

Ofcom's contribution to the OFT's discussion paper on self-regulation and industry-led compliance

Introduction

1. Ofcom welcomes the opportunity to contribute to the OFT's discussion paper on self-regulation and industry-led compliance. We believe the analysis of the key issues covered in the paper was very thorough and indeed very timely as the role of different regulatory approaches in the current economic climate has been the subject of much debate.
2. We also welcome and acknowledge the OFT's extensive work over the past few years in promoting industry-led initiatives and we are keen to share our own experience and approach to such schemes. We are pleased to have participated in the OFT self-regulation conference in March 2009, and to have the opportunity to contribute to the present consultation.
3. As the regulator of the electronic communications sector, Ofcom follows best practice and aims to adopt the most effective solutions to meet the interests of citizens and consumers and to deliver on our regulatory objectives. We also have legal duties in relation to the choice of a regulatory approach, for example, to promote self-regulation and reduce unnecessary burdens.
4. We recognise that all approaches have advantages and drawbacks and that different solutions are appropriate in different circumstances, depending on a variety of factors. These include: the nature of the problem, its urgency, the relevant market players, availability of expertise to develop a solution, and others.
5. To help identify best practice in co- and self-regulation, Ofcom conducted extensive analysis of past co- and self-regulatory schemes. Based on this, we have developed a set of "appropriate regulation principles" to help us assess alternative regulatory approaches to address an identified issue or area of concern. We set out the principles in a statement published in December 2008¹: These principles include:
 - Five steps to assess industry incentives to deliver effective self- or co-regulation and;
 - A set of good practice criteria to consider when establishing new self- and co-regulatory schemes.
6. In developing these principles our aim was to have a systematic, objective and transparent approach that promotes best practice yet is flexible to account for case-specific considerations. We are now committed to using this set of principles as a high level guide to help Ofcom decide when to rely on self- or co-regulation, and when to adopt formal regulation.
7. This response provides a brief overview of our new approach.

Types of regulation and relevance for Ofcom

8. Four broad approaches to delivery of citizen and consumer needs can be identified:
 - **No Regulation:** Markets deliver required outcomes. Citizens and consumers are empowered to take advantage of services and to avoid harm.

¹ Please see statement: Identifying appropriate regulatory solutions: principles for analysing co- and self-regulation at <http://www.ofcom.org.uk/consult/condocs/coregulation/statement/statement.pdf>

- **Self-regulation:** Industry administers a solution without formal regulatory oversight. No explicit legal backstops in relation to rules agreed by the scheme.
 - **Co-regulation:** Elements of self- and statutory regulation, where Ofcom and industry collectively administer a solution. The split of responsibilities may vary but typically we have legal backstop powers to secure objectives.
 - **Statutory regulation:** Specific rules and obligations on companies are defined by legislation, government or Ofcom, with Ofcom carrying out enforcement.
9. We believe that different regulatory approaches are appropriate for different issues, and no approach is by definition superior to others under all circumstances. Self-regulation can offer a quick solution to an urgent issue, help draw on industry expertise, or cover providers that formal regulation may not be able to reach. This can at times be particularly relevant in the fast moving and technologically complex communications market. In other cases some form of intervention may be most appropriate, through a co-regulatory solution, to ensure that incentives are effectively aligned. Where neither self- or co-regulation are appropriate but regulation is necessary, a statutory solution is required.
10. There are several good examples of self- and co-regulatory schemes in the sector; for example, in the areas of mobile content, broadcast training and skills, and metering and billing solutions. Figure 1 below provides some examples of issues where a self- or co-regulatory approach has been relevant.

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

Figure 1. Examples of issues where a self- or co-regulatory approach has been relevant

Ofcom’s principles for analysing the aptness of self- or co-regulation

11. Our analysis showed that self-regulation is most likely to work where the commercial incentives of industry stakeholders are aligned with public objectives. We developed five analytical steps which will help us assess what approach is likely to work, where a need for regulatory intervention is identified. These steps are highlighted in Table A below².

² In paragraphs 3.19 – 3.24 of our [statement](#) we provide a detailed description of how we propose to assess the likely success of a self or co-regulatory solution by considering the five conditions listed above.

Table A. Analytical steps when determining what solution (self-, co- or formal regulation) to rely on in specific cases

Step 1. Do the industry participants have a collective interest in solving the problem? For example, are the industry’s commercial objectives aligned to resolve the issue? Do the benefits outweigh the cost of participating in a scheme? If self-regulation is unlikely to work, can co-regulation correct weaknesses in incentives?

Step 2. Would the likely industry solution correspond to the best interests of citizens and consumers? Would self-regulation (a) deliver an effective and proportionate solution that meets citizen/consumer interests, (b) benefit from industry expertise and (c) be timely? If not, would co-regulation be appropriate? How would self- or co-regulation compare to alternatives?

Step 3. Would individual companies have an incentive not to participate in any agreed scheme? How many companies are likely to opt out, and with what implications for effectiveness? Can participation be enforced or incentivised (e.g. by raising public awareness)?

Step 4. Are individual companies likely to “free-ride” on an industry solution? Are individual participants likely to cheat? To what extent and with what consequences? Can monitoring/enforcement measures improve effectiveness?

Step 5. Can clear and straightforward objectives be established by industry? For example, consider complexity of the objective, diversity of participants, availability of expertise

Good practice criteria to guide the establishment of new schemes

12. Once it is established that a self- or co-regulatory solution is likely to be more appropriate than formal regulation, the design of the scheme should aim to maximise its chances of success. A well-designed and properly run self-regulatory scheme can address citizen and consumer interests adequately and therefore minimise the need for formal regulatory intervention. We have identified a number of institutional best practice criteria to consider when establishing new schemes. These are briefly set out in table B, below).

Table B. Good practice criteria to be considered when establishing new schemes

- Public awareness
- Transparency
- Significant participation by industry
- Adequate resource commitments
- Enforcement measures
- Clarity of processes and structures
- Audit of members and scheme
- System of redress in place
- Involvement of independent members
- Regular review of objectives and aims
- Non-collusive behaviour

13. We acknowledge of course that there may also be additional considerations in each case, and some of the criteria listed above may not be relevant³.

³ More detail on these criteria can be found in paragraphs 4.26 – 4.41 of our [statement](#).

14. Where we propose changes to an existing approach, or consider introducing new regulation, we will publish formal consultations and conduct thorough impact assessment for different options, inviting stakeholders' views.
15. We look forward to a continued engagement with the OFT to share our respective experiences and policy thinking around self regulation and industry-led compliance.