After the consideration of the various regulatory theories in Chapter 8 and after the conclusion of that chapter that self regulation might be a viable regulatory mechanism necessary to silence the echo of regulatory inflation concerns, this chapter looks toward the mechanism itself. A prevailing question is: how to run the state or an organisation with due regard to the interest and welfare of the regulated persons and institutions? We view this as an important factor since the adoption of an efficient regulatory measure requires an understanding of the regulatory options available, and the way how the regulated might react to the measures adopted.

In the design of law in so far as cyberspace is concerned, we opine that it is prudent for regulators to consider and appreciate the characteristics of cyberspace. We repeat here the characteristics which are aptly stated by Johnson and Post (1996).

“Cyberspace radically undermines the relationship between the legally significant on-line phenomena and the physical location. The rise of the global network is destroying the link between the geographical location and
(1) the power of local governments to assert control over on-line behaviour,
(2) the effects of on-line behaviour on individuals and things,
(3) the legitimacy of the efforts of the local sovereign to enforce rules applicable to the global phenomena, and
(4) the ability of physical location to give notice of which sets of rules to apply”.¹

Given such characteristics, it is apparent that any form of ‘top down’ regulatory strategy will be futile.² To ensure legitimacy of regulations, and recognition of authority to the law making body, which, we argue, correspondingly results in greater compliance of regulations, it is incumbent on regulators to recognise but also to invite greater participation of those who are subjected to the regulations. This approach in effect translates to having the consent of those governed. With the benefit of greater compliance and lower enforcement costs, we consider self regulation as (1) a livid representation of the increasing

² Note the Johnson and Post proposal of a ‘decentralised emergent law’ might prove to be a more efficient form of governance.
aversion towards extensive state intervention and (2) an alternative form of regulation that is worth to be investigated more thoroughly.

Starting from this point of view, we focus our attention on four topics. We investigate what is self regulation (Section 9.1), the types of self regulation (Section 9.2), and the benefits of self regulation (Section 9.3). In Section 9.4, we provide two illustrations of the failure and the inefficiency of hard laws to provide an adequate child protection mechanism. The illustrations are seen in the form of (1) the case of ACLU v Reno and (2) the Prevention of Child Pornography Ordinance (Cap. 579). Criticisms of adopting a self-regulatory approach are dealt with in Section 9.5. In Section 9.6, we define the conditions that must be in place for effective self regulation. A combination of approaches is discussed in Section 9.7. In Section 9.8 we deal with the criticisms of responsive regulatory theory. Code of practice as a form of a self-regulatory approach is considered in Section 9.9. We complete with a chapter conclusion in Section 9.10.

9.1 SELF REGULATION – WHAT IT IS AND WHAT IT IS NOT

For a proper definition of self regulation, we might start by looking at what regulation means. Regulation refers to the conduct of the individual or institution to be regulated. Thus regulation encompasses three components: (1) legislation – where rules are defined, (2) enforcement – where appropriate actions are initiated against the rule violaters, and (3) adjudication – where consideration is made if the rules had indeed been breached, and where the appropriate sanctions for such breach are determined. In so far as ‘self regulation’ is concerned, it is envisaged that the industry or sector is charged with the three components mentioned. There is, however, no one all-encompassing definition of self regulation as its meaning differs from person to person, from industry to industry, and also from sector to sector. For instance, US Assistant Secretary of Commerce, Larry Irving (1997) said that

"the term ‘self regulation’ itself has a range of definitions. At one end of the spectrum, the term is used quite narrowly to refer to only those instances where the government has formally delegated the power to regulate, as in the delegation of securities industry, oversight to the stock exchanges. At the other end of the spectrum, the term is used when the private sector perceives the need to regulate itself for whatever reason – to respond to consumer demand, to carry out ethical beliefs, to enhance industry reputation or to level the market playing field – and does so".3

---

In fact as opined by Gunningham and Rees (1997) “regulation can be perceived on a spectrum ranging from a detailed government command and control regulation to “pure” self regulation, with different points in the continuum encapsulating various kinds of co-regulation”. Following on from Gunningham and Rees, we provide in Figure 9.1, an illustration of the extent of state involvement varying from non involvement to full involvement.

<table>
<thead>
<tr>
<th>No regulation</th>
<th>Self regulation</th>
<th>Co-regulation</th>
<th>Statutory regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>No explicit controls</td>
<td>Regulations are specified administered and enforced by the regulated organisations</td>
<td>Regulations are specified administered and enforced by a combination of the state and the regulated organisations</td>
<td>Regulations are administered and enforced by the state</td>
</tr>
</tbody>
</table>

Figure 9.1: Regulatory spectrum.

Quite simply, we may continue to investigate the literature, but the more definitions, the more the concept fades away. Therefore, we have chosen a definition, viz. one by Graham (1994), for use in our study.

Definition of Self Regulation: “Self regulation can be seen as the delegation of public policy tasks to private actors in an institutional form with one of the main objectives being the regulation of markets (industry) by the participants (players) within”.

9.2 FIVE TYPES OF SELF REGULATION

After providing the above definition, we are still faced with a variance of what self regulation can mean. A good starting point would be to determine if the ‘self’ in ‘self regulation’ relates to self as an individual or self as a collective body of persons. Despite the word ‘self’, which implies an individual, it is more common for self regulation to refer to the regulation of the conduct of a group of persons. The notion of ‘self’ therefore seems to imply a process


5 Supra Bartle and Vass.

that is both voluntary and not subject to external constraint. However, individualised self regulation does exist, since this form of regulation is tailored towards the individual firm.\textsuperscript{7} A first group of five categories of self regulation is provided by Bartle and Vass (2005). We list the five categories below together with their meaning.

\begin{enumerate}
\item Co-operative: where they see the category as encompassing “cooperation between regulator and regulated on the operation of statutory regulation”\textsuperscript{8};
\item Delegated: this includes the delegation of the implementation of statutory duties by a public authority to self-regulatory bodies;
\item Devolved: this is the devolution of statutory powers to self-regulatory bodies and may include the specification of self-regulatory schemes in statutes;
\item Facilitated: although not directly backed by statute, this category envisages explicitly state-supported self regulation;
\item Tacit: this category is the closest representation to pure self regulation.\textsuperscript{9}
\end{enumerate}

It seems that Bartle and Vass’s (2005) categories of self regulation were viewed from the point of the regulator, i.e., whether the regulator is co-operative, facilitating, or tacit in their roles. Below, we provide a second group of five types of self regulation:

\begin{enumerate}
\item consensual self regulation;
\item enforced self regulation;
\item co-regulation;
\item mandated self regulation;
\item sanctioned self regulation.
\end{enumerate}

We view the five types of self regulation as based on the degree of state intervention. In this regard, we find it useful to provide a spectrum of self regulation taken from the perspective of the National Consumer Council (NCC). These may vary from tacit threats of state sanctions to close monitoring and enforcement by a state agency.\textsuperscript{10} As posited by Baldwin and Cave, (1999) “There is not, (…) a clear contrast or choice between self regulation and a regulation by a state agency”.\textsuperscript{11} Instead, as Ogus (1994) suggested “(…) a spectrum of institutional arrangements containing different degrees of legislative constraints, outsider participation in relation to rule formation or enforce-

\textsuperscript{8} Supra Bartle and Vass, n. 4.
\textsuperscript{9} Supra.
\textsuperscript{11} Supra at p. 136.
ment (or both) and external control and accountability”.

Below we discuss our five types in greater detail.

**Type 1: consensual self regulation**

Ogus (1995) refers to ‘consensual self regulation’ by providing an example of what an individualised self regulation is. Ogus’s approach stresses on achieving consensus by open participation of those involved. For example, Ogus posits that at the heart of consensual self regulation, compliance with general regulatory objectives should primarily be achieved by agreement between employers and employees through consultation and negotiation. According to Ogus, the consultation and negotiation stage must precede the issuance of formal regulations (seen in the terms of codes of practice and guidance notes). Much benefit can be derived from this approach with resulting standards being better tailored to suit local circumstances and conditions. The parties from which protection is devised are themselves involved in a standard setting. Incentives to devise better and perhaps cheaper means of meeting the risks are preserved.

**Type 2: enforced self regulation**

A second form of individualised self regulation is Ayers and Braithwaite’s (1992), ‘enforced self regulation’. This form of self regulation involves negotiations between the state and the individual firms to produce regulations which are particularised to each firm. Self regulation in this sense is ‘enforced’ in the following manner: first, each firm is required to propose its own regulatory standards to avoid harsher and less tailored standards imposed by the state – this is the self regulation aspect of enforced self regulation. Second, the rules are publicly ratified. This is necessary as in the event the private enforcement of these rules fail, the rules can be publicly enforced. Enforced self regulation is often used to distinguish it from co-regulation in the sense that in co-regulation the state initiates the move by establishing parameters or a framework within which the industry works. The state can also be said

---


13 It should be noted that in addition to consensual self regulation, Ogus also describes competitive self regulation which he sees as appropriate in situations where the principal objection to self regulation is the ability of the self regulating body to exploit its monopolistic position. Ogus provides three models of competitive self regulation. The first is unconstrained market competition in which the firm adopts standards of product quality in response to consumer demands which may incorporate industry wide practices; independent agency assisted competition where an agency accredits the quality of a product and finally competition between such accrediting agencies. See further Black supra n. 7.


15 Supra Ogus, p. 102.
to support co-regulation by providing prescriptive laws to ensure its due compliance.

Type 3: co-regulation
Co-regulation is industry-association or sector self regulation with some oversight and/or ratification by the state. In plain terminology, co-regulation is a strategy where the state sets up the broad parameters of regulation and the industry concerned is then responsible for the development of detailed regulations; these regulations are then approved and administered by a regulatory agency. Co-regulation thus refers to the situation where the regulator and industry stakeholders work together, with the regulator setting the framework to work within. The industry stakeholders may be left to draft detailed rules within this framework and to take responsibility for implementation and enforcement. It also covers the situation where industry develops and administers a code and the government provides the ability to enforce the code by giving it legislative backing in some way.

Type 4: mandated self regulation
In most circumstances, self regulation is seen as substitutes for state regulation. As such, the components of self regulation are not dissimilar to the standard state regulatory process. The regulatory processes include determining governing principles, that is (1) policy making, (2) defining appropriate rules by legislating, (3) enforcing these rules against violaters, and (4) adjudication – deciding if a violation had taken place and if so, (5) imposing the appropriate sanction. As can be seen, a number of relationships do exist in which the state does have an input. This is seen most clearly in circumstances where self regulation is the result of government threats (what Ayers and Braithwaite (1992) terms as enforced self regulation) or where the government’s involvement is seen in supporting policy making and in enforcement. These relationships can take the form of mandated self regulation. The collective group or industry is required to formulate and enforce norms within a framework defined and provided by the state and coerced self regulation. The industry formulates and imposes the regulations not as a result of their own free will, but rather as a result of threats by the state of statutorily imposed regulations. These relationships are prime examples of enforced self regulation.


Type 5: sanctioned self regulation

A lesser form of state intervention is seen in sanctioned self regulation and voluntary self regulation. What warrants clarification is whether the term self regulation implicitly excludes all forms of state intervention. Although the term literally implies that state intervention is excluded, and pure voluntary self regulation with no state intervention, direct or indirect, does exist, we must admit that these are few. We provide as an example, ‘Customer’s Charter’, where small businesses may develop a charter as a guide to good customer service. In fact, the majority of self regulations have some form of state input either by way of direct involvement or as a result of governmental pressure. In the sanctioned self regulation, the regulations are formulated by the collective group or industry. The regulations are then subjected to the government’s approval. The latter (as its name implies) is where no active state intervention whether direct or indirect is involved.18 Thus, despite the argument by Corn Revere (1998) who opines (1) that self regulation is best promoted by ending all direct and indirect government control, and (2) that the effort to promote government policies by means of threat, indirect pressure, and suggested industry codes are not true self regulation,19 we argue in support of Price and Verhulst (2005) that most forms of self regulation exist with some degree of relationship with the state.20 (In passing, we admit that individualised self regulation where the state rarely intervenes does exist. An example of this form of self regulation is the Customer’s Charter). The state’s interest may be passive in nature in that the interest may only be activated when circumstances are so dire as to warrant its attention.21

Figure 9.2 illustrates the eight categories of self regulation identified by the National Consumer Council (NCC) 2000.

---

18 Supra Ogus, n.12.
20 Examples of some individualised self regulation can be seen in the form of netiquette where guidelines are established by users of the Internet for the posting of individual messages on newsgroups. These guidelines include keeping messages short, not using capital letters and the use of proper formats. Normally, a breach of these guidelines would be met with rebuke from other newsgroup users. See http://webopedia.internet.com/TERM/n/netiquette/html and www.dtcc.edu/cs/rfc1855.htm
21 Supra Bartle and Vass, n. 4.
Categories of self regulation | Description
--- | ---
Legal codes | these are imposed by the government or public authority under statute but do not have full force of the law
Official codes and guidance | the code of guidance is issued by the government or regulatory agency
‘Recognised’ codes | these codes have some form of statutory recognition empowering for example, professional bodies, such as the Law Society to regulate its members
Trade association codes approved by the Office of Fair Trading (OFT) | these include codes developed and negotiated by the trade association in consultation with the OFT and subsequently approved by them
Negotiated codes | these codes are negotiated between the government, the industry, and consumer organizations
Unilateral sectoral Codes | as its name suggest, these codes are unilaterally adopted by the industry without any external consultation
Customer charters | charters are formulated by individual businesses to promote customer service initiatives
Unilateral codes of conduct | these codes are established 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.

Figure 9.2: NCC’s self regulation spectrum (adapted version).

At first glance, we note that the NCCs had not identified co-regulation as a method of self regulation in their self-regulation spectrum. We regarded this as odd since, as previously argued, ‘pure’ self regulation is a rare species. We subsequently discovered that it is only because NCC has not expressed it as such. We thus see (1) self regulation which is ‘underpinned by legal regulation’ or (2) self regulation with a statutory element or clear involvement of a public authority in negotiated codes, trade association codes approved by OFT, recognised codes, official codes and guidance, and legal codes. These codes of conduct do have some degree of government intervention and can be compared with, for example, unilateral codes of conduct, customer charter, and unilateral sector codes which have no external input neither governmental nor non-governmental.

---

22 The Law Society is a representative body for solicitors in the U.K. For more information of the professional organization, please see [http://www.lawsociety.org.uk/aboutlawsociety/whoweare/abouthistory.law](http://www.lawsociety.org.uk/aboutlawsociety/whoweare/abouthistory.law)

23 The diagram is taken from Bartle and Vass, supra n. 4. See also National Consumer Council, (2000), Models of Self Regulation: An Overview of Models in Business and the Professions, November 2000.

24 Supra Bartle and Vass, n.4.
Thus having examined the types of self regulation, we remark that it is a misnomer to say that self regulation is devoid of state intervention. Rather, it is more apt to determine their relationship with the state by considering the many questions that may emerge. We provide four example questions. They are:

1. Will efforts to regulate start from within the industry or as a consequence of government action?
2. Are the broad standards to be administered by the self-regulating body developed by the government or by the self-regulating body?
3. Will users have a right of review within the self-regulatory process or will they have the right to review before a state judicial system?
4. Will there be a duty or privilege of the regulating body to cooperate with the state’s law enforcement agencies for the purposes of monitoring and providing information of violations of law?25

We further argue that the fact that a relationship exists between the law and self regulation also reflects Teubner’s theory of law as an autopoietic system – where law is to ensure each system is responsive to its environment in that each system considers and takes into account in its operations, the operations of other subsystems with a view to inducing integration between the various systems and subsystems (see Subsection 8.11.1). Thus although self-regulatory bodies refer, generate, and produce (develop) their own standards, principles, and policies, they do so not in isolation and without due regard of the wider public interest. For example, a viable self-regulatory system for the Internet should include service providers and content providers as well as the interest of Internet users. It is therefore important that states that encourage self regulation must convince the industry, that effective implementation of self-regulatory measures is beneficial in that it may enhance the credibility of the industry amongst the consumers and reduce the threat of costly government regulation.26

9.3 BENEFITS OF SELF REGULATION

To many scholars such as Price and Verhulst (2005), Sinclair (1997), Streeck and Schmitter (1985), and Pitofsky (1998), self regulation offers a number of benefits that cannot be achieved sufficiently by the command control approach of regulation. From a public policy perspective, one of the most common benefits propounded is the reduction of costs in the implementation and compliance of state regulation. From the state’s point of view, self regulation is more efficient as the regulatory costs are borne by the industry instead of

25 Supra Price and Verhulst, n. 17, p. 11-12.
26 Supra Price and Verhulst, n. 17, p. 13.
by the state. Although this may seem an over-simplistic way of attributing the benefits of self regulation, the argument does hold water especially when industries or a collective group of individuals do get together to form principles and standards for which they agree to be bound by. These principles and standards are generally developed by those who are technical experts or skilled personnel in the industry. The individuals are also individuals who have their hand on the pulse of the industry and thus know what would work, what would not, and what would land well with the community. Compliance of regulations therefore is less cumbersome. Further, since the rules are designed by the industries and collective bodies, the rules would be more comprehensive in their coverage. The industries and the collective bodies would also be more committed to the rules.

In a similar vein, the state has often been criticised for information deficiencies when designing command control regulation. This deficiency stems from the lack of design or information input from those which the state intends to regulate. Without doubt, this criticism is reduced by input from technical experts in the design process.

Self regulation is often characterised as being highly dependent on the goodwill and cooperation of those regulated (the regulatees) where strict compulsion as is evident of the command control approach is not generally advocated. Instead, what is encouraged is moral-suasion, a moral commitment from the regulatees by using information, education, technology sharing, and peer pressure. In fact, the absence of compulsion and the preference amongst individuals to act on their own initiative rather than to be forced into a particular course of action is what attracts policymakers to self regulation. Additionally, self regulation has the benefit of avoiding state intervention in sensitive areas of basic rights, such as freedom of speech and information while offering standards for social responsibility, accountability, and user protection from offensive material.

Political scientists such as Streeck and Schmitter (1985) argue that self regulation could overcome the problems of implementation and legitimisation.

---

28 In terms of environmental regulations, it is argued that this stand is supported on the basis that it will result in a level playing field for all of industry and will facilitate access for new entrants. See Sinclair, D., (1997), Self Regulation versus Command and Control? Beyond False Dichotomies, Law & Policy Vol. 19, Number 4.
29 Moral-suasion is a persuasive tactic used by authorities to influence and pressure enterprises and organisations to adhere to policy.
31 Supra Price and Verhulst, n. 17 p. 9.
associated with state intervention. In this sense, self regulation can be seen as a testing ground with measures adopted acting as forerunner to state regulation. Self regulation can be used to pave the way for a more formal regulation once the state has familiarise itself with the issues raised by the new technology and new media. Attempting to transplant the established real-world state regulation to the fluidity and intangibility of the virtual world is futile. Furthermore, state regulation is known to be highly inflexible, less adaptable, and less accommodative to the myriad changes brought about by the Internet. Conversely, by its nature, self regulation is better suited to facilitate the efficient coordination of policies and standards of activities in the virtual world. As observed by Pitofsky (1998), “self regulation is more prompt, flexible and effective than government regulation”.

Thus, in considering whether self regulation might be the solution to regulatory inflation concerns, we articulate five main factors that must be considered: (1) the risk of regulatory failure in terms of law-enforcement results; (2) ineffective cost of enforcement; (3) the rapidly evolving environment of new technologies; (4) the degree of responsibility that should be attached to various stakeholders; and (5) the importance of stakeholders’ consultation and participation. In the Section 9.4, we provide by means of two illustrations (1) the state’s inadequacy and (2) the ineffectiveness of the law in regulating content.

9.4 TWO ILLUSTRATIONS

Following on from our discussions above, we remark that regulation by hierarchical control approach (direct state regulation) where the standard is set by law and modification of deviant behaviour by strict enforcement (normally by imposition of penalties) is fraught by numerous constraints. The constraints include the efficacy and efficiency of such hard laws (1) to protect, for example, the privacy and the rights of individuals, and (2) to reduce the commission of the offences or the wrongful activities, which the laws were enacted to reduce. Below we provide the two promised illustrations.

9.4.1 The state’s inadequacy

The first illustration deals with the attempts by the US to regulate on-line pornography. The attempt was first made with the passing of the Communica-
tions Decency Act (the CDA) in 1996. The Act was challenged by the American Civil Liberties Union (ACLU) and was partially overturned by the Supreme Court. In upholding the decision of the District Court, the Supreme Court declared as unconstitutional two statutory provisions which were enacted to protect minors from ‘indecent’ and ‘patently offensive’ communications on the Internet in the CDA as a violation of both freedom of speech and personal privacy. This was followed by the striking down of the Child On-line Protection Act in 1998 because the use of the term ‘community standards’ to determine harmful materials was found to be too broad and therefore unconstitutional. Although, we accept that above situation might be peculiar to the US taking into account the strong support and protection accorded to the First Amendment to the US Constitution, we opine that the case is illustrative of the many difficulties encountered by regulators in the design and formulation of regulations.

9.4.2 The ineffectiveness of law in regulating content

Below we look at the often weak attempt of the law to address adequately and deal effectively with the rising concerns. In this regard, we look again at the discussions of Chapter 6 on regulatory arrangements and the protection of children, wherein we have raised and discussed the Prevention of Child Pornography Ordinance (Cap. 579) on two issues (1) the failure of the Ordinance to address the hazard of ‘on-line grooming’, and (2) the ineffectiveness of the state’s enforcement of its hierarchical control strategy by the imposition of

34 The Act attempted to ban the transmission of obscene and indecent materials over the Internet.
35 See ACLU v Reno, 1997, 521 U.S. 844. The Supreme Court held that the CDA was an unconstitutional restriction on the Internet, a “unique and wholly new medium of worldwide human communication” deserving of full First Amendment protection. Because only obscenity is regulable, the regulations would effectively reduce the constitutionally protected material available to adults “to only what is fit for children.”
36 Also known as ACLU v Reno II, 00-1293. The Child On-line Protection Act (COPA) makes it unlawful to make any communication for commercial purposes by means of the World Wide Web that is available to minors and that includes material that is “harmful to minors”, unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. 231(a)(1) and (c)(1) (Supp. IV 1998). COPA relies in part on “community standards” to identify material that is “harmful to minors.” 47 U.S.C. 231(e)(6) (Supp. IV 1998). The question presented is whether the court of appeals properly barred enforcement of COPA on First Amendment grounds because it relies on community standards to identify material that is harmful to minors. The Supreme Court found that the government has not shown that there are no “less restrictive alternatives” to COPA, and that “there is a potential for extraordinary harm and a serious chill upon protected speech” if the law goes into effect. See http://supreme.lp.findlaw.com/supreme_court/briefs/00-1293/2000-1293.pet.aa.html
non-custodial sentences. As a follow up, we have also discussed in Chapter 8, how the effectiveness of the measures is dependent upon whether an individual can benefit more either (1) by ignoring the measures undertaken (in this case, the law), or (2) by complying with it. Thus, if the conventional command control approach is adopted with a view to facilitate and ensure compliance, what compliance can we expect to see from society if the penalty imposed is (1) insufficient to result in the deterrence of the offender and (2) seems to send implicitly the wrong message to the rest of the community?

9.4.3 Four benefits point towards self regulation

The two illustrations provide a sample of the constraints of the hierarchical control approach. We remark that effective self regulation can offer four main benefits in comparison to direct state regulation. (1) Self regulation utilises the expertise of the regulated. (2) With the support and input of relevant stakeholders within the industry, consensus of the regulated and therefore, compliance is more likely to be secured. (3) The flexibility of self regulation enables it to adapt more easily and rapidly to changing market conditions and technological innovations. (4) Self regulation can play an important role within the whole regulatory framework and that is “risk identification”. Self regulation can assist by identifying areas of concerns within the industry practice, consumer knowledge, and government policies.

Despite the benefits of self regulation vis-a-vis, state regulation, self regulation has attracted wide criticisms. Section 9.5 provides a brief description of the criticisms of adopting a self-regulatory approach.

9.5 Criticisms of adopting a self-regulatory approach

There are five main criticisms of adopting a self-regulatory approach. The first is its anti-competitiveness. Although industries and groups may come together to develop standards and principles, they do so mainly with their own interest in mind rather than the general public’s. For example, the principles and standards developed may act as entry barriers to the market and industry. Thus, the policies may not be geared towards the greater benefit of the consuming community as a whole but they are rather sector specific or industry specific.

Second, self regulation has been criticised as being used by interested parties to feather their own nest in what is regarded as ‘regulatory capture’. Regulatory capture is a concept used to describe a situation whereby regulators become tools of the industry they regulate in the sense that the regulators risk

37 In Chapter 6, under section 6.8, we had considered the effect of the PCPO and evaluated the judicial decisions made under the Ordinance.
being captured by those they are supposed to regulate.38 This can occur as industries or individuals with interest in the outcome of a policy or a decision focus their efforts in ensuring they obtain the outcome or benefit they prefer. We state that while this may be true of self regulation, it is an affliction which affects state regulators as well. The vulnerability of regulators to political influence and corruption at the expense of the community is nothing new and is seen as one of the major shortcomings of state regulation.39 Indeed, Sinclair (1997) suggests that one proposed solution is to remove as far as possible, industry and government from the regulatory process.40 In such circumstances, we remark that unless an independent body exists which monitors and supervises these self-regulatory bodies, it is questionable to what extent and in what way the public will benefit.

The third criticism is the enforcement of such standards and principles against violaters. Again, unless the self-regulatory body is backed up by the state, it is difficult to see how, and to what extent a regulatory body can ensure compliance. A high rate of violation and non-compliance of its standards and principles will no doubt create distrust and a loss of public confidence in the self-regulatory body as well as in self regulation as a regulatory mechanism. There are a number of enforcement measures. One example is expulsion or the withdrawal of privileges, such as the denial of the right to display a quality seal or a trust mark.41 While quality seals and trust marks are positive enforcement measures, the effectiveness of these measures, are dependent on whether a company or an organisation can make greater profit by ignoring self regulation or by complying with it.42

The fourth critique is related to the criticism of enforcement. It is the ‘free-rider’ problem. We state that the extent of the effectiveness of self regulation depends on full industry coverage and participation. In such circumstances, the mechanism can substantially weaken if it emerges that the self-regulatory

38 The term was created by Richard Posner who argued that “Regulation is not about the public interest at all, but is a process, by which interest groups seek to promote their private interest ... Over time, regulatory agencies come to be dominated by the industries regulated.” See http://www.economist.com/research/Economics/alphabetic.cfm?letter=R
40 Supra Sinclair, n.28.
41 A trust mark is a logo displayed on the website of a trader, which informs the customer that the trader is committed to certain qualitative standards or best practices. The purpose of trust marks and quality seals is to build confidence in the traders who display the trust marks or quality seals. See www.trustmark.org.uk
42 See Perritt, H., Regulatory Models for Protecting Privacy in the Internet, in Privacy and Self Regulation in the Information Age, supra n. 3 at p. 110.
scheme fails to attract the support of all industry members in terms of participation and/or adherence to the agreed rules.

A fifth critique arises if the self-regulatory scheme does not encompass vigorous accountability mechanisms in that, for example, the decisions taken by self-regulatory bodies are not transparent and reviewable.\textsuperscript{43}

Given that a self-regulatory strategy is an alternative form of regulatory strategy, an appreciation and proper understanding of its benefits and criticisms will assist in providing the right conditions that must exist for the optimal implementation of industry self regulation.

9.6 CONDITIONS FOR EFFECTIVE SELF REGULATION

In this section, we define the conditions that must be in place for self regulation to be effective. This is followed by a brief examination of whether the conditions exist in Hong Kong for self regulation to be successfully implemented (Subsection 9.6.1).

Having considered the benefits and concerns of self regulation as an alternative regulatory approach, we can briefly define six key conditions that need to be in place for self regulation to be effective.

(1) A common industry interest: Industry self regulation can only work if there is sufficient mass of common interest to pursue a common objective. In so far as our study is concerned, we state that there must be a critical mass of common interest within the industry and amongst the industry players (the MNOs, the MVNOs, mobile service providers) to protect children and young people from hazards that are accessible via Internet-enabled mobile phones.

(2) Industry commitment: We believe that co-related to common industry interest is the extent of the industry’s commitment towards harnessing the common interest in enlisting support from stakeholders such as the state (government agencies), NGOs, and consumer organisations. Moreover, we believe that sincere commitment to the address child protection concerns amongst these stakeholders is vital rather than promoting the adopting of measures as ‘a window dressing exercise’ to gain economic and political mileage. This is important since it is anticipated that significant resources would be required to support the successful establishment, compliance, and enforcement of self-regulatory mechanism.

\textsuperscript{43} Supra Black, n. 7; see further Cane, P., (1986), Self Regulation and Judicial Review, \textit{Civil Justice Quarterly} 24, and Pannick, D., (1992), Who is subjected to Judicial Review and in Respect of What?, \textit{Public Law} 1 at p. 4-5.
(3) **The development of clear objectives**: The objectives of the self-regulatory mechanism must be sufficiently clear to all the stakeholders. This can be best achieved if the self-regulatory mechanism is developed in consultation and in collaboration between industry, government agencies, NGOs, and consumer organisations.

(4) **Wide industry coverage**: We believe for self regulation to be successful and effective as a regulatory alternative, it is necessary that the mechanism applies to all industry members. This makes sense since (a) it may reduce the problem of ‘free riders’ and (b) it strengthens the mechanism by attracting the support of the industry.

(5) **Integration into the existing regulatory framework**: It is vital that the development and implementation of self-regulatory mechanism should not be done in isolation. It is necessary for the mechanism to complement the existing framework and to work harmoniously and in tandem with the regulator’s objectives.

(6) **Accountability, compliance and enforcement**: We have seen (in Section 9.4) that three of the significant concerns associated with self regulation are: inadequate compliance, monitoring, and enforcement. Thus, to ensure there is sufficient accountability, it is necessary that effective compliance, monitoring and enforcement mechanisms of rules, standards and policies are in place. These mechanisms must be supported by clear, user friendly and efficient dispute-resolution processes and education of industry members of their obligations.

### 9.6.1 Self regulation as an alternative regulatory mechanism in Hong Kong

While we regard self regulation as a good alternative to state regulation, so far we have failed to elicit sufficient evidence to indicate that the alternative approach can be effectively implemented in Hong Kong. Our brief study of Australia and the UK in Chapter 7 has provided us with valuable insights into and a good representation of insights in to a viable self-regulatory strategy for regulating mobile content services in the light of child protection concerns. Indeed from our study, we surmise that conditions articulated in Section 9.6 above fail to exist in a manner that the conditions can support the successful implementation of a self-regulatory mechanism in Hong Kong in so far as the protection of children and young people from the hazards of mobile content

---

44 Free riding occurs if all industry players do not coordinate on voluntarily restraining their conduct. The free rider gains a cost advantage relative to his business rivals because it does not undertake the costly voluntary action or adhere to the regulations. Thus, members that do comply may be economically disadvantaged. This could result as a ‘dis-incentive’ to members that comply.
are concerned. For the failure observed here are three main reasons (1) lack of strong industry representation, (2) stakeholders’ nonchalant attitude, and (3) weak government initiatives. We discuss the three reasons below.

(1) Lack of strong industry representation
It is apparent that self-regulation requires significant industry level involvement in the development and implementation of the regulation. This is not possible if major industry players lack ‘common interest, sincere commitment, and clear objective’ to protect the youngsters from the hazards of mobile content. Unlike Australia (see Chapter 7), where an organised industry representative body in the form of the Internet Industry Association (IIA) exists, such an association does not exist in Hong Kong. Indeed we see in Hong Kong, six mobile network operators (MNOs). They have been previously described in Chapter 2 and are (1) Hong Kong CSL Limited,\(^{45}\) (2) Hutchinson Telephone Company Limited, (3) SmarTone Mobile Communications Limited, (4) PCCW Mobile HK Limited, (5) New World PCS Limited, and (6) China Mobile Peoples Telephone Company Limited. Perhaps, it is due to the lack of strong industry representation that our investigations failed to reveal any proposal by the MNOs to develop an appropriate self-regulatory mechanism that can be seen as a positive and proactive measure towards addressing child protection concerns and inappropriate mobile content. We can also compare Hong Kong’s position with that of the UK, where we had observed a strong commitment by the six mobile operators (namely, Orange, O2, T-Mobile, Virgin Mobile, Vodafone, and Hutchinson 3) in developing a code of practice for mobile content services. At this place, I hesitate to state that Hong Kong’s position is evidenced by the author’s failed attempts to arrange an interview with three of the MNOs with a view of evaluating the MNOs position with respect to the concerns posed. The reason the author was provided with was “it is a commercial secret”. Thus, if the ‘economic immaturity’ continues to persist with each industry player viewing the other industry player as nothing more than “a market competitor and a rival for a larger slice of the mobile content services pie”, rather than “market partners with common interest, commitment and shared responsibility towards a clear social objective of protecting youngsters”, it would be difficult to see the implementation of industry self-regulation as a viable alternative mechanism in Hong Kong.

(2) Stakeholders’ nonchalant attitude
Since the development of any form of self-regulation mechanism would require the representation, participation, and input of other interested stakeholders (namely the community, NGOs, government agencies, Internet service providers, educational institutions, and the legal fraternity), the nonchalant attitude of

\(^{45}\) CSL New World Mobility Ltd was created to own two mobile telephone operators, New World PC Ltd and HK CSL Ltd.
these stakeholders will not assist in providing the necessary driving force required. We have stated previously in Chapter 7 that, to a large extent, the MNOs and the other stakeholders’ attitude can be attributed to the origins of the Hong Kong’s Chinese community and their socio-cultural and socio-economic point of view. For example, S.K Lau (1984) opines that the normative orientation of the Chinese community was (1) short term, (2) materialistic, (3) valuing social stability above political participation, and (4) securing their families longer term futures. Thus, the attitude which we regard as ‘narrow’ does not lend itself towards working for the betterment of the community as a whole.

(3) Weak government initiatives
Despite the lack of industry representation, we opine that it is possible to ‘jump-start’ the development of a self-regulatory mechanism amongst industry players when there are fears of government regulation. Thus, if the Hong Kong government expresses the intention to interfere by means of legislation, this might provide the impetus for the MNOs to self regulate. However, the likelihood of this occurring is small since the Hong Kong economy is dominated by oligopolies and business tycoons who support the government. The result is that these elite business interest groups have considerable political influence and clout to ensure that their interests are protected and the government policies are not detrimental. Thus, unless the government adopts a different style of governance, self regulation as a cost effective, less cumbersome regulatory alternative will fail.

Profit as incentive
MNOs can be encouraged to self regulate if there are incentives to do so. In this regard, we remark that a strong incentive for industry players is profit. We thus believe the adoption and strict adherence of industry-led regulations by MNOs will instill greater consumer confidence and trust in the industry; this can lead to an increase in profit margins. Conversely, if the compliance costs does not harm industry members’ profits nor imposes a financial burden, there may be a greater incentive towards self regulation. The government can play a significant role in encouraging MNOs to self regulate by using a ‘carrot and stick approach’ such as providing incentives (tax benefits or government backed business loans with easier credit terms) or by imposing stringent conditions upon the renewal of an MNO’s licences. It is important for the state

47 We note this observation by He and Zhu in our discussion in Chapter 7. See also He, Z., and Zhu, J.H. Jonathan, Regulating the New Media in China and Hong Kong: Manipulation and Transaction, Available at www.newmedia.cityu.edu.hk/cyberlaw/gp1/intro.html.
regulator to convince the industry that effective implementation of self-regulatory measures is beneficial in enhancing the credibility of the industry amongst consumers and in reducing the threat of costly government intervention.

Thus, we may tentatively conclude that the three main conditions, i.e., (1) a mature, well organised industry, (2) a ‘community focused’ stakeholder community, and (3) a strong state regulator does not currently exist in Hong Kong. Since the development, adoption, and effective implementation of a self-regulatory strategy necessitates the strong commitment of the industry and the support of the government to be successful, unless there is a change in the mind-set and attitude of the industry players and the culture of governance in Hong Kong, there is a high possibility that self regulation as a viable alternative regulatory mechanism for the protection of children and young people from the hazards of mobile technology may remain on the books.

9.7 A COMBINATION OF APPROACHES

Having (1) considered the pros and cons of self regulation and (2) defined the conditions necessary for its effective implementation, we are faced with an interesting question. Does this way of looking at benefits and criticisms of the self-regulatory approach by pitching the command control approach against the self-regulatory approach implies a mutually exclusive regulatory option? As pointed out by Iles (1996) “regulation is portrayed as top down, cumbersome and resource intensive, and voluntary standards as bottom up, relatively flexible and particularistic”.48 So we may answer the above question by stating that this is far from true. Instead, we state that the choices available to regulators are merely two extreme forms of the regulatory approaches; the command control approach at one end and pure self-regulatory approach at the opposing end (see Figure 9.3).

We know it has been stated that regulatory styles that are cooperative on the one hand and punitive on the other hand “may operate at cross purposes because the strategies fit uneasily with each other as a result of conflicting imperatives”.49 Notwithstanding the two extremes, it is argued that both approaches are neither independent and separate from the other nor are they applied solely to the exclusion of the other. It is not uncommon to see voluntarism in the command control approach and the threat of regulation being the mainstay of self regulation (see Figure 9.3).

Ayers and Braithwaite (1992) refer to such a strategy as a ‘tit-for-tat’ strategy, where it is the mixing of punishment and persuasion that is most likely to be effective. As posited by Ayers and Braithwaite, regulatory cultures can be transformed by clever signalling by regulatory agencies that every escalation of non-compliance by the industry or collective group can be matched with a corresponding escalation in the punitiveness by the state, thus resulting in a more interventionist regulatory strategy. This is best illustrated in the Figures 9.4 and 9.5.

![Figure 9.3: The spectrum ranging from command control to pure self regulation.](image)

![Figure 9.4: Example of enforcement pyramid.](image)

50 Supra Ayers and Braithwaite n. 49.
51 Supra n. 49.
52 Ayers and Braithwaite supra n. 49; Ayers and Braithwaite have suggested that the examples of the pyramids above particularly Figure 9.4 might be more appropriate and applicable to occupational health and safety, environmental and nursing home regulation rather than situations which would require affirmative action regulation.
According to Ayers and Braithwaite (1992), most regulatory action occurs at the base of the pyramid where attempts are initially made to coax compliance by persuasion. Therefore, compliance is more likely if the least interventionary form of regulation is applied first with a threat of more severe sanctions if the least interventionary form fails to produce the desired result. Thus, their proposed pyramid of regulatory strategies suggests that in the first instance, regulators should seek and offer, self-regulatory solutions to industries but that, if the appropriate goals are not met, the state should escalate its approach and proceed through enforced self regulation to command regulation with discretionary punishment and finally to command regulation with non-discretionary punishment. Ayers and Braithwaite’s responsive regulation theory has three elements to its implementation: (1) a systematic, fairly directed and fully explained disapproval, combined with (2) a respect for the regulatees, and (3) an escalation of intensity of regulatory response in the absence of a genuine effort by the regulatee to meet the required standards.

53 Supra Ayers and Braithwaite n. 49.
54 Supra.
9.8 CRITICISMS OF RESPONSIVE REGULATION THEORY

While both Ayers and Braithwaite’s pyramids of regulatory strategies and enforcement mechanism proved to be logical, their theory has met with criticisms. Since their theory envisages a step by step progression on the pyramids, the strategy may not be appropriate in situations where a more severe form of enforcement is required immediately. A convincing instance is a suspension of license for selling and offering for sale poultry affected by the H5N1 virus. Baldwin (2007) suggests it is more efficient to tailor and target the types of regulatory responses according to the regulatee’s attitudes to regulation. If, for example, a problem is caused predominantly by regulatees who are ill-disposed to respond to advice, education, and persuasion, then the regulatory response will not start at the base of the enforcement pyramid. Rather, an early intervention at a higher level will be demanded. Similarly, Baldwin argues that an analysis of the risk levels may militate in favour of an early resort to higher levels of intervention. Yeung (2004) provides a further criticism of responsive regulation strategy in which he states:

“Infractions causing widespread harm will not be treated severely so long as the regulate cooperates with the regulator, whereas minor infractions will be treated severely if the regulate does not cooperate.”

Yeung opines that since regulatory responses are dictated by co-operation or non co-operation of the regulatee, consistency of treatment between regulates will arise since the enforcement response is not to the harm caused but rather to the degree of cooperation.

In Subsection 9.8.1, we consider Gunningham and Grabosky’s (1998) smart regulation theory. In Subsection 9.8.2, we contrast the opinions from where we derive the conclusions.

9.8.1 Smart regulation theory

In addition to the criticisms by Baldwin and Black (2007) and Yeung (2004) we should remain mindful of Gunningham and Grabosky’s (1998) smart regulation theory and Baggott’s (1989) three dimensional conception of self regulation. Gunningham and Grabosky (1998) in their combined or mixture of controls method, while accepting Ayers and Braithwaite’s pyramids for

57 See Baldwin and Black, supra n. 55 for some criticisms of Ayers and Braithwaite’s responsive regulation theory.
58 Supra n. 55.
59 Supra n. 55.
60 Supra n. 55.
62 Supra.
responsive regulation and enforcement strategies, argued that a similar three-

sided pyramid but one that is not restricted to escalating punitive responses

should be adopted.\textsuperscript{63} Gunningham and Grabosky (1998) proposed a ‘smart

regulation’ pyramid; a pyramid that focusses on the combined use of institu-
tions and techniques as deemed appropriate in the circumstances and one that

is based on different instruments of controls exercised by different parties.\textsuperscript{64}

They suggest that the three sides of the pyramid reflect (1) state control, (2)

commercial and non-commercial quasi-regulators, and (3) corporations.\textsuperscript{65}

Baldwin (2005) stated that Gunningham and Grasbosky’s smart regulatory

pyramid does have the advantage of not being restricted to just moving up
one side of pyramid, for example, state control but rather has the benefit of
utilising (where necessary) the other instruments of control. Baldwin continued
by stating “This provides the flexibility of response and allows sanctioning

gaps to be filled; so that if escalation up to the state system is not possible
(for example because a legal penalty is not provided or is inadequate), resort

can be made to another form of influence.”\textsuperscript{66} Our investigation thus indicates

that the availability and the use of a mixture of controls may be more suitable

and appropriate in the light of changing more fluid circumstances. It might

also be viewed as being more efficient in terms of (1) ease of use, and (2)

compatibility of control methods which translates to (3) greater cost benefit.

Based on our studies we may conclude that the Murray and Scott (2002)

control system approach as discussed in Chapter 7 is not dissimilar to
Gunningham and Grabosky’s (1998) smart regulatory pyramid theory. The

apparent difference between the two approaches is that Murray and Scott’s

approach does not envisage the use of a pyramid representing the possible

escalating degrees of coercion through the interaction of different but comple-
mentary instruments and parties (or stakeholders).\textsuperscript{67} However, we believe

that both approaches are similar in that they recognise the importance of other

stakeholders in the formulation and implementation of a regulatory design.

As we know, Murray and Scott’s (2002) theory encompasses a wider range

of regulatory strategies which can include (1) hierarchical control (based on
the state), (2) community-based control (based on community), (3) competition-

based control (based on market), and (4) design-based control (based on the
architecture design). These control systems as enunciated by Murray and Scott
(2002) are not restricted to being applied independently. If necessary, the

\begin{thebibliography}{9}
\bibitem{Supra Gunningham and Grabosky} Supra Gunningham and Grabosky.
\bibitem{Supra Baldwin n. 63} Supra Baldwin n. 63.
\bibitem{Supra Baldwin n. 63} Supra Baldwin n. 63.
\end{thebibliography}
control systems can be applied in combination with each other. This reasoning thus is in tandem with that by Gunningham and Grabosky (1998) since their theory envisages controls that can be imposed by (1) the state, (2) quasi-regulators, such as trade association, pressure groups, and non-governmental organisations, and (3) corporations. As with Murray and Scott (2002), there is no absolute requirement for the controls to be applied on its own. Instead Gunningham and Grabosky (1998) have stated earlier that there should be an empowerment of participants that are in the best position to act as surrogate regulators.68

9.8.2 Contrasting opinions leads to conclusions

In contrast, Baggott suggests that we consider self regulation in the following ways: (1) the level of formality – essentially, this looks at the variance between achieving consensus between interested parties to a more institutionalised arrangement, (2) the degree of legalisation – this merely follows on from (a) reflecting either a voluntary arrangement or one that is more legalised, and (b) the extent of outsider participation – this dimension can be expressed in terms of whether participation is limited to a selected group of representation or one that envisages a wider participation of industry players, stakeholders, and interested groups.69

We may thus conclude that although the theories propounded by legal theorists technically differ, we do observe a common thread stemming from these theories: there is consensus that self regulation as an alternative form of state regulation does not do away with the need of government intervention. On the contrary, we see government intervention as a question of degree, that is to say, (1) whether a ‘light’ handed approach is adopted and (2) whether there is an escalation of punitive measures in the event of non-compliance. Perhaps it is worthwhile to note Sinclair’s (1997) suggestion that there are a number of policy variables which transcend a fundamentally dichotomous approach to regulatory design.70 Sinclair continued by proposing that states should tailor regulatory responses according to the circumstances by first identifying regulatory variables. Regulatory variables include (a) the nature and extent of regulatory compulsion, (b) the extent to which regulatory flexibility allow firms to accommodate their individual circumstances, (c) the opportunity for industry design input into the negotiation and development of

68 See Gunningham and Grabosky’s smart regulatory strategies five core principles summarized by Baldwin in supra n. 63.
regulations, and (d) the extent to which win-win outcomes are the focus of regulation.\textsuperscript{71}

Our investigation also revealed the increasing importance of non-state involvement.\textsuperscript{72} Accordingly, we surmise that self regulation is based on three key elements:

1. the involvement of all interested parties in the formulation and design; this element represents participation and confirms the regulatory theories previously expounded by Baldwin (2005), and Gunningham and Grabosky (1998); it is also a regulatory variable as suggested by Sinclair (1997);

2. implementation of the self regulation by the industry; this element being a follow-up element of (1), i.e., the involvement of all parties in the formulation and design, encourages a better compliance resulting in a greater effectiveness; and

3. an evaluation of the measures undertaken.

Key element (3) is especially noteworthy since it is crucial that regulations be reviewed from time to time to consider its effectiveness or continuing necessity. This is particularly so for regulations in the information communication technology sector which is innovative and rapidly changing. The three key elements are in line with the six key conditions articulated in Section 9.6.

9.9 Codes of Practice

In this section, a brief overview is provided on codes of conduct as one of the more viable forms of co-regulation. The section also describes the variables that might impact the evolution of codes.

Although there are many forms of self regulation, we view codes of practice as the most common form of self regulation.\textsuperscript{73} Other forms of self regulation include voluntary accreditation schemes and standards adopted by the industry.\textsuperscript{74} Standards are used to define the acceptable characteristics of a product, process, or service. They are voluntary and are generally intended for adoption by businesses. A good example of a standard is the British Standard, developed through the British Standard Institution (BSI). The BSI works in consensus with the British government, business, and other stake-
holders (consumers) to develop standards that suit their mutual needs. In comparison to voluntary accreditation schemes and standards, codes of practice refer to fairly explicit rules wherein a violation of the codes is likely to attract some form of sanction. Other less restrictive forms of self regulation can be seen in the form of guidelines and recommendations.

Although in general codes of practice can exist for a variety of reasons, we observe that their formulation and adoption is commonplace within the business circles. In addition to the codes being seen as a means to avoid government intervention, we observe that the codes use a proactive measure in (a) building consumer’s trust, and in (b) instilling greater confidence in the products or services. The adoption of codes is evidenced in wide ranging sectors from property construction and management industries to professional sectors. Yet, we argue that the underlying incentive to the adoption of the codes is based on commercial reasons in that (1) it is to avoid government regulation (wherein too much regulation is not good for business), and (2) it is to improve business by raising the public image of their industry. One example of an effective and well known code of conduct is the code of conduct by the Association of British Travel Agents (ABTA). The ABTA code aims to ensure that customers receive the best possible service from their ABTA member travel agent and tour operator before they book. This may happen through the whole booking process, after sales service, and the way they handle complaints. A second example of codes regulating professionals is the code of practice for solicitors or general medical practitioners. These codes address amongst other matters, issues concerning the professionalism of the individual members and can include matters such as confidentiality of clients and patients, advertisements and publicity, and conflict of interests.

Our investigations reveal that codes of practice are one of the better forms of co-regulation in that the codes are seen as possessing the ability to provide greater freedom and flexibility in deciding how best to meet social demands and objectives. This ability avoids (1) the need for state regulators’ involvement in the prescribing operational arrangements, and (2) allows for a more focussed approach in dealing with non-compliance thus resulting in a degree of certainty that is normally a characteristic of state regulations. The code’s flexibility and adaptability to changing circumstances, and to social and cultural norms are important elements that cannot be ignored especially with regards to the evolving nature of new communication technology. We thus see the code’s flexibility and adaptability as an emerging, yet undeniable characteristic of self-regulatory codes which will no doubt assist, and further enhance its

75 www.bsi-global.com/index.xalter
76 See www.abta.com/benefits.html#code for more information.
77 The U.K.’s solicitor’s code of conduct 2007; available at http://www.sra.org.uk/solicitors/code-of-conduct.page, see also the revised code of conduct for medical practitioners in Hong Kong at www.gld.gov.hk/egazette/pdf/20050903329.pdf
applicability and usefulness. However, we accept that there are variables which might impact the evolution of the codes. Five variables suggested by Price and Verhulst (2005) are (1) the convergence of national, regulatory, and corporate cultures; (2) the changing nature of the relationship between the government and industry; (3) the evolving technological architecture that underwrites self regulation; (4) the further development of standards, codes, and rules; and (5) the growth and change of cultural norms and of public understanding surrounding self regulation.78 In identifying the variables, Price and Verhulst (2005) views codes as one of the most appropriate forms of self-regulatory mechanisms in that (a) codes make a suitable testing ground for innovative measures adopted by regulators when faced with uncertainty, (b) codes draw greater expertise and experience from stakeholders and users alike, (c) codes “(...) represent a temporarily agreed upon set of standards which serves as a (...) modus vivendi as new modes of information are distributed”, and (d) codes are not independent of the state but rather are complementary to state regulations.79 We support the views posited by Price and Verhulst. Their arguments in (a) and (b), for example, are what we have described as some of the benefits to self regulation. In so far as (c) and (d) are concerned, as codes “represent a temporarily agreed upon set of standards”, these codes as we have earlier argued, do have the flexibility to change and adapt in tandem with changes in society’s values, norm, culture, and circumstances. Further, we have at length discussed the degree and the necessity of state intervention based on various theories and can allude to Price and Verhulst’s position that codes of practice as self regulatory mechanism is a product of interaction with the state.

Having examined the codes of practice as an appropriate form of self-regulatory mechanism, Subsection 9.9.1 considers the variables which constitute a code’s framework.

9.9.1 The code’s framework

In this section we aim to lay down the ingredients that constitute a code’s framework. We do this by adopting the following four broad variables suggested by Price and Verhulst (2005) in the form of (A) coverage, (B) content, (C) communication, and (D) compliance.

A: Coverage

By coverage, Price and Verhulst refer to the scope of application of the code. We agree with this and state that since we are dealing with mobile communications, the code should be aimed at mobile network providers and mobile

79 Supra.
content providers. Currently a code of practice does not exist for mobile network providers and mobile content providers in Hong Kong. In so far as the ISPs in Hong Kong are concerned, a voluntary code of practice does exist.\(^80\) As such, the code can indirectly apply to mobile network providers who are (1) members of the Hong Kong Internet Service Providers Association (HKISPA), and (2) who offer and provide Internet access service to their subscribers using Internet-enabled mobile devices.

Essentially, the HKISPA code of practice stipulates that members will take ‘reasonable steps’ to prevent users of their services from placing and/or distributing material on the Internet likely to be classifiable as Class III (obscene) under the Control of Obscene and Indecent Articles Ordinance. In contrast, category II (indecent) material must be preceded by warning notices similar to those on printed material.\(^81\) Internet users who repeatedly break the rules of the code can have their access to the Internet disconnected. Members are encouraged to promote technologies which provide a content rating classification or block sites which are regarded as inappropriate for access and viewing. In addition, the code enables members of the public to complain formally to a website’s host Internet company of inappropriate sites or materials. In the event of complaints, the member company must ‘act promptly and conscientiously on the complaint’. Any unresolved complaints may be referred to Television, Entertainment, and Licensing Authority (TELA) who may conduct their own investigations.\(^82\) However, there are limitations to the application of the codes in that (1) the codes are not mandatory being only applicable to members of the HKISPA, and (2) the codes only apply to the posting or publication of obscene and indecent materials on the Internet. Members of HKISPA are also subjected to anti-spam codes of practice. As its name suggests, the code is to regulate the sending of unsolicited mass, bulk, junk electronic mail, message, and postings.\(^83\) The code also encourages members to adopt spam filtering mechanisms although if the filtering mechanisms are so provided, the subscriber must have explicitly requested for it. Further in the event members perform SPAM filtering by default, they must (a) explicitly inform their subscribers of the service feature, and (b) provide a convenient method for subscribers who wish to disable the filtering feature.\(^84\)

**B: Content**

With regards to content, we find it imperative to determine firstly the types of content which the codes are intending to cover. In this respect, we can refer

---

80 See www.hkispa.org.hk
81 Code of Practice: Practice Statement on Regulation of Obscene and Indecent Materials . www.tela.gov.hk
82 Hong Kong’s Anti-Spam Code of Practice, June 2005, available at http://www.hkispa.org.\(^\text{hk}/\text{antispam/cop.html}
83 Supra.
to (1) the potential harms that emanate from the use of Internet-enabled mobile phones, and (2) the hazards that can arise as a result from the use of such modern communication devices. The hazards have been fully examined and discussed in the earlier chapters. For the present purposes, the codes will need to address broadly (1) the access, posting, transmission, and distribution of illegal and/or prohibited content, (2) the access, posting, transmission, and distribution of harmful content, and (3) conduct and activities which are deemed inappropriate and/or unlawful. Content should be defined to include any material including user-generated material and material whether or not reproduced from another source for the purposes of sharing and distribution. Thus the code will cover (a) inappropriate materials of extreme sexual and violent nature such as pornography, (b) mobile games depicting violent and sexually explicit themes, (c) mobile spamming, (d) mobile marketing tactics aimed at children and young persons, (e) prohibited activities such as sourcing and grooming children and young persons, and (f) cyber-bullying. It is useful in this respect perhaps not to restrict the definition of activities to, for example, meeting on-line via electronic communications but to include subsequent activities or conduct followed through in real space. This thus covers subsequent meetings arranged via the mobile by child sexual abusers or additional and/or continued intimidation and taunting by bullies in the real world.

C: Communication
The third variable requires measures undertaken to enhance the relationship between the code subscribers (mobile network providers, mobile service providers, and mobile content providers) and mobile users. This can include (1) providing information (a) to effective filtering mechanisms for filtering communication, (b) materials and activities that are considered inappropriate or harmful, (c) on the possible sanctions that will be imposed for breach of the rules, and (2) providing an easily accessible help-line for users. The information provided must be clear and couched in simple terms so as to leave little room for mis-interpretation.

D: Compliance
It is also necessary that the codes should have clear, accessible, well-publicised detailed procedures to deal with breaches of code. Codes that promote effective compliance can include a simple and easy to use phone number, like dialing ‘111’, which allows mobile users to initiate complaints. It is crucially important that further and in addition to complaints being dealt with swiftly and fairly, to show that the decision-making process is fair and transparent.

9.10 Chapter Conclusion
As argued earlier, self regulation does not mean the absence of state intervention at all. Instead, it means less direct state intervention. From a public policy perspective, self regulation cannot completely replace traditional state intervention. There is an inter-dependence between self regulation and official state regulation, and we see this most appropriately in enforced self regulation and co-regulation. Consequently, we surmise that self regulation in the form of co-regulation is an effective way to complement state regulation. In this regard we agree with Bartle and Vass’s (2005) position that the effectiveness and efficiency of regulation depends to a large extent on the interplay between the mixture of controls on the continuum between the state of the one part and the industry or stakeholders of the other. In fact, this can be seen in the examples provided by Ayers and Braithwaite (1992). In summary, it can be said that the degree of intervention and the type of intervention is dependent not only on the industry or the sector to be regulated, but also on what is to be regulated.

In fact, we can see how the ingredients for our proposed code of practice framework consisting of coverage, content, communication, and compliance sit well with the four guiding principles for regulating content. The four guiding principles are advocated in greater detail in Chapter 10 and we briefly mention them here as (a) community standards, (b) protection from harm, (c) informed choices and decision making, and (d) complaints procedure. We may thus conclude that co-regulation in the form of code of practice underpinned by state regulation for the mobile communication industry may prove to be a viable regulatory mechanism for regulating mobile content.

In the next chapter we set ourselves the task of establishing the elements that we view as necessary when formulating a regulatory framework for the protection of children and young people in the mobile communication age.

---

85 Supra Bartle and Vass, n. 4.