

Institutional variety in communications regulation. Classification scheme and empirical evidence from Austria

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Abstract

In recent decades, major regulatory reforms have changed the role of the state in the liberalised and convergent communications sectors of developed economies worldwide. The central characteristics of this transformed statehood in communications are, inter alia, a rising importance of independent national regulatory agencies (NRAs) and a growing reliance on alternative modes of regulation, i.e. self- and co-regulation. While the advent and activities of NRAs are often analysed in current literature, the institutional variety and regulatory contributions of private actors through self- and co-regulation are largely neglected. This article contributes to closing this research gap. A newly developed classification scheme of regulatory modes makes it possible to grasp the numerous and often intertwined contributions of both state and private actors. Furthermore, a case study of Austrian regulatory institutions active in the convergent communications sector demonstrates the potential of this new analytical tool and provides an in-depth analysis of various kinds of self- and co-regulation, which have substantially increased in communications regulation in Austria in the past decade.

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1. Introduction

Since the 1980s major changes in institutional arrangements have come about in the regulatory systems of communications sectors of developed economies worldwide in general and EU-wide in particular, where liberalisation has entailed, among other things, the shifting of regulatory responsibilities from state administrations to NRAs. Along with convergence it has resulted in the establishment of integrated regulators for telecommunications and broadcasting, which are partly responsible for Internet matters as well. Such NRAs exist, for instance, in Austria, Italy and the United Kingdom,¹ although with varying designs and

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¹In Austria the Austrian Regulatory Authority for Telecommunications and Broadcasting (RTR-GmbH) and in Italy the Autorità per le garanzie nelle comunicazioni (AGCOM). In the UK the competencies of the Broadcasting Standards Commission (BSC), the Independent Television Commission (ITC), the Radio Authority, the Radiocommunications Agency and OFTEL are merged in the Office of Communications (OFCOM) that assumed its powers at the end of 2003.

extent of institutional integration. NRAs² are not only gaining importance in communications but also in other policy fields.³ They are being discussed as indicators of a profound transformation of governance across Europe and the USA, more precisely as indicators for the ‘regulatory state’ hypothesis, which argues that the main function of the state has become the correction of market failures via rule-making at the expense of re-distributive policies (Thatcher, 2002, p. 860; McGowan & Wallace, 1996, p. 563).⁴

State regulatory bureaucracies just as much as NRAs are the most visible parts of regulatory systems. Accordingly, they receive most of the attention both in the public debate as well as in research. However, the transformation of the institutional arrangement in the communications sector does not stop here. Against the backdrop of globalisation in terms of technological innovation as well as trade liberalisation of goods and services—predominantly pushed by the fast diffusion of Internet applications—many regulatory goals are increasingly being pursued by less formalised means of regulation, i.e. by alternative regulation (self- and co-regulation). Alternative regulation is carried out partly or even entirely by private or semi-private regulatory institutions, and represents a further step away from traditional, politically dominated state institutions towards indirect government, thereby serving as an additional but widely under-researched indicator of the regulatory state hypothesis and of broad institutional changes in the governance of the communication sector (Latzer, Just, Saurwein, & Slominski, 2003). Alternative regulatory mechanisms are gaining importance at the international and national levels, e.g., ICANN⁵ for Internet domain names, ICRA⁶ for Internet content rating, the Dutch NICAM⁷ for the classification of audio–visual media content. These are promoted widely as a supplement and/or alternative to state regulation—not only by the industry but also by various policy makers, prominently by the European Commission.⁸ The European Commission is at the forefront of developing a new legislative culture. In doing so it not only aims at reducing and simplifying traditional regulative tools such as traditional command-and-control-oriented legislation (e.g., regulations and directives) but also at encouraging alternative modes of legislation, notably self- and co-regulation. With this the Commission has two objectives: first, to increase the efficiency of reaching its policy goals and, secondly, to increase regulatory legitimacy by including various stakeholders in the regulatory process (Senden, 2005). A review of the literature on alternative modes of regulation, however, reveals that research on them is limited to random, failed or best-practice examples, and that systematic analytical accounts are missing. Often it is devoted to special sub-sectors only (e.g., advertising, press, eCommerce or telecommunications)⁹ and not to the convergent communications sector as a whole, which in this paper is described as *mediamatics* (media and telematics), comprising broadcasting, telecommunications, the Internet and the press (Latzer, 1997, 1998).

This paper intends to close this research gap. It develops a new approach that makes it possible to empirically grasp and analyse the current institutional variety in communications regulation. Generally, there are two dimensions to an analysis of regulatory mechanisms: the *institutional* dimension, which shows by whom (actors) and how (processes) regulation is carried out, and the *substantive* dimension, which asks what is being regulated (e.g., access, prices). This paper primarily centres on institutional arrangements of regulation, which depict the special combination of regulatory norms and organisational specifics, and only to a lesser extent on substantive changes. This results from this paper’s focus on the changing role of the state in communications regulation. In other words, it considers whether recent regulatory reforms have led to the

²Analytically, NRAs are non-majoritarian institutions (NMIs), which also comprise institutions as diverse as courts and central banks (Majone, 1998, p. 10).

³For example, in environment, public health, energy, railways and water.

⁴It is beyond the scope of this article to give a comprehensive account of the ‘regulatory state’. For a recent overview see Moran (2002), Thatcher and Stone Sweet (2002) and H eritier and Thatcher (2002).

⁵Internet Corporation for Assigned Names and Numbers. For overviews and critical remarks on ICANN see inter alia Mueller (1999), Froomkin (2000) and Weinberg (2000).

⁶Internet Content Rating Association.

⁷Nederlands Instituut voor de Classificatie van Audiovisuele Media.

⁸See, inter alia, White paper on European governance (COM (2001)) and subsequent communications, especially COM (2002). For the reasons of this increased reliance on and advantages of alternative forms of regulation see Latzer et al. (2003), Latzer, Just, Saurwein, and Slominski (2002).

⁹See, for instance, Suhr (1998), Nordenstreng (1999) for the press; Boddewyn (1985, 1988) for advertising; OFTEL (2000, 2001) for telecommunications; OECD (2001) for eCommerce codes of conduct; and Schultz, Kaufmann-Kohler, Langer, and Bonnet (2001) for online dispute resolution.

transformation of a functionally understood statehood (e.g. the specific distribution of political responsibility, tasks within and between states, applied policy instruments, structure of policy networks and organization of regulatory institutions) in communications, one indicator of which is an increased reliance on private actors in communications regulation, i.e. self- and co-regulation.¹⁰

To this end, this paper develops a novel classification of regulatory institutions, which distinguishes regulatory institutions by their *degree of state involvement*. This classification is part of a wider analytical framework containing several institutional parameters according to which the existing regulatory institutions are assessed empirically, e.g., regarding their *modes of establishment*, *operational scope* and degree of *stakeholder involvement*, as well as regarding *regulatory processes* and *instruments* employed (Section 2). This approach makes it possible to grasp institutional regulatory variety in terms of public and private contributions, and allows for a comprehensive overall picture of the existing regulatory structure. The analytical design of this approach can be deployed in case studies of any advanced economy, in longitudinal and comparative research. In this paper, the Austrian communications sector has been chosen as an illustrative case, thus presenting the first comprehensive study of the Austrian regulatory landscape for the convergent communications sector as a whole (Section 3).

2. Classification and analytical framework

Definitions and classifications of regulation vary widely in the literature.¹¹ For the purpose of this paper, regulation is defined as collective intentional restraints on industry behaviour with the goal of achieving public (economic and social) goals.¹² From an institutional perspective, regulation comes in many varieties and is generally not a binary choice between state or self-regulation: It takes place on a *continuum* between pure state regulation on the one hand and pure self-regulation on the other, and can generally be understood as a combination of state/public and societal/private contributions, which are closely interlinked (Gunningham & Rees, 1997, p. 366). To grasp the institutional variety of regulation on this continuum empirically, the classification developed here categorises regulatory modes according to their degree of state involvement. Definitions and classifications are not a matter of right or wrong, but more or less helpful analytical tools, depending on the particular research questions and methodological approaches. As such—pursuant to this paper's interest in how statehood is being transformed in the mediamatics sector, how the fulfilment of regulatory tasks is being divided between private and public actors, and how the institutional regulatory structure is changing in the convergent communication sector—the emphasis is on drawing up in a differentiated manner the varying contributions of state involvement in the different regulatory institutions. In doing so, this approach distinguishes between five modes of regulation, which are listed below along with examples from Austria and other countries:

- (1) *State regulation in the narrow sense*, which comprises the legislative, the executive and the judiciary: for the Austrian mediamatics sector especially, executive institutions such as KommAustria, the Austrian Communications Authority.
- (2) *State regulation in the broad sense*, i.e. tasks related to national sovereignty, but at arm's length from the executive sovereign: e.g., NRAs, such as the two Austrian regulatory authorities for telecommunications

¹⁰The approach to statehood adopted here is a functional one that focuses on control and regulatory tasks of the state. Transformed statehood comprises changes of policy—the content dimension, politics—the process and polity—the institutional setting. The trend *towards growing reliance on self- and co-regulation* is one of the basic hypothesis of this transformed statehood in the mediamatics sector. Other trends would be, inter alia, *from protectionism to the promotion of competition*, *from vertical to horizontal regulation*, *from detailed regulation to broad parameters* and *the separation of political/strategic and operative tasks*. For details see Latzer (2000, p. 307ff).

¹¹For definitions of regulation see, inter alia, Black (2002), Baldwin and Cave (1999), Borrmann and Finsinger (1999), and Lessig (1998). For various terms/classifications of alternative regulation and their meanings see, e.g., Schulz and Held (2002), OFTEL (2000), Price and Verhulst (2000), Gunningham and Rees (1997), Black (1996), Ayres and Braithwaite (1992), and Page (1986).

¹²Further, regulation is limited to market interventions that go beyond the general rules of the game, limiting the freedom of trade and contract (also Borrmann & Finsinger, 1999, p. 8; and Müller & Vogelsang, 1979, p. 342). This narrow definition of regulation excludes unintended effects (as opposed to Lessig, 1998), and other, non-regulatory market interventions brought about in the form of advantages (e.g., tax breaks, exemptions from regulations), subsidies and taxation (Picard, 1989, p. 94ff.).

- and broadcasting RTR-GmbH and TKK; the Italian *AGCOM*, Autorità per le Garanzie nelle Comunicazioni, regulator responsible for telecommunications, broadcasting and the press.
- (3) *Co-regulation*, which operates on an explicit unilateral legal basis, but does not involve aspects of national sovereignty: e.g., *OVE/OEK*, Austrian Electrotechnical Association/Austrian Electrotechnical Committee; *Switch*, the Swiss organisation responsible for domain-name administration.
 - (4) A private, but state-supported *self-regulation in the broad sense*: e.g., *Stopline*, Austrian hotline for illegal Internet content; *CRTC Interconnection Steering Committee (CISC)*, a Canadian institution responsible for technical, administrative and operational issues of telecommunications with a special emphasis on interconnection.
 - (5) *Self-regulation in the narrow sense* with no explicit state involvement: e.g., *Werberat*, the Austrian Advertising Council; *Interessenverband Europäischer Webmaster*, formerly *Adult Webmaster Network (AWMN)*, a German institution of adult services webmasters.

This classification allows for a subtle differentiation and analysis regarding state/public and societal/private involvement in the institutional regulatory structure. State involvement in regulatory institutions can happen in many and inexhaustible ways, such as legal foundation¹³ (e.g., accreditation,¹⁴ ratification,¹⁵ or supervision schemes/mechanisms¹⁶), human and/or financial resources¹⁷ (see Fig. 2). The identification of these differences in mode and degree of state involvement in the various institutions is essential so as to allow the classification of the institutions according to the classification developed here and also for further institutional analysis. However, this does not imply that every institution that falls within a given category is in every aspect identical with other institutions within the same category. For example, two institutions can be classified as co-regulatory institutions, the decisive criteria for which is strong state involvement by way of an explicit unilateral legal basis, and that the institutions must not pursue sovereign tasks. Regarding other institutional characteristics, however, there may be differences between these institutions, e.g., the state may contribute financially to one co-regulatory institution while it does not do so in the case of the other, or it may be represented in one institution and not in the other. Classification and grouping are important because the here-applied analytical tools are intended for comparative and longitudinal research of institutional changes in regulatory structures. A standardised categorisation is therefore necessary to survey, edit and analyse data. Attempts to analyse all institutions according to all possible regulatory forms and individual variations without categorising them in groups that exhibit certain characteristics would otherwise only result in a bare list of possible regulatory forms without any further significance.

The Austrian case study comprises two state regulatory institutions in the narrow sense and 23 further regulatory institutions, which can be categorised as follows (see Fig. 1):

- three state regulatory institutions in the broad sense;
- seven co-regulatory institutions;
- six self-regulatory institutions in the broad sense;
- seven self-regulatory institutions in the narrow sense.

¹³For instance, the Italian Communications Regulatory Authority (AGCOM) is established by Law No. 249 of 31 July 1997.

¹⁴For instance, Otelo or CISAS which provide ADR schemes in the UK. The sections 52, 53 and 54 of the Communications Act 2003 require Ofcom to ensure that public communications providers in the UK provide access to dispute-resolution procedures and to approve those procedures under certain conditions, following consultation with the Secretary of State. Two procedures have been approved so far (OFCOM, 2005): (1) The Office of the Telecommunications Ombudsman (Otelo, approved 30 September 2003) and (2) The Communication and Internet Services Adjudication Scheme (CISAS, approved 19 November 2003).

¹⁵For instance, the *Australian Communications Authority (ACA)* ratifies regulatory results of the *Australian Communications Industry Forums (ACIF)*.

¹⁶For instance, the Swiss *Bundesamt für Kommunikation (BAKOM—Federal Office of Communications)* is responsible—according to para. 14 of the *Verordnung über Adressierungselemente im Fernmeldebereich/784.104*—for the supervision of *Switch*, the Swiss institution for domain names administration.

¹⁷For instance, the French *Internet Forum* is financed predominantly by the government, and state representatives are involved in the relevant committees.

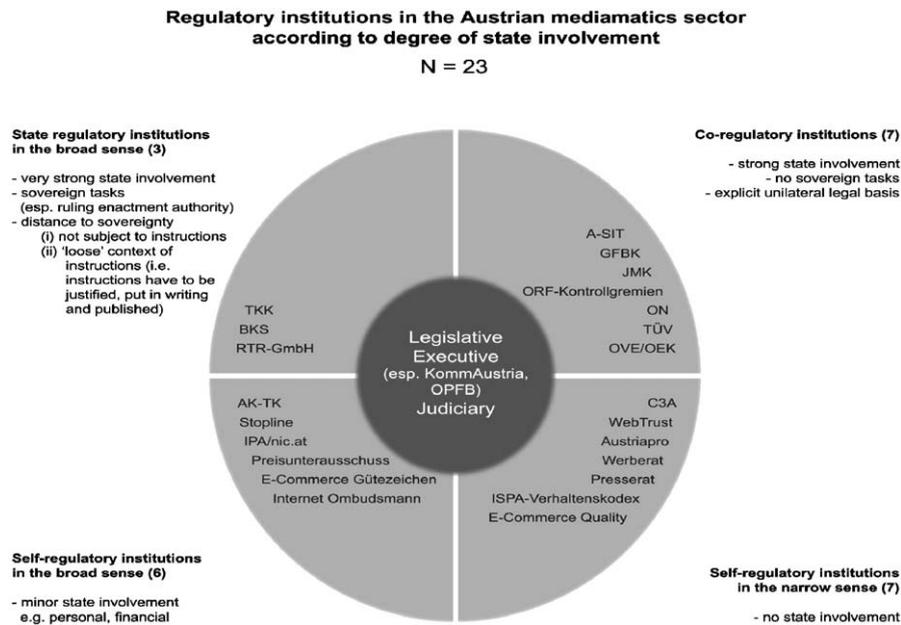


Fig. 1. Regulatory institutions in the Austrian mediamatics sector according to degree of state involvement. *Key:* *AK-TK*: Working Group Technical Co-ordination in Telecommunications (responsible *inter alia* for the co-ordination of technical/administrative issues in telecommunications); *A-SIT*: Secure Information Technology Centre Austria (responsible *inter alia* for security aspects in the context of electronic signatures); *Austriapro*: responsible *inter alia* for EDI standardisation; *BKS*: Federal Communications Senate (*inter alia* authority of appeal regarding decision of KommAustria); *C3A*: Certified Austrian Advertising Agency; *E-Commerce Gütezeichen*: Austrian eCommerce Quality Mark; *e-Commerce Quality*: e-Commerce Quality mark; *GFBK*: Common Film Assessment Board of the Provinces; *Internet Ombudsmann*: Internet Ombudsman (incl. alternative dispute resolution); *IPA/nic.at*: Internet Private Foundation Austria/Network Information Centre (Domain-Name-Administration); *ISPA-Verhaltenskodex*: Internet Service Providers Austria—Code of Conduct; *JMK*: Austrian Board of Media Classification (protection of youth by means of film and multimedia content ratings); *KommAustria*: Austrian Communications Authority (administers *inter alia* regulatory activities in broadcasting); *ON*: Austrian Standards Institute; *OPFB*: Supreme Postal and Telecommunications Authority; *ORF-Kontrollgremien*: Austrian Public Broadcasting-Controlling Bodies (ORF-foundation council and ORF-public/audience council); *OVE/OEK*: Austrian Electrotechnical Association/Austrian Electrotechnical Committee; *Preisunterausschuss*: Price Subcommittee of the Parity Commission (social partners body responsible for control of prices/decisions on price increases); *Presserat*: Austrian Press Council; *RTR-GmbH*: Austrian Regulatory Authority for Telecommunications and Broadcasting; *Stopleveline*: hotline for illegal internet content; *TKK*: Telekom-Control-Commission; *TÜV*: TÜV Austria Group (technical supervision); *WebTrust*: WebTrust eCommerce seal; *Werberat*: Austrian Advertising Council.

All the categories, their distinctive characteristics and the Austrian institutions identified are presented in Fig. 1.

This classification is part of a wider analytical framework, which consists of four groups of various institutional parameters according to which the institutions identified were analysed (see Fig. 2). Generally, the analysis starts with the identification of the regulatory institutions and the degree to which the state is involved, leading to the classification of the regulatory institutions under one of the five regulatory modes. The categorised institutions are then analysed according to the institutional parameters selected here. This provides insights into their institutional specifics and design as well as their functioning (see Section 3). Institutions can be evaluated according to many different possible sets of criteria. The institutional parameters for this study were selected so as to cover many of the most prominent policy issues surrounding the employment of alternative forms of regulation: For example, the data regarding stakeholder involvement and openness of institutions to participation indicate, among other things, who is involved in the regulatory network, whether there is a balanced representation of interests, what barriers to participation exist and what kind of regulatory arrangement most likely facilitates broad public participation. The data with respect to the sanctioning powers of institutions allow interpretations regarding the likelihood of compliance with regulatory decisions. If a

Regulatory institutions & state involvement	Operational scope & regulatory objectives
<ul style="list-style-type: none"> ▶ Intensity of state involvement <ul style="list-style-type: none"> • State regulatory institutions in the narrow sense • State regulatory institutions in the broad sense • Co-regulatory institutions • Self-regulatory institutions in the broad sense • Self-regulatory institutions in the narrow sense • Other steering institutions ▶ Year of foundation ▶ Legal form ▶ State involvement <ul style="list-style-type: none"> • Legal basis/legitimation • Accreditation of institutions • Ratification of results • Assignment of tasks/objectives • State supervision/liability • Specification of structure/organisation • Reporting requirements/transparency • Fallback scenarios • Contracts • Financial involvement • Human resources 	<ul style="list-style-type: none"> ▶ Operational scope <ul style="list-style-type: none"> • Press • Telecommunications • Broadcasting • Internet • Other ▶ Regulatory objectives <ul style="list-style-type: none"> • Content objectives • User specific objectives • Promotion of competition • Market power control ▶ Regulatory approach <ul style="list-style-type: none"> • Market structure regulation • Result-oriented regulation of conduct (e.g. price recommendation) • Transparency-oriented regulation of conduct (e.g. labelling)
International involvement & stakeholder participation	Regulatory process & regulatory instruments
<ul style="list-style-type: none"> ▶ Involved stakeholder <ul style="list-style-type: none"> • State actors • Social partners • Consumer representatives • Academics/experts • Industry • Other ▶ Openness/entry barriers <ul style="list-style-type: none"> • Rules governing entrance <ul style="list-style-type: none"> ▶ Openness: open/closed ▶ Target group definition: narrow/wide ▶ Access modus: open/restricted • Economic barriers <ul style="list-style-type: none"> ▶ Financing: yes/no ▶ Human resources with/without compensation: yes/no ▶ International involvement <ul style="list-style-type: none"> • No involvement • Slight involvement • Strong involvement ▶ Financing <ul style="list-style-type: none"> • By provided service: yes/no • By actors <ul style="list-style-type: none"> ▶ Public ▶ Social partners ▶ Industry 	<ul style="list-style-type: none"> ▶ Rule making <ul style="list-style-type: none"> • Code of conduct • Technical norms • Terms and conditions ▶ Ex ante enforcement <ul style="list-style-type: none"> • Conformity assessment (e.g. appraisal) • Labelling (e.g. quality mark) • Authorisation (e.g. licensure/certification) • Allocation/assignment (e.g. scarce resources) • Proactive control/oversight (e.g. spot check) • Recommendations regarding conduct (e.g. price recommendations) ▶ Ex post enforcement <ul style="list-style-type: none"> • Ombudsman • Mediation/arbitration/negotiation • Assessing malpractice and sanctioning ▶ Sanctioning powers <ul style="list-style-type: none"> • Existential (e.g. revocation of a license) • Financial (e.g. fines) • Organisational (e.g. debarment) • Reputational (e.g. reprimands) • None ▶ Forms of appeal ▶ Evaluation indicators

Fig. 2. Analytical framework.

regulatory institution can impose existential sanctions, for instance by revoking a license, it can be assumed to have stronger regulatory powers than if it can only resort to reputational sanctions such as reprimands.

3. Selected results from the Austrian case study

Empirical surveys of national or multilevel regulatory systems based on the categorisation and analytical framework presented here¹⁸ mainly yield results on the *institutional* structure and less on the *process* and *efficiency* of regulation.¹⁹

Until the 1980s, the Austrian media and telecommunications sectors exhibited the typical regulatory structure of electronic communications sectors of developed European economies before liberalisation: The national government played a pivotal role regarding the development and control of media and telecommunications. Strong, sector-specific state regulations, particularly monopoly regulations and public property in market-dominant companies, characterised both electronic media and telecommunications. In recent decades, this traditional common pattern has been eroded, leading to a different role for the state, which inter alia includes less formalised means of regulation and the increasing involvement of private actors in regulatory processes (self- and co-regulation). This raises the question of whether the declarations of intent

¹⁸This section presents selected findings of the empirical analysis of the regulatory structure of the Austrian mediamatics sector (Latzer et al., 2002).

¹⁹It is important to stress that this article deals with processes and instruments *within* a given institution (e.g., rule-making, ex-ante/ex-post enforcement) but ignores interactions between different institutions.

by policy makers and industry alike that they would increasingly employ self- and co-regulation are mirrored in empirical evidence of growing alternative regulation. Ultimately, it is a question of whether there is empirical evidence for a recent increase in self- and co-regulation as part of a wider common process of transformation of statehood in convergent communications sectors of developed economies,²⁰ and/or as an indicator for the regulatory state hypothesis. If such an increase is evident, it consequently raises questions as to its extent, the adequate division of labour between state and private actors, the applicability and appropriateness of these new modes of regulation in regulatory practice, the (democratic) legitimacy of such institutions to fulfil public policy goals and the potential risks inherent in such a development.

3.1. Establishment of regulatory institutions

The central question of this institutional analysis is, first, to uncover whether there is empirical evidence of growing self- and co-regulation in recent years, contributing to a transformation of statehood and to a new institutional variety in communications regulation. To answer this, the following section takes a look at the historical development of the institutional regulatory arrangement in communications in Austria. Moreover, it shows regulatory patterns and gives some explanations for the establishment and deployment of alternative regulation, as well as for changes in state involvement in the regulatory structure.

Fig. 3 provides relevant information on the establishment of the 23 Austrian institutions at the centre of this study.²¹

- Since the end of the 1990s there has been a *sharp increase* of self-regulatory institutions. This development coincides with the Internet boom. All self-regulatory institutions founded since 1997, except for AK-TK and C3A, deal solely with Internet issues (seven of nine). One may further observe the establishment of state regulatory institutions in the broad sense, i.e. independent national regulatory agencies (NRAs). In accordance with EU liberalisation and harmonisation policies, sovereign tasks have been delegated to organisationally independent institutions.²² Altogether, more than half of the Austrian regulatory institutions (13 of 23) were founded between 1997 and 2001.
- However, this is not to say that self- and co-regulation are totally new phenomena. They have long been a constituent of the Austrian regulatory structure. Half of the alternative institutions (10) were founded before 1990. They have traditionally been applied in *technical areas* (since the second half of the 19th century) for issues such as standardisation²³ and standards conformity assessment,²⁴ for instance in the case of electro-technical matters²⁵ as well as in the *press* and *advertising* sectors, among other purposes for the protection of minors, film assessment and the promotion of minimum standards and fairness in news reporting.²⁶
- Over time, some long-established self-regulatory institutions have been transformed into co-regulatory institutions.²⁷ Three co-regulatory institutions²⁸ originally commenced their work as self-regulatory

²⁰See footnote 10.

²¹In total, 25 institutions active in communications regulation in Austria were identified, of which two state regulatory institutions in the narrow sense. Because of this paper's focus on new modes of regulation, the empirical analysis centres mainly on the 23 institutions identified in the other four categories, viz. state regulation in the broad sense, co-regulation as well as self-regulation in the broad and narrow sense.

²²The establishment of independent regulators is indicative of another trend in transformed statehood in the mediamatics sector, viz. the "separation of political/strategic and operative tasks" (Latzer, 2000).

²³OVE/OEK, ON, Austriapro.

²⁴TÜV, OVE/OEK, ON.

²⁵OVE/OEK.

²⁶For example, Presserat, Werberat, JMK, GFBK.

²⁷Such institutional changes from self- to co-regulation are also observable today, e.g., NICAM and Switch. NICAM, the Dutch institute for the classification of audio-visual media, and Switch, the Swiss institution responsible for domain names, started out as self-regulatory institutions. NICAM was provided with a legal basis by the *Media Act* in 2000, and Switch in 2002 by the *Verordnung über Adressierungselemente im Fernmeldebereich*. Further, a co-regulatory approach for youth protection was adopted in Germany under the *Jugendmedienschutz Staatsvertrag* in 2003. Existing self-regulatory institutions may now be officially approved by a commission for youth protection (KJM).

²⁸TÜV, OVE, ON.

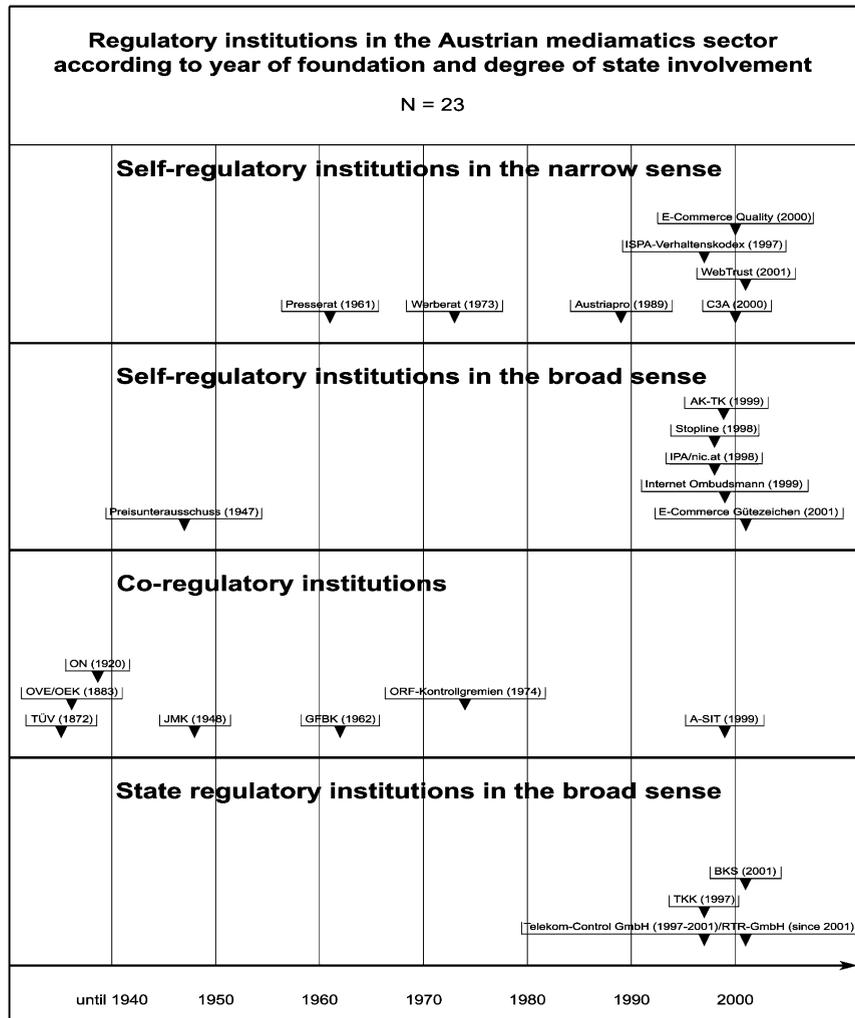


Fig. 3. Regulatory institutions in the Austrian mediamatics sector according to year of foundation and degree of state involvement.

initiatives in response to technical and security problems caused by the industrial revolution, which state regulation could not counter owing to the lack of (financial) resources and technical expertise. For these reasons, and because of the success of self-regulatory efforts, state institutions later delegated further regulatory tasks to these organisations and established them as co-regulatory institutions on a statutory basis.

- Politically encouraged co-regulation (e.g., by the European Commission) has not yet resulted in new foundations. Only one institution, active in the area of electronic signatures (A-SIT), was founded after 1990. An explanation could be that co-regulation takes longer to implement than self-regulation, as it is based on an explicit unilateral legal basis and therefore has to meet certain procedural requirements that self-regulation does not.

3.2. Operational scope and regulatory objectives

Another aim of this institutional analysis is to examine the areas of application of alternative regulation. To this end, it investigates the link between the degree of state involvement in regulation and the *operational scope*

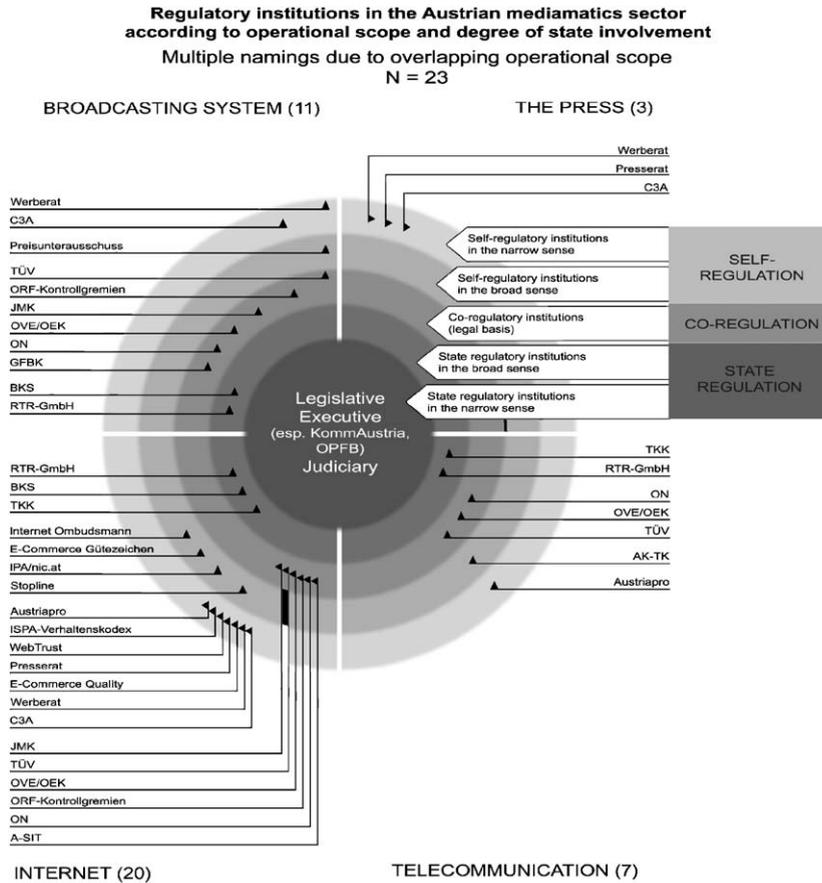


Fig. 4. Regulatory institutions in the Austrian mediamatics sector according to operational scope and degree of state involvement.

of regulatory institutions (telecommunications, press, broadcasting, Internet) as well as the *regulatory objectives* (content and user specific objectives, market power control, promotion of competition) (see Figs. 4 and 5). This approach mainly shows the sectors and policy objectives where a reliance on self- and co-regulation is observable and those where state regulation is still the predominant regulatory mode. This section also assesses the reasons for stronger public or private involvement (e.g., intensity of regulatory intervention, conflicts of interest, industry expertise) in order to draw conclusions on the general applicability of alternative regulation. Moreover, it gives insights into institutional regulatory patterns (e.g., regulatory convergence, regulatory competition).

- In terms of operational scope, most regulatory institutions (20) are active in the Internet sector. The reasons for this large number are the existence of many single-issue institutions (eight), i.e. institutions responsible only for one regulatory task (e.g., electronic signatures *or* the administration of the domain-name system *or* alternative dispute resolution)²⁹ and the fact that most institutions (12) that have traditionally been active only in telecommunications, broadcasting or the press have extended their operational scope to the Internet. The large number of institutions carrying out Internet regulation is an indicator of highly divided responsibilities, but not of high regulatory intensity.

²⁹Eight alternative institutions are active solely in Internet regulation: one co-regulatory institution (A-SIT), four self-regulatory institutions in the broad sense (Internet Ombudsmann, E-Commerce Gütezeichen, IPA/nic.at, Stopleveline), and three self-regulatory institutions in the narrow sense (E-Commerce Quality, WebTrust, ISPA-Verhaltenskodex).

Regulatory institutions in the Austrian mediatics sector according to regulatory objectives and degree of state involvement
 Multiple namings due to varying objectives of the same institutions
 N = 23

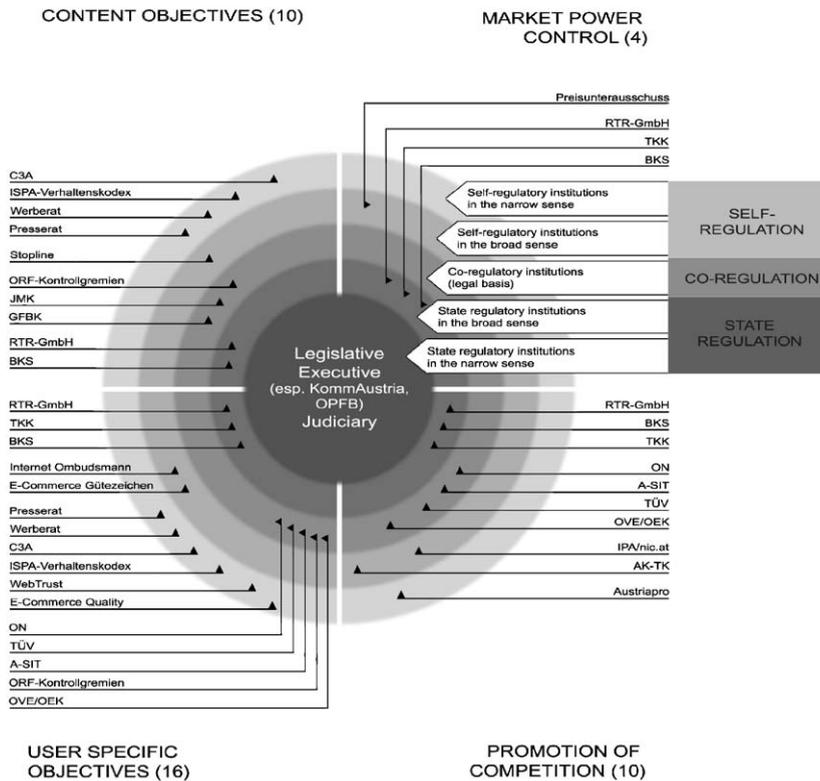


Fig. 5. Regulatory institutions in the Austrian mediatics sector according to regulatory objectives and degree of state involvement.

- The Austrian institutional structure supports the assumption that the Internet is characterised mainly by self-regulation (eleven of 20 institutions). This can be explained by the self-regulatory tradition of Internet regulation³⁰ but also by the potential advantages of self-regulation over state regulation (e.g., faster, more flexible).³¹
- State involvement in Internet regulation happens, as indicative of regulatory convergence, when it extends its traditional operational scope to the Internet. All state regulatory institutions in the broad sense and all co-regulatory institutions except for GFBK are active in this area.
- The degree of state involvement (as calculated by the number of institutions operating on a legal basis) is higher in telecommunications and broadcasting than in Internet and press regulation. While the Internet sector (eleven of 20) and the press sector (three of three) are dominated by self-regulatory institutions, approximately three quarters of the institutions active in telecommunications and broadcasting regulation operate on a statutory basis.
- There is a positive correlation between the degree of state involvement, conflicts of interest and the intensity of regulatory intervention, which may be illustrated by the regulatory structure of the Austrian

³⁰Especially in the early years of Internet development, the prevailing view was to leave the Internet to bottom-up regulatory approaches and that governments should stay out of Internet governance (Netanel, 2000; Baird, 2002).

³¹Alternative regulation may be used as a *makeshift solution*, if traditional state regulation fails, e.g. with regard to transborder regulatory problems such as content-related regulation on the Internet, or they may be chosen as an *ideal solution*. In such cases they can be expected to have certain advantages over state regulation (e.g., faster, more flexible) (Latzer et al., 2003, p. 142).

telecommunications sector. The stronger the conflicts of interest (e.g., between incumbents and newcomers) and the stronger the intensity of intervention (e.g., restrictions on former monopolists), the greater the reliance on state regulation. Accordingly, important regulatory competences in the Austrian telecommunications sector are vested in state regulatory institutions in the broad sense.³²

- The low number of self-regulatory institutions in the Austrian telecommunications sector can be further explained by the fact that various remaining regulatory tasks, which are suitable for alternative regulation (especially technical and administrative issues), are carried out by one institution only (AK-TK).³³ It is argued that the existence of *one* representative and accountable institution responsible for a variety of tasks makes for more successful alternative regulation.³⁴
- In terms of regulatory objectives, self- and co-regulation are not employed for market-power control. Theoretical reasoning suggests that alternative regulation does not work well in the case of strong conflicts of interest (see also above). Merger control, the control of abusive practices and the like are almost exclusively performed by state regulatory institutions in the narrow and broad sense.
- Alternative regulation is predominantly employed where industry interests are more homogeneous as in the case of user-specific objectives. More than two thirds of institutions (16 of 23) deal with issues such as consumer and data protection, universal service, improvements in market transparency or user empowerment. Generally, it is assumed that alternative regulation can react faster and be more flexible with regard to such issues, because the law is not able to foresee and regulate all future conflicts. In the case of alternative dispute resolution, for instance, redress can be achieved more quickly as compared to legal remedies through civil proceedings.
- There is regulatory competition with respect to eCommerce seals. Three institutions deal concurrently with this task.³⁵ While regulatory competition could result in a more efficient regulatory output, negative effects are possible as well. For example, there could be a reduction in transparency for consumers or insufficient information could be available. Regulatory competition often occurs when regulation is provided as a paid service, for instance in the case of eCommerce seals or alternative dispute resolution.³⁶ Consequently, the competition between various self-regulatory institutions for new customers and earnings could entail the danger of a ‘race to the bottom’ with standards continuously being lowered.³⁷
- Approximately half of the institutions (10 of 23) pursue content-specific objectives. Alternative regulation is traditionally applied in this area because of likely conflicts of interest regarding state censorship and the need for protecting the freedom of speech/press. Here, self-regulatory institutions deal mainly with issues such as the safeguarding of minimum standards, e.g., in news reporting, or the prevention of demerit content, such as child pornography. The fostering of merit content (e.g., cultural, regional and national content) on the other hand is pursued with stronger state influence and mainly by other means of political guidance (e.g., government aid for press and film) than by regulation, understood as collective intentional constraints of industry behaviour.³⁸
- The promotion of competition, e.g., by guaranteeing communications security or efficient use of resources, is dealt with by ten of 23 institutions. These activities are mainly aimed at bettering the conditions for market development, where most market participants should benefit on an equal basis, e.g., standardisation,³⁹ or special aspects of communications security.⁴⁰ The superiority of alternative regulation over state regulation in technical areas is mostly argued on the basis of greater industry expertise.

³²Given that the telecommunications sector is heavily regulated by EC Community law, this also holds true for other EU member states.

³³A similar structure exists in Australia, where ACIF (Australian Communications Industry Forum), a co-regulatory institution, performs a variety of regulatory tasks. See Schulz and Held (2002).

³⁴See, inter alia, Baeke, De Clercq, and Matthijs (1999, p. 29).

³⁵E-Commerce Gütezeichen, WebTrust, E-Commerce Quality.

³⁶For a comparative analysis on various online dispute-resolution services including data on service-fees see Schultz et al. (2001) Schultz, Kaufmann-Kohler, Langer, and Bonnet (2001). For comparative analyses on selected eCommerce trust marks/seals including data on service-fees see Nannariello (2001) and Nordquist, Andersson, and Dzepina (2002).

³⁷For regulatory competition and self-regulation see Christiansen (2000).

³⁸See Section 2 for the definition of regulation used here.

³⁹Austriapro, AK-TK, ON, OVE/OEK.

⁴⁰A-SIT, TÜV, IPA/nic.at.

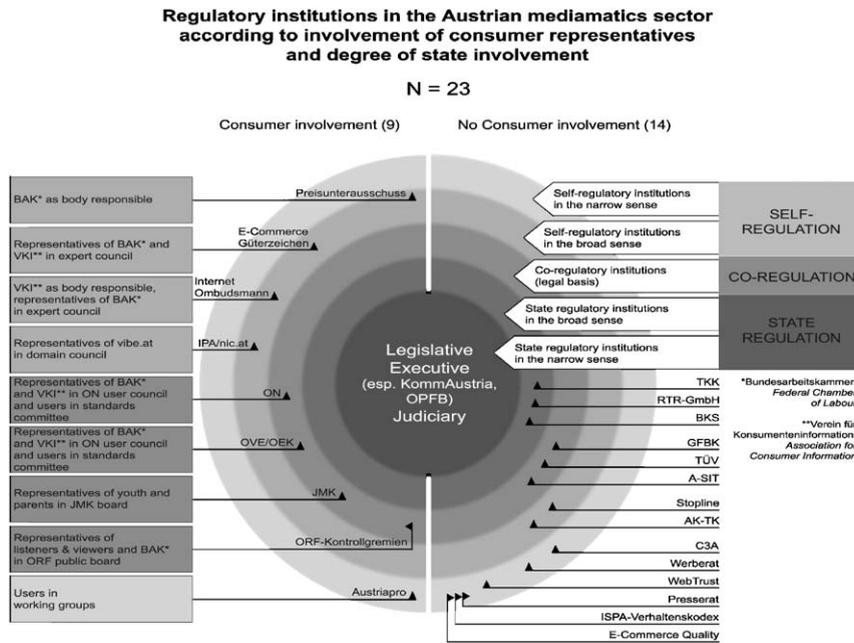


Fig. 6. Regulatory institutions in the Austrian mediamatics sector according to involvement of consumer representatives and degree of state involvement.

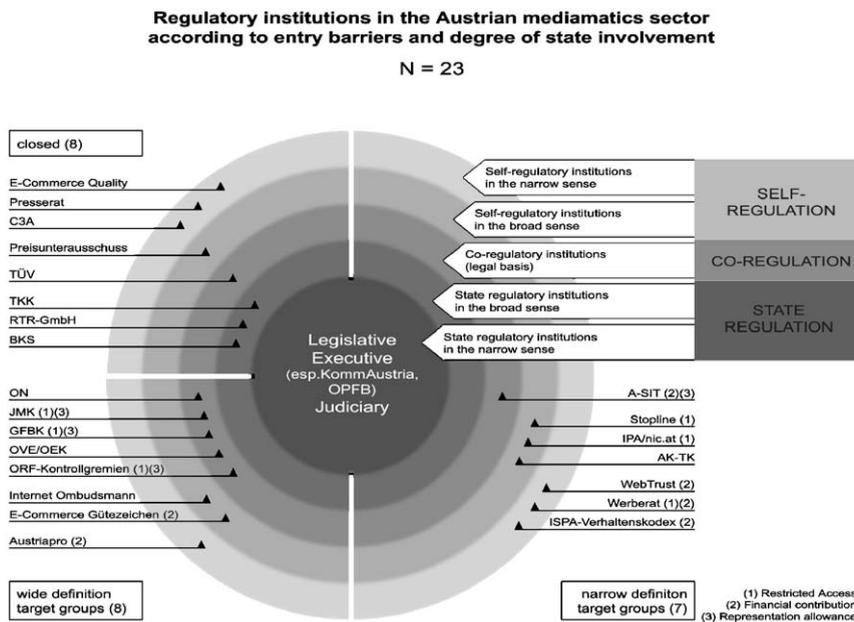


Fig. 7. Regulatory institutions in the Austrian mediamatics sector according to entry barriers and degree of state involvement.

3.3. Stakeholder involvement

A potential risk of self-regulation is that it is often considered as being self-serving on the part of the industry—that special interests are pursued at the expense of public interests.⁴¹ Hence, from a public-policy

⁴¹Further potential risks of alternative regulation include symbolic policy with weak standards, ineffective enforcement and mild sanctions (see Section 3.4), regulatory capture, anti-competitive behaviour, a loss of know-how on the part of governmental regulators,

point of view, overall possibilities for the participation of relevant stakeholders (e.g., consumer representatives, social partners) and the openness of institutions to such involvement are important for successful alternative regulation and are deemed essential to counter likely deficits. Correspondingly, the former EU Commissioner [Liikanen \(2001\)](#) even argued that self-regulatory efforts that do not provide for sufficient room for stakeholder involvement do not deserve strong political support. This section therefore focuses on participation and representation in regulatory institutions. It shows who is actually involved in the various regulatory institutions and if there is a balanced representation of interests in terms of industry and consumer involvement (see [Fig. 6](#)). Moreover, it analyses the general conditions for stakeholder involvement in terms of institutional openness and entry barriers (see [Fig. 7](#)):

- The premises for the balancing of interests by means of consumer representatives' participation seem to be insufficient. In the majority of alternative institutions (eleven of 20) there is no such involvement.⁴² Major reasons for this are access restrictions (e.g., compulsory industry membership or nomination required) and financial barriers (e.g., membership fees).
- The integration of consumer representatives and corollary possibilities of reconciling various interests differ between the various categories of regulation. There is no involvement in the case of state regulation in the broad sense (zero of three). This is quite in contrast to the situation before NRAs were founded. Until then, social partners (also representing consumer interests) had been heavily involved, in particular in state regulation of telecommunications. Decreasing state involvement in alternative regulation correlates with decreasing consumer involvement: It is best for 'self-regulation in the broad sense' (four of six) and co-regulation (four of seven), where two thirds, or rather more than half of institutions exhibit such involvement.⁴³ The lowest level of consumer representatives' involvement occurs in the category 'self-regulation in the narrow sense' (one of seven).
- Combined with the results on the establishment of regulatory institutions (see [Fig. 3](#)) it is evident that consumer involvement in alternative regulation decreases over time. While approximately two thirds of institutions (six of ten) founded before 1990 integrate consumer representatives, the number decreases to one third of institutions (three of ten) founded after 1990.
- Consumer interests are predominantly (two-thirds) represented by two major Austrian consumer representatives' institutions, the Federal Chamber of Labour and/or the Consumer Information Association. Any other form of consumer involvement is quasi non-existent.⁴⁴

From the analysis of provisions governing admission to a regulatory institution, it is possible to draw conclusions on the general preconditions for the balancing of interests. Generally, it can be assumed that the higher the barriers to entry the lower the possibilities for participation and for reconciliation of interests.⁴⁵

(footnote continued)

low industry coverage and free-riding and insufficient democratic quality (accountability, transparency and legal certainty). See [Latzer et al. \(2003\)](#), [NCC \(2000\)](#), [Campbell \(1999\)](#), [Boddeyn \(1988\)](#) and [Cane \(1987\)](#).

⁴²The analysis of social-partner involvement shows similar results ([Latzer et al., 2002](#), p. 136f.).

⁴³In the case of co-regulation the possibility of stakeholder involvement is often provided for by the law on which these institutions operate (e.g., ORF-public/audience council).

⁴⁴For example, the Internet users association [vibe.at](#) is involved in [IPA/nic.at](#). The ORF audience elects six of 35 members of the ORF public/audience board.

⁴⁵For the rules governing entrance this analysis distinguishes between:

- (1) *Access possibilities*: restricted access (completely closed or participation possible, for instance, by nomination, appointment, invitation) vs. open access (mere formal admission).
- (2) *Definition of target groups*: narrowly defined target groups (tight criteria for admission, such as compulsory industry membership, independence, expertise) vs. widely defined target groups.

Further, consideration is given to economic barriers such as the provision of human resources and financial barriers (membership fees, other funding).

The results of the analysis of Austrian regulators' openness and entry barriers are summarised in Fig. 7:

- There are high barriers to participation. More than three quarters of institutions are characterised by restricted access, narrowly defined target groups or by being closed in respect to participation by outsiders.
- Approximately one third of institutions (eight of 23) are closed, i.e. regulatory tasks are solely performed by members from within the institutions.
- Almost one third of institutions have narrowly defined target groups (seven of 23), where admission is subject to special criteria. Among these are compulsory industry membership,⁴⁶ independence,⁴⁷ or special expertise.⁴⁸ Furthermore, all these institutions—with the exception of AK-TK—have additional barriers in the form of restricted access⁴⁹ or financial barriers.⁵⁰
- The openness to participation in alternative regulatory institutions rises with increasing state involvement. As such, co-regulatory institutions are characterised mainly by openness (six of seven), wide definition of target groups (five of seven) and low economic barriers (six of seven), i.e. participation is not—except for A-SIT—subject to fees. In contrast, self-regulatory institutions in the narrow sense are either closed (three of seven), characterised by narrowly defined target groups (three of seven), and if participation is possible (four of seven) it is subject to a financial contribution.

3.4. Regulatory process and instruments

According to the literature, alternative regulation mainly occurs at the legislative stage of the regulatory process and lacks proper enforcement mechanisms. Weak standards and poor instruments to sanction malpractice are considered to be potential disadvantages of alternative regulation, which may result in mere symbolic politics (NCC, 2000, p. 23). In this section the regulatory instruments applied—from rule making to rule enforcement—were analysed in order to better understand the regulatory potential and practice of alternative regulatory institutions. Results show at what stage of the regulatory process self- and co-regulatory institutions are predominantly active, thus complementing traditional state regulation. Additionally, it identifies the applied regulatory instruments and the possibilities for alternative regulatory institutions to sanction malpractice so as to draw conclusions on their applicability to various regulatory issues:

- Alternative regulatory institutions supplement statutory regulations by rule making and rule enforcement. More than half of the alternative regulatory institutions (12 of 20) are active in rule making, e.g., by setting codes of conduct or technical standards. Besides AK-TK and Austriapro, all alternative regulatory institutions (18 of 20) are also active in rule enforcement (e.g., labelling, authorisation, allocation of domain-names, conformity assessment). This is contrary to the assumption found in the literature that the greatest degree of self-regulation occurs at the legislative stage (Swire, 1997).
- Rule-making activities by alternative regulatory institutions rise with decreasing state involvement. All self-regulatory institutions in the narrow sense (seven of seven), half of the self-regulatory institutions in the broad sense (three of six), but less than one third of co-regulatory institutions are active in rule-making.
- State regulatory institutions in the broad sense are only active in rule enforcement. They transpose the predetermined objectives assigned to them. This corresponds to the hypothesis regarding the transformation of statehood in the mediamatics sector that there is a separation of political/strategic tasks, which are fulfilled by ministries, from operative tasks, which are removed from political administration (Latzer, 2000).
- Self-regulation usually intervenes after problems have occurred. With decreasing state involvement ex post rule enforcement increases while the intensity of intervention decreases in self- and co-regulatory institutions (see Fig. 8). Only one co-regulatory institution (one of seven), but two thirds of self-regulatory

⁴⁶Stopline, WebTrust, Werberat, AK-TK, ISPA-Verhaltenskodex.

⁴⁷A-SIT.

⁴⁸IPA/nic.at.

⁴⁹IPA/nic.at: invitation by IPA board; Werberat: nomination by the three committees of the umbrella organisation, Stopline: ISPA board decides on composition of hotline advisory board.

⁵⁰Membership fees for A-SIT, ISPA-Verhaltenskodex, and Werberat; license fees for WebTrust.

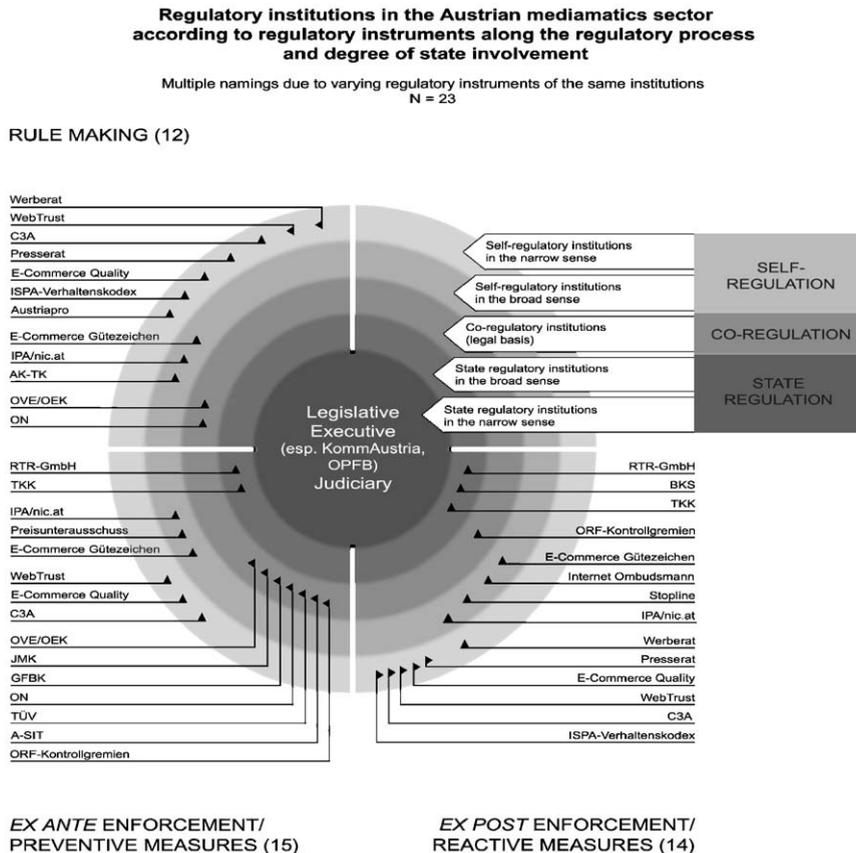


Fig. 8. Regulatory institutions in the Austrian mediamatics sector according to regulatory instruments along the regulatory process and degree of state involvement.

institutions in the broad sense and all but one self-regulatory institution in the narrow sense (Austriapro) are active in ex post rule enforcement. The instruments used are mediation or sanctioning in the form of, inter alia, the revocation of a quality mark. The fact that self-regulatory institutions resort mainly to reactive measures and intervene after problems have occurred indicates their limited applicability to regulatory issues requiring the possibility of strict preventive controls (e.g., due to the high risks of regulatory failure and possible adverse effects on health and security).

- Self-regulation is characterised by weak enforcement mechanisms. Possible sanctions by self-regulatory institutions in the broad and narrow sense are either non-existent (five of 13) or limited to reputation or organisational sanctions, such as the withdrawal of quality seals (five of 13), public reprimands/‘naming and shaming’ (two of 13), or the expulsion of members (one of 13). In contrast, all co-regulatory institutions and two-thirds of state regulatory institutions in the broad sense, may impose existential sanctions by revoking licenses or by denying certification (see Fig. 9).⁵¹

4. Summary and conclusions

The starting point of this paper was a research interest in transformed statehood in the communications sectors, under the influence of liberalisation, privatisation, globalisation and convergence. One of the

⁵¹Only one institution among the self-regulatory institutions has the (limited) power of existential sanctions. IPA/nic.at may refuse to register domain-names under the ccTLD (Country-Code Top-Level Domain) “.at”. However market entry is still possible for the applicant because he may register under another ccTLD or with a different domain name under “.at”.

Regulatory institutions in the Austrian mediamatics sector according to strongest possibilities of sanctions and degree of state involvement

N = 23

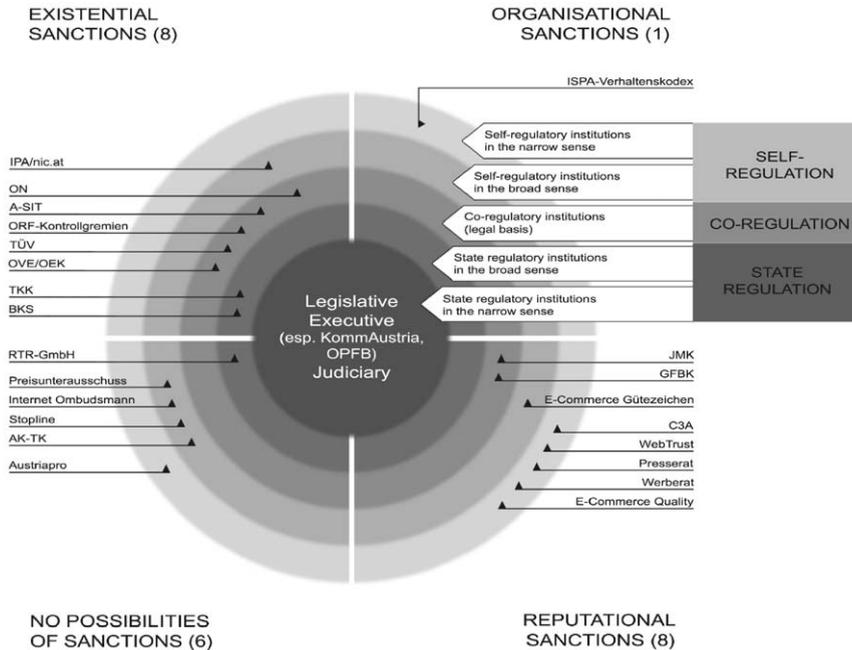


Fig. 9. Regulatory institutions in the Austrian mediamatics sector according to strongest possibilities of sanctions and degree of state involvement.

hypotheses regarding this transformation process is the emergence of a growing reliance on alternative modes of regulation (self- and co-regulation) and thus an increased reliance on private actors in communication regulation. While it can be widely read in the literature that self- and co-regulation are gaining more regulatory importance, comprehensive empirical research is still scarce. This contrasts with the regulatory practice in the convergent communications sector, where there is an impressive variety of different regulatory modes. Central questions are how the relation between state and non-state regulatory actors has changed in the convergent communications sector (mediamatics), if there is empirical evidence of growing alternative regulation and whether there are institutional patterns regarding regulatory objectives, instruments, sanctioning mechanisms, and stakeholder involvement, which correlate with the different degrees of state involvement in regulatory institutions. The approach presented here is novel in two respects. First, it embraces the full spectrum of national regulatory institutions in the mediamatics sector, comprising telecommunications, broadcasting, Internet and the press. Secondly, given that self- and co-regulation are vaguely defined concepts, lacking a single generally understood definition, in line with its interest in a transformed statehood, the paper develops a classification scheme for empirical analysis that allows for grouping and analysing regulatory institutions by their specific degree of state involvement. In this approach the simple dichotomy of state- vs. self-regulation is transcended by adding three more categories of regulatory institutions (state regulation in the broad sense, co-regulation and self-regulation in the broad sense). This makes it possible to provide additional insights into the politically promoted category of co-regulation for example. The empirical results are as follows:

Within state regulation there is a shift of regulatory competence from state regulation in the narrow sense to state regulation in the broad sense, i.e. NRAs. With regard to self-regulation, the paper argues that this is an increasing but by no means new phenomenon. While it has a long tradition in technical areas and media content regulation, it also enjoyed a sharp rise during the 1990s triggered by the Internet boom. Conversely, there are not many new co-regulatory institutions. Due to the fact that several self-regulatory institutions were transformed into co-regulatory ones in the past and that co-regulation is currently strongly politically encouraged, it can be assumed that co-regulation may become more important in the future.

The in-depth analysis regarding the operational scope of regulatory institutions shows that the rise of self-regulation is not evenly distributed within the communications sector. While the state still plays a major role in broadcasting and telecommunications, a plethora of new self-regulatory institutions can be identified in the Internet sector, many of which are single-issue institutions. This indicates that responsibilities are highly divided between the various institutions, which might entail problems in terms of visibility, but also in terms of stakeholder involvement when such participation is subject to fees (multiple membership cost). The print sector has traditionally shown a strong reliance on self-regulation with hardly any changes observable so far.

With regard to regulatory objectives it is evident that alternative regulation is not applied in the case of sharp conflicts of interest (e.g., market-power control) and where regulation displays a high intensity of regulatory intervention (e.g., limits on the market dominance of incumbent operators). Conversely, alternative regulation is mainly deployed if interests within the industry are more homogeneous, as in the cases of user specific objectives (e.g., consumer protection) and the promotion of competition to enhance the conditions for market development (e.g., information security). There is regulatory competition between self-regulatory institutions in the Internet sector (e.g., eCommerce seals), and regulatory convergence, which results from the extension of regulatory scopes of existing regulatory institutions to the Internet.

Empirical evidence partly supports the often-asserted assumption that there is unbalanced representation of stakeholders in alternative regulation. This results from high entry barriers such as access restrictions and financial barriers. While co-regulatory institutions are—by and large—open and accessible, self-regulatory institutions in the narrow sense usually lack possibilities for representation and openness, thus hampering equal participation of all stakeholders affected. Altogether, the involvement of consumer representatives in regulatory institutions falls with decreasing state involvement. Hence, a more balanced stakeholder involvement could be achieved through an increased deployment of co-regulation, where possibilities of participation and representation could be prescribed by law.

Considering regulatory processes and regulatory instruments, the findings contradict the assumption that the greatest amount of self-regulation occurs at the legislative stage. The analysis of regulatory processes (rule-making/legislation, ex-ante enforcement, ex-post enforcement, sanctioning) shows that self-regulatory institutions do not limit themselves to rule-making. They mostly resort to enforcement measures, especially to reactive/ex-post regulatory instruments, but they lack strict sanctioning possibilities. Consequently, self-regulatory institutions usually intervene after problems have occurred, which may be problematic in areas that feature high risks of regulatory failure.

The empirical analysis shows an increase in alternative regulation in the Austrian mediamatics sector, which, in combination with state regulatory institutions, is striving to achieve various public goals. This development inevitably raises questions regarding policy implications as well as potential risks of alternative regulation. Seen from a public-policy point of view, self- and co-regulation cannot replace traditional state intervention. But this does not mean that alternative regulation is irrelevant, or (democratically) illegitimate. On the contrary, alternative modes of regulation may be an effective way to deal with a control crisis of the state by *complementing* state regulation. So the question emerges of the circumstances under which alternative regulation can and should be applied in regulatory practice. Results from theoretical and empirical research indicate that alternative regulation may be appropriate:

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

Although any specific regulatory choice remains in the end a political decision, it should depend on a careful evaluation of each particular criterion also taking into account their interplay as well as their degree of intensity. Given that alternative regulation is still largely under-researched, the scholarly literature should increase its attention and provide practitioners with sound theoretical and empirical knowledge to enable decision making on a much more informed basis. The novel analytical tools developed and applied in this

article can be used within a wider framework of research on regulatory choice in order to identify the appropriate mix of state and alternative regulatory modes.

Moreover, there is a need for further *comparative* research on institutional patterns of state involvement in regulation in order to assess commonalities and differences between national regulatory structures and strategies. Comparisons may focus on alternative regulation in the mediamatics sectors of other countries, but also on institutional variety in further policy fields such as biotechnology, thus providing a more comprehensive insight into transformed statehood across policy fields.

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