory state and the actions of its constituent regulators.

Table 9: The elements of regulatory governance

Elements	Characteristics	Guiding principles
regulatory purpose	objectives (outputs) 'The problem to be addressed'	objectivity, coherence, rationality
regulatory means	instruments (inputs) 'The options available to solve the problem'	proportionality targeting consistency
regulatory framework	structure and process (governance) 'The control mechanisms aimed at optimising regulatory outcomes'	transparency accountability

Important aspects of the regulatory framework are set out in **Table 10**. Under the three stages of accountability (as defined by the Constitution Committee of the House of Lords in its report 'The Regulatory State: Ensuring its Accountability), 'giving reasons for decisions' should be seen to be encompassed more generally in the preparation of regulatory impact assessments (RIAs) by regulators; 'exposure to scrutiny' would include effective consultation processes as well as the independent audit of regulatory activities by Parliamentary committees and other authoritative bodies, such as national audit offices; and 'the possibility of independent review' refers to courts and other tribunals which have the power to overturn regulatory decisions that are either *ultra vires*, inequitable or unreasonable.[109] The structure and process considerations are concerned with entrenching the regulatory framework through codification and institutionalisation, which is an important aspect of the design of the regulatory state. In effect, regulating the regulators requires the same control sequence of setting standards, monitoring and enforcement which the regulators apply to regulated companies - but applied to themselves. The historical development of codification and institutionalisation in the UK has been interestingly covered by Moran (2003). A key transition in this regard is from the tacit to the explicit.

Table 10: The regulatory framework

Structure and process considerations	Three stages of accountability
- the legal framework - separation of roles and responsibilities - principles of good regulation - forming a 'whole of government view' - provision of relevant information	- giving reasons for decisions - exposure to scrutiny - the possibility of independent review

Separation of roles and responsibilities is an important feature for achieving effective accountability and effective regulation. One aspect of this, the development of the so-called 'independent' regulator, may be misunderstood, however, and cause concern that a wedge has been driven between the requirements for democratic accountability of the regulatory state and the decision-making of independent, technocratic regulators. This need not be the case, and the answer is to see independence as 'within', rather than 'of', the state.

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[109] House of Lords Select Committee on the Constitution (2004), The Regulatory State: Ensuring Its Accountability, 6th Report of Session 2003-04, Vols I-III, HL Paper 68 I-III.

'Co-regulation' - the new regulatory paradigm?

Self-regulation within the regulatory state

- the new 'wave' of self-regulation is a result of the development of a 'better regulation' agenda within the regulatory state, such that regulators now increasingly focus on strategic oversight of industry-based solutions for achieving outcomes which correct for either actual or potential market or conduct failures. This process might usefully be termed '**subsidiarity**'. It enables regulators to harness, in a properly and effectively controlled way, the knowledge and motivation of regulated industries to achieve good outcomes in the public interest.

- the new wave of self-regulation should not be seen as a 'deregulatory' agenda, but as a more efficient and effective mode of operation for the regulatory state - a 'better' regulatory agenda.

In the post-privatisation or 'liberalised' world of the regulatory state, the emphasis is on regulating behaviour (via policy not service provision, ie, 'steering' not 'rowing'). The consequence of this is two complementary trends - an extension of the regulatory state, whereby it 'envelops' previously self-regulatory activities within its sphere of interest, but operates at the strategic level such that it delegates or devolves responsibility for securing public interest outcomes to (apparently) self-regulating industry arrangements. In this way, markets are harnessed to achieve effective, but 'light touch' regulation. These arrangements could be termed 'co-regulation' between the regulatory state and empowered 'industry' bodies. The self-regulatory arrangements, as part of co-regulation with the regulatory state, range from the formal to the informal (demarcated on our classification as co-operative, delegated, devolved, facilitated or tacitly-supported).
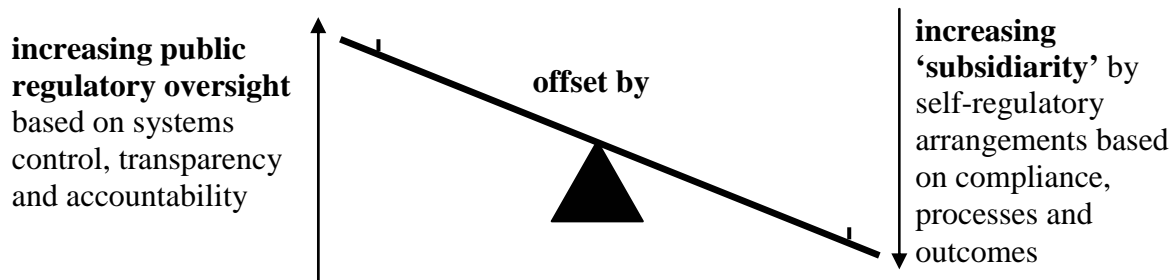
The research has exposed a potential reconciliation between what are apparently two contradictory trends - the inexorable development of the scope of the regulatory state, alongside the promotion of more self-regulatory arrangements. The answer is effective regulatory governance reflecting the work of bodies such as the Better Regulation Task Force. Increasing involvement of the regulatory state is balanced by focusing that involvement on more system-based controls, with effective accountability mechanisms for both the regulators and the regulated based on transparency and scrutiny. These accountability mechanisms operate as a control system on both parties, and allow for the use of 'subsidiarity', whereby self-regulation by industry can be substituted for direct regulation, based on delivering outcomes, supported by compliance processes and transparency of performance.

The response has been the development of a better regulation agenda (with institutionalisation of conduct objectives, eg, the BRTF Principles of Good Regulation, processes for transparency and accountability, eg, RIAs and consultation, and co-ordination and harmonisation, eg, the Better Regulation Executive promoting a 'whole of government view'). This has facilitated a return to self-regulation, but in a new context. It is interesting to note here how broad is the BRTF's definition of regulation, being any action that is intended to change behaviour for public interest purposes (eg, publication of performance league tables).

Figure 12 illustrates the idea of the new regulatory paradigm involving what might be seen to be a form of regulatory 'subsidiarity', whereby the detailed implementation and achievement of regulatory outcomes can be delegated ('downwards') to industry bodies and private sector agreements. This debate has been well analysed by Michael Moran when considering the transformation of self-regulation. As Moran notes "The dominant analytical paradigm for the

modern regulatory state pictures it as an institution concerned with steering self-regulating networks…" (op cit, p69).

Figure 12: The new regulatory paradigm?

increasing public regulatory oversight based on systems control, transparency and accountability

offset by

increasing 'subsidiarity' by self-regulatory arrangements based on compliance, processes and outcomes

However, representation of the regulatory state as 'the governor of the machine' (ibid, p13) has to be accompanied by a 'better regulation' agenda. This is to both control the activities of the regulatory state, which has become 'all-embracing', and to provide the necessary legitimacy to a representative democracy which operates through technocracy rather than decision-making by direct participative methods of democracy. The new wave of self-regulation should not therefore be seen so much as a 'deregulatory' agenda, but as a more efficient and effective mode of operation for the regulatory state - a 'better' regulatory agenda. Accountability of both the regulators and the regulated, through transparency of process and reporting, is the essential mechanism required to maintain the new regulatory paradigm or settlement. From the regulated companies' point of view, it requires effective compliance regimes by industry to ensure that public interest outcomes are achieved and performance builds public confidence and consent.

The support for self-regulation should not be interpreted therefore as evidence of a deregulatory agenda *per se*, where deregulation is seen as disengagement by the regulatory state based on ideas of private and public domains. To the contrary, the modern regulatory state manifests its continuing responsibility, but discharges its attendant obligation to effect outcomes by using different means, including promoting self-regulation.

The terminology and classification of self and co-regulation

- the diversity of views and knowledge on what constitutes self and co-regulation is so great that it is unlikely that a single term can in the future provide a coherent definitional basis on which there would be consensus;

- self and co-regulation have therefore to be qualified terms to match the circumstances, including types of co-regulation, where co-regulation might be reserved for the 'vertical' arrangements or understandings between public regulatory bodies and private industry bodies;

- various types of self-regulation can therefore be grouped under the general heading co-regulation, whilst other forms of co-regulation might best be termed 'co-ordinated' regulation (as between public regulators) or 'co-operative' regulation (eg, bilateral arrangements between companies and regulators).

The modes of regulation can therefore be seen to operate directly and indirectly, and indirect regulation using private sector institutional arrangements can be literally characterised as 'co-regulation', that is, self-regulation with public oversight. Types of self-regulatory arrangements have been put into five categories reflecting the degree of formality (legal or contractual). These

are co-operative, delegated, devolved, facilitated and tacitly supported self-regulation. This would include direct regulation, split into occasional reactive (*ex post*) and regular proactive (*ex ante*). The 'hierarchy' can be illustrated as **Table 11**:

Table 11: Modes of embedded self-regulation ('co-regulation')

Direct

- **co-operative** | *Occasional* - eg, competition authority inquiries and enforcement
Regular - sectoral and thematic regulators
setting a price control - eg, economic regulators
setting environmental standards eg, Defra
monitoring and enforcing environmental standards - eg, The Environment Agency

Indirect
- **delegated** | *contracted* - eg, the ASA from Ofcom

- **devolved** | *statutory* - eg, the GMC (statutory self-regulation)
the Law Society (professionally-led regulation)

- **facilitated** | eg, OFT promoted codes of practice - bestowed authority

- **tacit** | informally supported self-regulatory regimes based on 'understandings' with government
industry association - codes of practice/dispute resolution/enforcement
individual company - corporate governance

The diversity of examples and perspectives on self and co-regulation observed during the research means that neither term is likely to find common cause and consent as a suitable definitional term. Self-regulation has lost the traditional contextual meaning, and has a pejorative sense for those who the regulatory state is seeking to protect (would you trust self-regulation?). So self-regulation has to be accompanied and classified according to the specific arrangements put in place by the regulatory state, and which reflect the nature of its oversight and involvement (hence, for example, delegated self-regulation). Co-regulation is an even less well-grounded term and therefore at best it serves the function of grouping all types of self-regulation where the regulatory state harnesses private sector institutional self-regulatory arrangements. Whilst co-regulation could be applied to 'horizontal' arrangements between different regulators within the regulatory state, or 'vertically' between the government and independent regulators within the regulatory state; the former is likely to founder on the necessity for the 'independent' regulators to be seen to preserve that independence; a message not best signalled by the use of the word co-regulation. Here, as with direct regulation and its relationships with the regulated - the best interpretation is perhaps as 'co-ordinated', reserving co-regulation for the set of self-regulatory arrangements described above.

In the UK, the Communications Act 2003 incorporates a duty on the Office of Communications (Ofcom) to promote self-regulation. Yet if the government seeks to emphasise the deregulatory elements of a better regulation agenda, then the potential for misunderstanding caused by the terminology of self-regulation needs to be addressed if there is to be public confidence in the process (NCC, 2000a). Self-regulation by an 'industry' or an incumbent in relation to activities for which it has monopoly power will always be viewed sceptically, given concerns over potential abuse resulting from concerted actions or predatory behaviour. The regulatory state can only 'tolerate' self-regulation in these respects where it demonstrably meets public purposes (ie, it substitutes for action which would otherwise be taken directly by the regulatory state). The

development of 'co-regulation' is therefore not so much an agreement between equal parties, as a delegated relationship with the principal party being the public oversight body. In this respect, for example, the UK's Advertising Standards Authority - an industry player - is carrying out functions delegated by, and on behalf of, Ofcom. Similar developments can be seen in the UK legal profession, where traditional 'self-regulation' (termed 'professionally led' regulation) is now to be overseen by a public oversight body, the Legal Services Board.

Perspectives on co-regulatory pairings include public body with private body (vertical), public regulatory body with another public body (vertical and horizontal within the regulatory state) and regulated organisation with civil society organisations as stakeholders, eg, representing customers (retail or wholesale) or involving lay members. The following **Figure 13** is simply one way of 'envisioning' the connections:

Figure 13: The transparent 'parasol' of 'co-regulation'
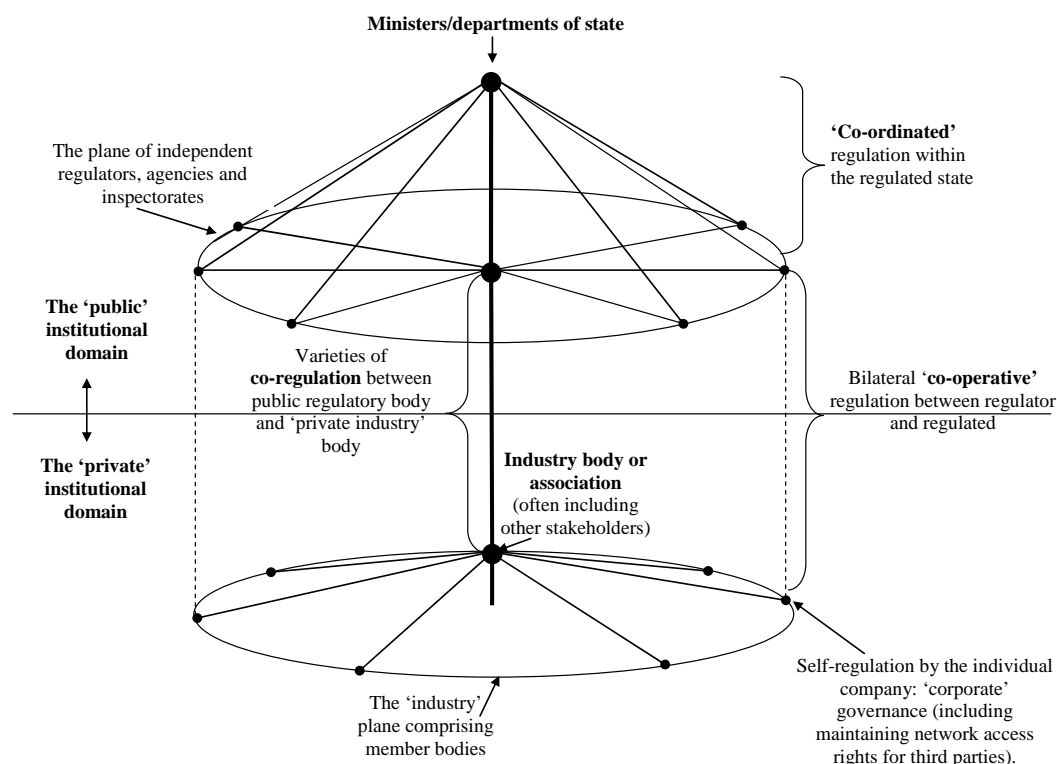
Policy implications - sustaining the new paradigm

The survey shows that some sectors have, or are developing, co-regulatory arrangements more extensively than other sectors (telecoms and airports might be contrasted, for example, with the water sector). The potential, however, is present in all sectors since regulators have a choice on the extent to which their monitoring and control is based on predominantly *ex ante* or *ex post* foundations. There are, of course, 'half-way houses', which might in any event be necessary to develop the trust and procedures necessary for a full transfer of *ex ante* responsibility to regulated companies, then to be monitored on a 'competition authority approach' by the relevant regulator. Such ideas are timely for debate if the potential of the new regulatory paradigm is to be explored and possibly entrenched. An indication of this was trailed by Professor Stephen Littlechild in his recent Beesley lecture, entitled 'Beyond Regulation' (4 October 2005

forthcoming), in particular the section on negotiated settlements in North America (p18).[110] Interestingly, such discussion might reveal an important rationale for developing the role of independent consumer bodies (which at present is ambiguous given the statutory duty of customer protection placed on the economic regulators), since they would become the primary *ex ante* interface in the customer/company negotiations replacing the traditional model of the formal periodic review. As Professor Littlechild said in his lecture:

> "I rather think that Offer's consumer committees would have enjoyed hammering
> out distribution price control settlements with their regional electricity
> companies. They might not all have come to the same conclusions as Offer and
> Ofgem did, but we should have learned much from the diversity and innovation.
> I would not rule out the possibility of such an approach even now, perhaps with a
> regulatory backstop in the event of a failure to agree on certain aspects. But this
> lies beyond the scope of the present lecture" (p.19).

The regulator would clearly remain to provide a formal framework for such negotiations and to carry out the on-going monitoring necessary to be a constraint against the abuse of monopoly power *ex post*. The relationships of the various parties then has the opportunity to evolve to a position where governments focus on outputs and companies and customers focus on fair, efficient and equitable pricing of inputs to achieve those outputs. **Figure 14** sets this out schematically.

Figure 14: Roles and relationships within embedded self-regulation
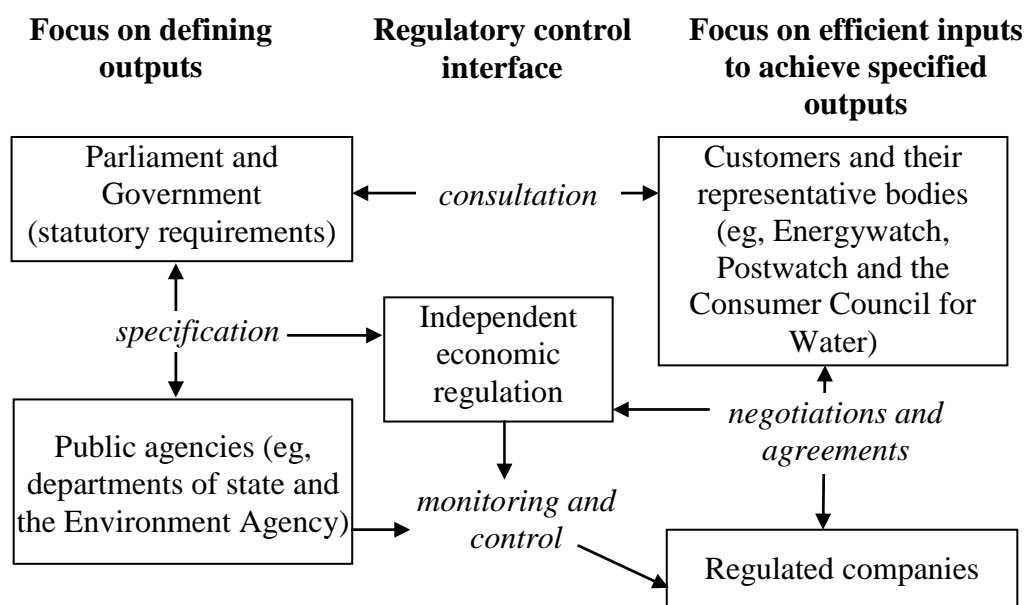
Compliance and performance measurement requirements

- the new regulatory model of self-regulation to deliver 'public interest' outcomes on behalf of the regulatory state requires **effective compliance regimes** by industry to ensure that outcomes are achieved and performance builds public confidence and consent. Otherwise self-regulation will be taken away;
- performance criteria for compliance regimes must relate to the objectives to be achieved. Hence, regulators have to specify clearly the outcomes required.

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[110] Littlechild S (2005), Beyond Regulation, the Beesley lectures on regulation, Series 15, 2005, the Regulation Initiative, IEA and London Business School, 4 October, forthcoming.

Compliance regimes within the regulated industries play two roles. First, they help secure outcomes which meet regulatory objectives and, secondly, the reporting requirements help hold both the regulator and the regulated to account - the latter for delivering (or not) outcomes which retain (or not) public confidence in self-regulatory arrangements, and the former for their design, monitoring and maintenance of a core regulatory system which secures (or not) public confidence. Compliance regimes are a 'joint product' for the regulator and the regulated.

Clear arrangements have to be made, therefore, for effective relations between the regulators and the regulated in designing and maintaining self-regulatory systems which meet public interest regulatory requirements and deliver good outcomes. Such arrangements need to be 'institutionalised'. Multiple indicators are likely to be relevant to judging whether self-regulatory arrangements are delivering good outcomes - and the framework for analysis and interpretation has to be clear, given that indicators such as complaints and press articles might not always be well-founded. Forming a 'benchmark' of the counterfactual might be difficult, and involves judgement and skills in communication.

Transparency - building knowledge and awareness

The policy implications of the research findings emerge naturally from the fact that good regulation is built on effective accountability. Developing regulation within a co-regulatory framework is an example of how the practice of regulation evolves to achieve better cost-effective outcomes, but is dependent, if public confidence is to be secured and maintained, on good regulatory governance. Industries which have the opportunity to self-regulate must demonstrate that they can be trusted with it (through the rigorous application of compliance regimes and reporting of performance), and regulators must demonstrate that their regulation is cost-effective and in the public interest (through the rigorous application of the principles of better regulation and accountability for performance through, in particular, the preparation of sound regulatory impact assessments). This requires explicit processes to secure transparency.[111] Good regulatory governance not only controls the application of existing regulatory policies but helps avoid potential policy fiascos.[112] Transparency requires that:

- regulators should be explicit about how self-regulatory arrangements are used to meet their public interest obligations and duties, having regard to the application of risk-based regulation and the compliance regimes necessary to achieve that;

- the mechanisms for monitoring and performance measurement of self-regulatory arrangements should be explicit, which requires a variance analysis between expected and actual outcomes;

- the statutory framework for self and co-regulation should be well understood and 'fit for purpose'. At present, its role comparatively among the sectoral regulators is rather uncertain;

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[111] "If any single sign could sum up the changes that have come over British government in the last 30 years, it would be the shift from the tacit to the explicit - from a world of broad informal understandings to one where arrangements became more precisely codified. This seemingly small shift was associated with great developments, notably the destruction of the oligarchical club system and, in its fullest culmination, with the rise of systematic surveillance and reporting that has marked the new regulatory state. The substantive impact of the European Union has been to magnify this shift from the tacit to the explicit and, thus, to reinforce the displacement of the traditional by the modern". Moran (2003), p167.

[112] "The great changes that succeeded the collapse of club government were justified on all sides in a rationalizing language of policy competence and effectiveness - as one naturally would expect of a quintessentially modernist enterprise. Yet the age of the new regulatory state has also been the age of policy fiasco. Fiasco is, as we shall see, both a reflection of hyper-innovation and a force driving the state into even greater frenzies of hyper-innovation". Moran (2003), p156.

- regulators should promote a better public understanding of the role of self and co-regulation. This might include (i) studies by bodies such as the BRTF, the BRE or the NAO which aim to harmonise or standardise the understanding of self-regulation within a co-regulatory framework - and whether codification in legislation or general terminology would be helpful; (ii) developing forums for debate, whereby regulators and/or the regulated can exchange both ideas and expose themselves to accountability for the on-going operation of self and co-regulatory systems.

APPENDIX

Examples in the five categories of self-regulation

'Co-operative': co-operation between regulator and regulated

This category involves the co-operation between public authority and industry on matters relating to statutory regulation. Although some interviewees thought co-regulation might be an appropriate term to describe this form of regulation, we believe the term 'co-regulation' is never used by practitioners. The co-operation can be in relation to the proposals for and development of new/amended regulation carried out in working groups or industry committees with representation from the regulatory authority. It may also involve co-operation between regulator and industry on regulatory tasks associated with implementation and compliance, eg implementation techniques, monitoring, reporting and enforcement. Seven examples of this kind of regulation are given in the following **boxes (1-7)**:

Box 1. Energy networks regulation.

The price control review process of the regulation of access to energy networks is an area in which there has been increasing co-operative working between the regulator and the regulated. This has developed in a gradual process of change from the early and mid 1990s which was more of a unilateral process. For the electricity distribution price control review (2003-04), for example, a number of working groups were created under the auspices of Ofgem covering such issues as incentives, uncertainty, assessment of consumers' willingness to pay, quality of supply, structure of charges and financial modelling.[113] Closely connected to the process of coordination was the Price Control Group established by the Energy Networks Association which involved all the electricity distribution companies.[114] Similar working groups are likely to be established for the regulatory review of gas distribution companies. Also in the forthcoming review of transmission price controls (of both electricity and gas) the regulator is expected to work closely with the four companies involved (National Grid Company, Scottish Power Transmission, Scottish Hydro-Electric Transmission in electricity and Transco NTS for gas).[115]

Box 2. Electricity trading regulation.

With the introduction of the British Electricity Trading and Transmission Arrangements (BETTA) changes to the mechanisms for the management and operation of key aspects of the grid system have been required.[116] As a result the 'GB panels' have been set up for administration and reform of three aspects: the Grid Code across GB; the Balancing and Settlement Code; and the Connection and Use of System Code. These panels clearly operate within the auspices of Ofgem which has powers of approval and veto over their suggestions. They are not viewed as co-regulatory bodies by Ofgem or the industry but they are central to the development and reform of the grid codes and involve processes of co-operation between the regulator and industry.

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[113] Ofgem (2003), Developing Network Monopoly Price Controls, Initial Conclusions, 54/03, June.
[114] Interview: Energy Networks Association. Also see www.energynetworks.org/reg.asp, [22/08/05]
[115] Ofgem (2005b), Transmission Price Control Review, Initial Consultation, July.
[116] Ofgem (2004), Establishing GB Panels for the CUSC, the Grid Code and the BSC under BETTA, Ofgem/DTI, Conclusions, April.

Box 3. Airport regulation.

In a more explicit change in the regulatory process, the Civil Aviation Authority has proposed to move to a co-operative approach with the airports and airlines for the price control of London airports (Heathrow, Gatwick and Stansted) and Manchester Airport.[117] This is described as a 'new regulatory approach' which involves more participation by the companies involved and the facilitation of more negotiation between the airports and the airlines. The CAA foresees that during the forthcoming price control review some of the work it has undertaken in the past will be undertaken by the airports and the airlines. This work involves identifying certain key data including: volume and capacity requirements; the nature and level of service outputs; opportunities for operating cost efficiencies; the nature and scale of the investment programme and the associated efficient level of capital expenditure; the revenues from non-regulated charges by the airport to airlines; and, the elements of service quality and investment to which financial incentives can be attached (CAA, 2005, p6). This process has been initiated to attempt to reinforce rather than interrupt the normal commercial interactions which take place between airports and airlines. The CAA stresses that this is a 'regulator-led joint' process and thus does not involve the CAA relinquishing its statutory duties. The regulator will lead in specifying the framework for the whole process, the overall parameters for the working arrangements and the airport/airline dialogue. It also stresses that, if the process does not function satisfactorily, it reserves the right to move back to a more conventional price control process.

Box 4. Railways: Network Code.

The Network Code is a common set of rules applying to those who are party to track access contracts governing the use of and access to the rail network. The need for a Network Code, rather than only bilateral contracts, arises because there are certain industry processes which are common to all train operators and there are significant benefits in having common processes. The Network Code sets out industry procedures for access to the network, Network Rail's contractual obligations in the management of the network, and the obligations and protection of train operators. Modification to the code is undertaken primarily by the industry in a committee named the 'class representative committee' which has representatives of four classes of railway companies: Network Rail (the infrastructure operator), franchised passenger train operators, non-franchised passenger operators and non-passenger train operators. Changes have to be approved by the regulator which can also impose changes.

More substantial reforms to the Network Code, such as those resulting from the government's rail review in 2004 and the Railways Act 2005 are led by the regulator. Reforms will cover a wide range of areas including the management of operational performance; timetabling; changes to the network and trains on the network; dispute resolution; and third party rights. The whole process, however, involves significant co-operation with industry. The ORR considers that the industry should provide an active input into the reform and a number of industry working groups have been set up for that purpose. The government's recent policy reforms to some extent foster this process, in particular giving more responsibility to Network Rail for whole-industry performance and timetabling. The regulator would also like industry to develop its own solutions where possible and more involvement of the rail companies in areas such as the Network Code may improve the working between Network Rail and the train operators.

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[117] CAA (2005), Airport Regulation, The Process for Constructive Engagement, May. Interview: CAA.

Box 5. Railway safety and standards.

Railway safety is a highly regulated area and, with the significant involvement of state regulatory authorities, appears to be a paradigm example of classic state regulation. However, there are significant elements of collaboration between state authorities and industry in safety regulation. In particular an industry body, the Rail Safety and Standards Board set up in 2003, plays a leading role in the specification and development of safety standards. The RSSB has numerous functions which include the management of the production of 'Railway Group Standards' (detailed safety and operational standards), the development of safety strategies, and the measurement of safety performance and risk.[118] Up to 2005 the overall safety regime has been managed by the Health and Safety Executive and a constituent body of the HSE, Her Majesty's Rail Inspectorate (safety regulation is to be transferred to the Office of Rail Regulation). In general, the HSE sets the framework for safety regulation and high level principles, such as the ALARP principle (as low as reasonably practicable) and the RSSB and various industry companies develop the detailed standards. There are three key areas of the rail safety regulatory framework set by the HSE.[119] First, the requirements of the Health and Safety at Work Act 1974, which put much responsibility on those who own and manage systems, have to be managed. Second, an approvals regime in which operators have to gain approval from the HSE before bringing new or altered works and equipment into use. Third, a safety case regime which is required for safety critical industries such as the railways. The safety case regime is an example of co-operation between the state regulatory authority and industry: Network Rail and train operating companies are required to develop safety cases for certain works and equipment which have to be approved by the HSE. Although rail safety regulation is a clear case of co-operation between state regulatory authorities and industry, the terms self-regulation and co-regulation are not used.

Box 6. Environmental protection: PPC (Pollution Prevention and Control).

Pollution from industrial installations has been regulated for over 150 years. In Britain the main regulatory framework is the PPC scheme which is based on the Pollution Prevention and Control Act 1999.[120] On the face of it, the regulation of pollution, particularly from hazardous industries, is a clear example of statutory regulation. While in many ways this is the case, the PPC scheme aims to be less prescriptive, more outcome focused and more co-operative with the regulated industries.[121] Thus, although outcome based standards are set by a governmental body, they do not prescribe how outcomes are to be achieved. In order to meet the standards industry takes on more responsibility for checking, monitoring and evaluating compliance with the specified standards. In return for undertaking these regulatory tasks, companies may be offered some incentives such as less regulatory intervention or reduced charges. Governmental intervention, in the form of oversight, nevertheless remains strong, principally to ensure that industry effectively performs the regulatory tasks and achieves the regulatory outcomes. A high level of inspection and close co-operation between regulators and industry, possibly with advice to industry, is therefore an expectation of this form of regulation.

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[118] http://www.rssb.co.uk/whatdwd.asp
[119] http://www.hse.gov.uk/railways/aboutus.htm
[120] http://www.defra.gov.uk/environment/ppc/
[121] Written response: Environment Agency.

Box 7. Drinking water inspection.

There are legally defined standards for drinking water quality which derive from European directives and other legal standards set in the UK.[122] This, together with the Drinking Water Inspectorate which has statutory enforcement duties delegated to it by ministers, makes drinking water quality appear to be a clear example of statutory 'command and control' regulation. There is, however, a significant degree of self-regulation in the process of monitoring and reporting of drinking water standards.[123] The DWI does undertake sample testing and it demands traceable and transparent monitoring and reporting processes but it relies substantially on the companies for much of its information.

Working groups and committees are ubiquitous in the regulated industries but much of time they are seen to provide only an advisory input rather than a regulatory input. Sometimes, however, the difference between these two roles is unclear. There are also instances when these groups develop their own voluntary codes and standards. The following **boxes (8 and 9)** illustrate two examples of these trends:

Box 8. Telecommunications network interoperability.

The Network Interoperability Consultative Committee (NICC) is a telecommunications industry committee involved in specifications and technical standards associated with the interoperability of networks of competing companies. It operates under the auspices of Ofcom to which it provides advice on the harmonisation of interconnection arrangements. The committee includes representatives of network operators, public exchange manufacturers, terminal equipment suppliers and service providers and there is a separate users' panel.

Categorising this and other telecommunications working groups is not straightforward. In one way it is an example of self-regulation without full statutory backing as many of its outputs are voluntary codes and guidelines on network design and interoperation. In another way it acts as a focus of co-operation on statutory regulation as it involves representatives from industry and the regulator and it can advise on Ofcom on regulatory matters. The term co-regulation is, however, not used by practitioners in telecommunications for this type of arrangement as it is seen as mainly advisory or self-regulatory.[124] This is partly because in telecommunications the term 'co-regulation' is normally reserved for industry bodies which have specific powers and duties delegated to them by the regulator (the next category below). Despite this, the NICC does have similar characteristics to the above examples of co-operative regulation from rail, airports and energy.

There are a number of other industry and user groups under the auspices of Ofcom which do not have any statutory powers delegated to them but operate a process of co-operation between the regulator, industry and users.[125] Carrier Pre Selection and Wholesale Line Rental are examples of network access issues which have such groups. Also there is a Service Providers Forum and a Consumer Issues Task Group.

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[122] Bailey P (2002), Regulation of the UK Water Industry 2002, CRI, University of Bath.
[123] Interviews: Ofwat. Written responses: Water UK, United Utilities, Wessex Water.
[124] Interviews: Ofcom, BT.
[125] http://www.ofcom.org.uk/telecoms/groups/

Box 9. Financial services practitioner and consumer panels.

Within the Financial Services Authority there are the three panels which appear to play a role in co-operation between the regulator and industry and consumers. The Practitioner Panel's role is to provide input into the FSA to assist in meeting its statutory objectives and to represent the interests of industry.[126] The Smaller Businesses Practitioner Panel plays a similar role, while the Consumer Panel 'reviews the policies and practices of the FSA as they affect consumers, and provide feedback and advice on getting a better deal for consumers of financial services'.[127] The Practitioner and Consumer panels have a statutory basis in the Financial Services and Markets Act (2000) which also specifies a procedure for the involvement of the panels in decision making in the FSA. Although the panels are funded by the FSA, they have an independence and are free to publish their own views and commission research on matters of their interest.

To be sure, these panels do not have the power to make rules and the FSA sees them as performing moderating or advisory functions rather than carrying out regulatory tasks.[128] In particular, the term co-regulation does not have currency within the FSA and is not used for these panels. Nevertheless, these panels do play an important role in the process of co-operation within the regulatory decision making process and can be perceived in this way.

Another body clearly within the FSA and part of the decision-making process but including substantial industry and consumer representation is the Regulatory Decisions Committee. This takes major regulatory decisions on behalf of the Board of the FSA and was set up because the Financial Services and Markets Act requires the investigation and recommendation functions to be carried out separately from taking decisions and issuing statutory notices.

There are also cases where the regulatory agency would like to promote more co-operation between the regulator and regulated though the process has hardly begun. One example of this is given in **box 10** below:

Box 10. Qualifications and Curriculum Authority.

The Qualifications and Curriculum Authority (QCA) is required by government to regulate examinations, qualifications and the national curriculum and associated tests. The QCA claims that it is moving towards more self-regulation and in an initiative which aims to make regulation more proportionate and targeted it is reassessing its activities and those of the examinations bodies.[129] There is an argument that the QCA does much work that could be done by the examinations bodies. This possible shift in the regulatory approach can be seen as an attempt to promote more co-operation and coordination between the regulator and the regulated.

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[126] http://www.fsa.gov.uk/Pages/About/Who/Accountability/Practitioner/index.shtml
[127] http://www.fs-cp.org.uk/ct_about_panel.html
[128] Interview: FSA.
[129] http://www.qca.org.uk/12860.html; Interview: QCA.

'Delegated': the delegation of statutory powers and/or regulatory tasks

This category involves a clear act of delegation of statutory powers and/or regulatory tasks by a public authority to an industry or profession-led body. It is Ofcom's view of co-regulation for which it uses the term, and most of the examples in this chapter are from the communications sector. Several examples from communications are given in **boxes 11-15.**

Box 11. Regulation of broadcast advertising.

The communications regulator, Ofcom, has a statutory duty to regulate the content of broadcast advertising (Communications Act 2003). In November 2004, in one of the clearest acts of the delegation of regulatory duties, 'Ofcom contracted out the day-to-day regulation of broadcast advertising content to the Advertising Standards Authority' (ASA).[130] It was proposed by the advertising industry and a group of television and radio broadcasters (Ofcom, 2003, p1). This was a highly formal process which involved extensive consultation and received parliamentary approval under the Deregulation of Contracting Out Act 1994. This Act is a legislative instrument which allows public bodies to contract out some of their statutory functions. An important condition is that the statutory body does not surrender its right to carry out any of the functions or duties granted to it by the primary legislation. The ASA is historically a self-regulatory body which has regulated non-broadcast advertising such as press, cinema and posters. It is composed of representatives of the publishing and advertising industry. Since 1988, the ASA has been backed up by statutory powers under the Control of Misleading Advertisements Regulations and the ASA can refer advertisers who refuse to co-operate to the Office of Fair Trading for legal action.[131] For the delegation of broadcast advertising to the ASA Ofcom has clear procedures of public accountability which include the monitoring of its effectiveness. In addition, the ASA can apply to Ofcom for the imposition of a statutory sanction if a broadcaster fails to comply with a ruling of the ASA.

Box 12. Regulation of premium rate telecommunications services.

The Communications Act 2003 specifies powers on Ofcom to regulate premium rate telecommunications services. Regulatory action is required because there are concerns about the content and price of these services which have been seen to be misleading. Ofcom also has the authority to approve any self-regulatory code made for this purpose and to delegate its regulatory powers to a separate body. The Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS) is an independent, industry funded, self-regulatory body set up in 1986 with the encouragement of the telecommunications regulator OFTEL.[132] To fulfil its duties under the 2003 Act Ofcom assessed and approved the ICSTIS code of practice in December 2003 - in effect this was the formal act of delegating statutory powers to ICSTIS as the co-regulatory body. Ofcom's work in this area will focus on ensuring that ICSTIS has the capability to regulate premium rate services and in so doing, Ofcom is able to fulfil its statutory duties. This will involve approving ICSTIS's code and budget; using its powers to ensure compliance with ICSTIS Directions; carrying out sufficient oversight and using its backstop powers where necessary to make sure that regulation of premium rate services is effective. To aid this process a Memorandum of Understanding has been produced to establish a framework for the relationship between Ofcom and ICSTIS. An aspect of the oversight by Ofcom will include performance and reporting procedure in which ICSTIS, for example, has to report on its activities and specify and report on key performance indicators at regular intervals.

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[130] http://www.ofcom.org.uk/media/mofaq/bdc/regulates/#content
[131] http://www.asa.org.uk/asa/about/history/
[132] http://www.ofcom.org.uk/consult/condocs/icstis/mou/, Oftel (2000), Encouraging Self- and Co-regulation in Telecoms to Benefit Consumers, June.

Box 13. Dispute resolution in telecommunications.

The Communications Act 2003 specifies a requirement for companies to participate in a dispute resolution procedure which must be approved by Ofcom. After normal complaint procedures with the company have proved unsatisfactory all residential consumers and small businesses are to be able to make a complaint to an independent dispute resolution body. In 2003 two such bodies were set up: the Office of the Telecommunications Ombudsman (Otelo) and the Communications and Internet Services Adjudication Scheme (CISAS); they were approved by Ofcom in September 2003 and November 2003 respectively.[133] The bodies can impose remedies (apology or explanation; product, service or action which benefits the complainant; or an award up to £5,000) which companies are required to accept though the complainant does not have to accept and can pursue other means of resolution. These bodies were clearly set up in response to the Communications Act 2003 and Ofcom is required by the Act to review and approve the schemes, and have published a review report in 2005 (Ofcom, 2005a). In this sense they represent a clear act of regulatory delegation. Despite this, they are not seen to have the same level of public accountability as the ASA (regarding broadcast advertising) and are seen to be more distant than ICSTIS and the ASA.[134] Moreover, a director of Otelo has stressed that, in contrast to ICSTIS, Otelo is not a 'co-regulatory' body.[135] However, this depends on what is defined as 'regulation'. It is clearly not regulatory in the sense that it has powers to apply *ex ante* regulations on one or more companies, but it does carry out a key function required by statute and has powers to impose remedies.

Box 14. Equality of access to BT's network.

A significant aspect of Ofcom's recent strategic review of telecommunications was the problem of restricted access to BT's network services which was perceived to limit competition.[136] This covered a wide range of BT's network services, including, but well beyond, local loop services. As a response to the review and the possibility of a reference to the Competition Commission under the Enterprise Act 2002, BT proposed to restructure its business organisation in order to facilitate 'real equality of access'.[137] The structure involves a new Access Services Division within BT to provide network services (to downstream operations within BT as well as other operators), and an Equality of Access Board. The latter is a new type of governing body and has the responsibility to ensure BT fulfils its access equality commitments. According to Ofcom 'The Equality of Access Board's remit will cover compliance with the undertakings across the whole waterfront of SMP [significant market power] products. It will have five members, three of whom will be independent, and a BT non-executive board director who will chair the EAB – providing a direct link in terms of accountability to the BT Group Board. It will have independence, resources, powers and teeth' (Ofcom, 2005b). Ofcom are closely supervising the establishment of this board and the new business structure and expect detailed reporting from BT. The board is clearly separate from BT's operations, has independent representation, resulted from Ofcom's extensive strategic review and threats of more punitive action, and will be closely monitored by Ofcom. All of this was sufficient for it to be considered by Ofcom in effect to be a 'co-regulatory body' with duties and responsibilities delegated by Ofcom.[138]

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[133] Ofcom (2005a), Ofcom Review of Alternative Dispute Resolution Schemes, Report and Draft Recommendations, Consultation document, July.
[134] Interviews: BT, Ofcom.
[135] Discussion with author, 25/7/05.
[136] Ofcom (2004b), Strategic Review of Telecommunications, Phase 2 Consultation Document, November. http://www.ofcom.org.uk/consult/condocs/telecoms_p2/
[137] Ofcom (2005b), Telecommunications statement, June. http://www.ofcom.org.uk/consult/condocs/telecoms_p2/statement/
[138] Interview: Ofcom.

Box 15. Adjudication of access to the telecommunications local loop.

For the purpose of promoting local loop unbundling Ofcom set up in 2004 a telecommunications adjudication scheme.[139] This involved an act of delegation of Ofcom's duties to a new body, the Office of the Telecommunications Adjudicator. The scheme involves an agreement between BT and a number of other operators. Its purpose is twofold: to facilitate an increase in local loop unbundling and to resolve disputes between BT and a second operator. The Adjudicator's rulings are binding unless superseded by a contrary determination by Ofcom or a court order. There are close connections with Ofcom: the Adjudicator is appointed by Ofcom alone, and Ofcom has specified clear reporting and performance monitoring procedures.

Communications is the only sector in which the term 'co-regulation' is used to describe delegated regulation but there are other examples in which there has been or possibly will be a clear act of delegation. **Boxes 16-17** below give two examples:

Box 16. National curriculum tests.

The Qualifications and Curriculum Authority (QCA) is required by government to regulate examinations, qualifications and the national curriculum and associated tests.[140] In 2004 the QCA launched the National Assessment Agency which is responsible for delivering a more modern examination system and national curriculum tests. Although it is primarily an operational body and is regulated by the QCA,[141] it does involve a clear act of delegation of one of the statutory functions of the QCA and can thus be seen as a form of delegated co-regulation.

Box 17. Proposed reform of regulation of the legal profession.

The legal profession has been self-regulated within a statutory framework for many decades. In recent years, however, a major review of the regulatory framework for legal services has been undertaken by Sir David Clementi who reported in December 2004.[142] The existing regime has been criticised as 'flawed' partly because the governance structures of the professional bodies are inappropriate for the tasks they face but also because the system is over complex, inconsistent and not adequately transparent and accountable (Clementi, 2004). The new regime, should it be passed by parliament into law, involves *inter alia* the introduction of an 'oversight regulator', a governmental 'Legal Services Board'. The LSB would be 'vested with regulatory powers which it would *delegate* to recognised front-line bodies' (author's emphasis) notably the Law Society and the Bar Council (Clementi, 2004). The new regime will also involve a clear separation of the regulatory, representative and consumer complaints functions of the Law Society. Although the term 'professional-led regulation' is preferred in the profession to co-regulation,[143] the new regime has many of the hallmarks of a regime of 'delegated self-regulation'.

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[139] http://www.ofcom.org.uk/telecoms/groups/telecoms_adj_sch/?a=87101

[140] http://www.qca.org.uk/12860.html

[141] Interview: QCA.

[142] Clementi, Sir David (2004), Report of the Review of the Regulatory Framework for Legal Services in England and Wales, Final Report, December. http://www.legal-services-review.org.uk/content/report/foreword.htm

[143] Interview: Law Society.

'Devolved': the devolution of statutory powers to an industry self-regulatory scheme

Self-regulatory regimes with statutory backing – in effect devolved by parliament – commonly apply to the regulation of the professions. **Boxes 18-20** give examples within this category:

Box 18. Medical and dental professions.

The regulation of medical practitioners has been one of professional-led self-regulation within a strong statutory framework for many decades. While the professional standards of doctors and dentists are primarily self-specified within institutions which are composed primarily of the profession, the institutions and their procedures, notably those governing the entry to the profession, are specified in statute.[144] Thus the procedures for the protection of professional titles are legally defined and no one can practise as a medical practitioner or a dentist without being on the register of the General Medical Council and the General Dental Council respectively. The self-regulatory bodies also have some important statutory powers in relation to disciplinary procedures and sanctions against practitioners. In the case of medical doctors, for example, the GMC is required to act on complaints and allegations of poor performance or conduct. The GMC also has powers to investigate general competence, it can place conditions on the scope of practice of professionals for health reasons and it has the power to strike practitioners off the register for serious professional misconduct.

Box 19. Architects.

The architects' profession is another example of a professional-led regulatory regime within a statutory framework. The regime is self-regulatory in that the principal codes of conduct are set by the profession itself within the auspices of the Royal Institute of British Architects. However, the statutory framework, notably the Architects Act 1997 requires that the profession has a code of practice, defines the procedures for its modification and the procedures for registering and practising. There is a professional conduct committee which has legal powers and the government set up the Architects Registration Board as an independent regulator of the profession.

Box 20. Legal profession.

Although arising from a traditional self-regulatory system and still seen within the profession as a system of 'professional-led self-regulation',[145] the regulation of the legal profession is now within a strong statutory framework (Moran, 2003, pp83-86). It was particularly the Courts and Legal Services Act 1990 which represented a significant step towards the integration of professional self-regulation with statutory regulation. The Law Society and Bar Council were designated as authorised bodies in the legislation with a wide array of controls on the profession such as entry, training, discipline and standards. The procedures and operations of these bodies also became subject to statutory controls.

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[144] NCC (1999), Self-regulation of Professionals in Health Care, Consumer Issues. June.
[145] Interview: Law Society.

Statutory backed self-regulation applies beyond professional self-regulation. There are regulatory requirements which manifest in self-regulatory schemes specified by licence or franchise (indirectly based on statute) and in 'Royal Charters' (strictly not based on statute but with much the same effect). **Boxes 21-25** below give examples.

Box 21. Royal Mail performance targets.

Minimum performance targets for the Royal Mail are set in its licence specified by Postcomm, the postal services regulator.[146] This specifies, inter alia, the percentage of first class letters which should be delivered within one day and second class letters delivered within three days. The licence also specifies the frequency and type of performance information which should be reported by the Royal Mail to the regulator. The targets, however, have been described as 'aspirational' by the Royal Mail.

Box 22. Railway timetabling.

The timetabling process is primarily a commercial process between Network Rail and the train operating companies. However, the basic parameters and procedures for the process is specified in regulation, and can thus be seen as an example of self-regulation or co-regulation though these terms are not used.[147] This regulation includes: the Passenger Service Requirements (specified in franchise agreements, formerly by the Strategic Rail Authority (SRA) and now the Department for Transport's (DfT) Rail Group), Network Rail's and the train operating companies' licences (specified by the regulator), and track access agreements between Network Rail and the train operating companies (approved by the regulator).[148] A further element of the 'co-regulation' is the dispute resolution role of the regulator. If Network Rail is unable to resolve disputes between train operating companies about the use of a particular track then the regulator acts to resolve the dispute.

Box 23. Rail passenger's charter.

Each train operating company is required by its franchise agreement to publish a passenger's charter.[149] This includes the standards of service that can be expected, such as punctuality and reliability, enquiry, booking and reservations procedures, compensation when things go wrong. The basic requirements are specified in the franchise agreement and the detailed charter is produced by the train company. The clear requirement for a charter specified by the SRA (and now the Dft's Rail Group) in the franchise means that this has not been perceived as an example of self-regulation.[150] Nevertheless the role of the companies in producing the charter and the scope for interpretation of the general requirements mean that the process does have an element of self-regulation.

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[146] http://www.postcomm.gov.uk/departments/SubSection.asp?ID=22
[147] Interview: Network Rail.
[148] http://www.sra.gov.uk/qa/service
[149] http://www.sra.gov.uk/passengers/charter
[150] Interview: Rail Passengers Council.

Box 24. National rail enquiry scheme.

 Train operating company licences specify that all operators must participate in a national rail enquiry scheme. The scheme, set up in 1996, was originally a single telephone number for enquiries about timetables, fares and service disruptions.[151] Since then the service has developed significantly with new ways of providing information, notably the website which provides timetabling, fares, ticket sales, disruption information, live departure boards and numerous special promotions by the operating companies. This is an example of a basic service being specified by licence but many more sophisticated services being developed by the initiative of the operating companies and the enquiry service. Its minimum requirement can therefore be said to be based on statutory regulation but the developments, which serve both the private commercial interests of the companies and the public interest (the web site now handles about 50% of all enquiries), are highly self-regulatory.[152]

Box 25. Royal Charters.

Royal Charters are a means of governmental regulation which apply to a wide range (about 400) of professions, educational establishments, hospitals and charities.[153] Their original purpose (dating back to the 13th century) was to create public or private corporations and to define their privileges and purposes. Today they are used for the incorporation of bodies which operate to further some kind of public interest. Governmental control is not based on parliamentary statute, rather it is via the Privy Council. The Privy Council is the part of government which exercises 'royal prerogative' powers and other powers assigned to the Queen and Council by parliament. The act of incorporation means a body surrenders a degree of control to the Privy Council and the Council is required to ensure that this form of regulation is in accord with public policy. Examples of bodies incorporated by Royal Charter are: most universities, some schools and hospitals (eg Royal Grammar School, Newcastle; Royal Orthopaedic Hospital, Birmingham),[154] many professions (eg Institution of Electrical Engineers, Royal Pharmaceutical Society, Law Society), charities and public interest associations (eg Royal Society for the Protection of Birds, National Society for the Prevention of Cruelty to Children, though not the Royal Society for the Prevention of Cruelty to Animals). Some professional associations incorporated by Royal Charter have also become subject of parliamentary statute (eg Law Society, Royal Pharmaceutical Society) and many of the rules governing their profession now have full statutory backing.[155] The rules governing many other professions and their bodies (eg the Institution of Electrical Engineers) are primarily defined in their royal charters.[156]

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[151] http://www.atoc.org/nres/index.shtml
[152] Interview: ATOC.
[153] http://www.privy-council.org.uk/output/Page44.asp
[154] The term 'royal' in an organisation's name does not necessarily indicate that it is incorporated by Royal Charter, nor is the term always used by an organisation which is incorporated.
[155] http://www.rpsgb.org.uk/members/society/index.html
[156] http://www.iee.org/TheIEE/Charter/index.cfm

'Facilitated': state oversight and support but not backed by statute

In this category regulation is not backed by statute but the government and other public authorities play a significant 'facilitation' role in encouraging, supporting and sometimes approving self-regulatory schemes. **Boxes 26-32** give examples.

Box 26. Internet Watch Foundation.

The IWF is an industry funded and operated body with the primary function of tackling illegal content on the internet, notably what it refers to as 'child abuse images'.[157] It was established in 1996 as a result of an initiative by the Home Office, the police and the internet service provider industry. The IWF is not statutorily constituted, nor does it have statutory powers or duties but it works closely with government and in effect operates within the 'shadow of the law'.[158] Close public oversight of the IWF is manifested in a number of ways. There is a 'partnership' arrangement between the government, police and the IWF, which also notes that its remit is to assist the law enforcement process and assist internet service providers in the prevention of the abuse of their systems. Also since the IWF was established two reviews of the IWF have been undertaken by the government, law enforcement agencies and internet service providers.

Box 27. Safe Sludge Matrix.

The Safe Sludge Matrix is a set of guidelines for the use of sewage sludge on agricultural land and for industrial crops. The initiative arose as a result of concerns by consumers (and retailers and food manufacturers) about the health implications of using sewage sludge as a fertiliser. Two sets of guidelines – one on the application of sewage sludge to agricultural land, the other on industrial crops - resulted from agreements between Water UK (representing the 14 UK water and sewage operators) and the British Retail Consortium (representing the major retailers).[159] The agreements, reached in 1998 and 1999, arose from negotiations managed by ADAS, a company which provides advice on a wide range of environmental, rural and agricultural matters. Input into the negotiations was provided by governmental authorities – the Environment Agency, Department of Environment, Transport and Regions and the Ministry of Agriculture, Fisheries and Foods. The agreements are self-regulatory in that they arose from negotiations within industry itself without statutory initiation though with the encouragement from governmental authorities. The guidelines, however, have been and are being incorporated into legislation thus will be backed by the full force of statute and no longer in this category.

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[157] http://www.iwf.org.uk/public/page.103.htm
[158] Interviews: BT, Energis. Written response, Wanadoo.
[159] The Safe Sludge Matrix, Guidelines for the Application of Sewage Sludge to Agricultural Land, Guidelines for the Application of Sewage Sludge to Industrial Crops, http://www.adas.co.uk/news/publications.html

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Box 28. Energy marketing, debt, disconnection and billing.

There are a number of self-regulatory codes on consumer practice introduced by the energy retailers. Since 2003, for example, energy retailers have been subject to a self-regulatory code for face-to-face marketing of energy supply.[160] Although the code does not have the force of statute, it arose from years of controversy over misselling practices of energy retailers and strong encouragement from Energywatch and Ofgem with the implicit threat of stronger statutory regulation if satisfactory self-regulation could not be achieved. A similar self-regulatory approach has been taken regarding the disconnection and debt policies. The particular thrust is to have clear and consistent standards applicable across all retailers which ensure that genuinely vulnerable consumers are not denied access to energy supply. Another issue in which a self-regulatory approach is being encouraged is in regard to billing.[161] In April 2005 Energywatch filed a 'super-complaint' to Ofgem on the standards of billing and in July 2005 Ofgem told energy suppliers that they had a year to take certain steps to improve billing or face regulatory action from Ofgem. Each of these areas, though not backed by statutory regulation, involves clear and explicit oversight by the public authorities. In each case they are characterised by strong encouragement of self-regulatory action by Ofgem and Energywatch and threats of regulatory action if appropriate self-regulation was not put in place.[162]

Box 29. OFT approved codes of practice.

The Office of Fair Trading has had the duty (since its establishment by the Fair Trading Act 1973) to encourage good business and trading codes of practice. The Enterprise Act 2002 has reformed this with a stronger approval scheme for codes of practice.[163] The OFT runs a two-stage scheme under which trade associations submit codes for approval. The first stage involves the development of consumer codes based on core criteria set by OFT. OFT confirms in writing where a code appears to meet the core criteria but does not at this stage approve the code. At the second stage evidence of delivery of the initial promises in the code is required and OFT will approve and promote the code once it is satisfied that this has been demonstrated. An approved code of practice contains a redress mechanism and a complaints procedure. The approved codes of practice are self-regulatory in that they have been developed by the industry and do not have the full force of statute. They allow traders to display a government seal of approval if their code delivers consumer protection above the legal minimum.[164] However, the two stage monitoring and approval scheme involves sustained and close public oversight. All approved codes must meet a strict set of criteria including code content, governance, compliance monitoring, disciplinary procedures, complaints systems and availability of an independent redress scheme.[165] Examples of the consumer codes approval scheme include: the Society of Motor Manufacturers and Traders New Car Code; the Direct Selling Association Consumer Code of Practice; and the Vehicle Builders & Repairers Association Consumer Code of Practice.

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[160] http://www.energy-retail.org.uk/salespractice.html
[161] See Asher A (2005), Utility Week, Billing is a Real Problem, 29 July 2005, p11 and Sedgewick D, CRM and Billing, UK Power, Issue 2, 2005, p15.
[162] Interview: Energywatch. Written response: Ofgem.
[163] Enterprise Act 2002, Section 8, explanatory notes.
[164] OFT: written submission.
[165] OFT: written submission.

Box 30. Postal service company performance (non Royal Mail).

An area that may become an example of co-regulation or self-regulation is information provision on postal services company performance. In the coming era of competition the Royal Mail is pushing for a requirement that competing companies provide performance information to balance the licence requirement that it provide such information.[166] This is not expected to be a licence requirement on the competing companies but may be developed in an industry forum with the encouragement of the regulator.

Box 31. Water consumer debt.

Since the 1999 Water Industry Act which prohibited the disconnection of water consumers for reasons of non-payment, water companies have had less power to minimise and recover debt. Water companies have therefore wanted to pursue other means of debt recovery more vigorously. Consequently a set of guidelines for water companies dealing with customers in debt has been developed by Ofwat in consultation with the key stakeholders.[167] There is no statutory power behind these codes but Ofwat have looked to the industry to accept them; implicitly there is the threat of statutory power if acceptable codes of practice are not developed by the companies.[168] In 2005 Ofwat is planning to review the guidelines. To inform this it has asked the companies for more detailed information on payment methods and enforcement actions taken by the companies for non-payment.[169] This is clearly an instance of (hoped for) self-regulation with strong encouragement by the regulator and backed up by more detailed information reporting.

Box 32. Banking and mortgage codes.

In the financial services industry there are a number of self-regulatory codes produced by industry associations, for example, the Banking Code (British Bankers' Association)[170] and (up to October 2004) the Mortgage Code (Council of Mortgage Lenders).[171] However, these areas, like many areas of financial services are closely overseen by the Treasury and the Financial Services Authority.[172] One general initiative of the FSA, for example, has been to maintain efficient, orderly and clean financial market and ensure that consumers achieve a fair deal.[173] There is an implicit threat of more and stronger regulation if financial services companies do not perform. This might take the form of better consumer information and complaints procedures, the promotion of competition, and ease of customer switching of financial service provider. Alternatively, in the case of the mortgage lending, from 31 October 2004 the self-regulatory mortgage code was superseded by direct regulation by the FSA.[174]

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[166] Interview: Royal Mail.

[167] Ofwat (2002), Dealing with Customers in Debt, Guidelines, October.

[168] Interview: Ofwat.

[169] http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/Content/rd1205

[170] http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=103

[171] http://www.cml.org.uk/servlet/dycon/zt-cml/cml/live/en/cml/pub_info_code

[172] Interview: FSA.

[173] FSA (2001), Treating Customers Fairly after the Point of Sale, June.

[174] http://www.fsa.gov.uk/consumer/07_MORTGAGES/about_keyfacts.html

'Tacit': close to 'pure' self-regulation, no statutory obligation little explicit role for public authorities

In this category examples come closest to common notions of 'pure' self-regulation. The examples (**boxes 33-42**) have many of the hallmarks of self-regulation and in appearance there is little or no role of the state. However, in most of these regimes the government and other public authorities have played some kind of role. This role can be described as 'tacit': public authorities have undertaken some action such as commission reports and studies on the sector, or assessing and monitoring existing regimes. However, there has not been an explicit call for regulation; the process is more of an unspoken threat – if the industry does not set up a satisfactory scheme then the state may step in.

Box 33. Press Complaints Commission.

The press content regime is highly self-regulatory. The Press Complaints Commission is a non statutory independent body set up to deal with complaints from members of the public on the content of newspapers and magazines.[175] It was up in 1991 after increasing dissatisfaction about press content which arose in the 1980s and the limited control and redress the public have. At the heart of the Commission is a code of practice on the way in which news is gathered and reported. The code is written by the editors and is binding on all national and regional newspapers and magazines. Although the Commission describes itself almost exclusively in terms of self-regulation, governmental investigation and the threat of statutory controls had a big impact on the establishment of the Commission. In an introduction to the PCC it is noted, for example, that 'when the Commission was established [in 1991] in break neck speed by the newspaper and magazine publishing industry, a Damoclean Sword - in the shape of the Calcutt Report, a privacy law and statutory controls - dangled menacingly over our free press'.[176]

Box 34. Complementary health practitioners.

In the health care field there are numerous non-statutory self-regulatory arrangements, notably in areas which are generally seen to be 'complementary'. Areas which are covered by self-regulatory arrangements include acupuncture, herbal medicine, homeopathy, and hypnotherapy (NCC, 1999). The self-regulatory bodies for these areas have procedures which include disciplinary sanctions, notably the removal from the register of practitioners. These regimes are highly voluntary in nature and appear to be close to an ideal type of 'pure' self-regulation. However, these regimes have been monitored by the government, the Department of Health, for example, commissioned a study which reported in 1997 on professional organisations in alternative and complementary medicine (NCC, 1999). Also some areas of complementary medicine have recently moved to a statutory scheme of regulation. In osteopathy, for example, the Osteopaths Act 1993 established the General Osteopathic Council which registers practitioners and sets standards for practice and codes of conduct.[177] Thus, although the state appears to have no role in regulation of complementary medicine, there is some governmental monitoring and the possibility of moving towards the establishment of statutory schemes.

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[175] http://www.pcc.org.uk/about/whatis.html
[176] Introduction to the PCC, http://www.pcc.org.uk/10YearBook/introduction.html
[177] http://www.osteopathy.org.uk/about_gosc/

Box 35. Planning of mobile phone masts.

The Mobile Operators Association in consultation with local councils and communities has developed a code of practice, named 'ten commitments', which eases the planning process for the siting of mobile phone masts. This voluntary code meets a public interest (environmental and health concerns) and a private interest in reducing the companies' transaction costs involved in the planning processes.[178] The MOA describes three aims of the scheme: 'improved transparency of the process of building mobile networks; providing more information to the public; and increasing the role of the public in the siting of base stations'.[179] The scheme is being implemented in association with local government and community stakeholders to ensure they are workable. The commitments are not, however, an instance of pure self-regulation. The code was set up in response to the Stewart report in 2000 which resulted from study commissioned by the government into the possible public health risks of the use of mobile phone and the siting of transmitters.[180] In addition, the Office of the Deputy Prime Minister has assessed the commitments in relation to general principles on planning and use of land.[181]

Box 36. Rail engineering best practice and manpower plans

The train operating companies have a voluntary code of practice for the sharing of information on engineering best practice and manpower plans.[182] This was primarily driven by the commercial interest of the train operating companies to improve performance and for the better anticipation of problems.

Box 37. Responsible drinking – the Portman Group.

The Portman Group was set up in 1989 by a number of the UK's leading alcoholic drink producers and suppliers to promote responsible drinking.[183] The group aims to prevent the misuse of alcohol, encourage responsible marketing and a 'balanced understanding' of alcohol related issues. The group has a code of practice on the naming, packaging and promotion of alcohol products. There are, of course, many statutory regulations which relate to alcohol such as in relation to its advertising and selling. In addition, there is the current concerns about 'binge drinking' all of which suggests the need to understand this self-regulatory organisation in terms of the threat of further statutory regulation.

Box 38. Travel agents.

The Association of British Travel Agents has developed a self-regulatory code of practice governing the conduct of its member organisations.[184] The code is designed in general to ensure that the public get the best possible service from travel agents. It governs the conduct of ABTA's members towards their customers, between themselves and between them and non member organisations. The code also embodies laws and regulations which apply to the travel industry. It is perceived as an effective code (BRTF, 2003, p.42), which significantly reduces the possibility of the introduction of significant new statutory regulation to the industry.

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[178] Interview: Mobile Operators Association.
[179] http://www.mobilemastinfo.com/planning/best_practice.htm
[180] http://www.iegmp.org.uk/terms/index.htm
[181] Interview: Mobile Operators Association.
[182] Interview: ATOC.
[183] http://www.portman-group.org.uk/about/131.asp
[184] http://www.abta.com/

Box 39. Media content regulation.

There is a proliferation of new forms of media and the regulation of their content is more and more difficult. Ofcom has tried to encourage self-regulation of the various media, such as by a code of practice for the labelling of the content of products such as films, DVDs, CDs, computer games, and TV programmes.[185] As technological convergence of the various forms of media continues so lightly regulated new forms will clash with more heavily regulated old forms. A code of practice for all forms of media is therefore becoming more and more important.

Box 40. Family law solicitors.

In the legal profession there are examples of self-regulation outside the Law Society.[186] The Solicitors Family Law Association, for example, have a code of practice on how to handle family law disputes 'in a way designed to preserve people's dignity and to encourage agreements'.[187] The Law Society recommends the code as good practice for all family lawyers. The code is self-regulatory – it is not legally binding though family solicitors are still bound by Law Society professional rules.

Box 41. Water: voluntary customer codes.

In the water industry codes of practice towards the customers which companies must follow are statutorily regulated by Ofwat in the 'Guaranteed Standards Scheme'. Some companies, however, claim voluntarily to offer customer standards which are above the statutory minimum.[188] This includes, for example, discretionary payments to customers for sub-standards service.

Box 42. Chemical industries: 'Responsible Care'.

The chemical industry in the UK has developed a commitment to continual improvement of health, safety and environmental performance and to openness in communication about its activities and its achievements.[189] The voluntary commitment, termed 'Responsible Care' is led by the Chemical Industries Association (CIA) and was adopted in 1989; adherence to Responsible Care is a condition of membership of the association. The commitment includes: the use of a consistent set of indicators; best practice sharing and mutual aid systems; formal processes of communication to the public; common management system principles and a self-assessment process. The scheme, though voluntary, is monitored by the Environment Agency, and is linked to statutory regulation of the chemical industry and public concerns about the potential hazards in chemical installations, notably after the Flixborough accident in the 1970s.[190] There is a combination of public interest and private commercial objectives: the CIA note that 'Responsible Care is to earn public trust and confidence through a high level of HS&E performance in order to maintain the industry's licence to continue to operate safely, profitably and with due care for the interests of future generations'.[191]

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[185] Interview: Ofcom.
[186] Interview: Law Society.
[187] www.sfla.org.uk.
[188] Written responses: Wessex Water, Three Valleys Water.
[189] http://www.cia.org.uk/newsite/responsible_care/care.htm
[190] Written response: Environment Agency.
[191] http://www.cia.org.uk/newsite/responsible_care/care.htm

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