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The Economic Efficiency of Self-regulation - Two Case Studies

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Abstract

Self-regulation has been hailed as an evermore powerful tool for the regulation of dynamic markets and actors - especially in the IT-sector. Self-regulation permits regulation where traditional legislation fails to meet requirements of conflict prevention, urgency, flexibility and internationalization. It is, however, still unclear what the effects of self-regulation will be, and what types of self-regulation there are. In fact, there is not any generally accepted definition of the concept of self-regulation, nor of who the "self" in self-regulation is. It can be questioned whether self-regulatory measures are sufficient to protect third party interests, or if such measures are only a face saving tool of powerful industry groups. It may also be difficult for third parties as well as for participants to determine which self-regulatory measures are reliable.

In this paper, we aim to offer some general views on the nature of self-regulation - from an economic and legal perspective - and then use these views to analyze the Swedish direct marketing association's self-regulatory initiative for SPAM: the Nix register. This initiative complements traditional legislation by specifying the meaning of good marketing practice and by providing companies with specific tools to meet the requirements.

In this analysis we try to find if the initiative has negative competitive consequences for new companies in this sector. Self-regulation presupposes an understanding that it is in a company's self-interest to cooperate with its competitors. Yet, an agreed standard could easily be designed as to favor big and established players. Hence, it is imperative to examine the effects on competition, and consequences for small and medium-sized enterprises, that self-regulation may have. It could certainly be argued that the Nix register is too vague to provide the intended protection. On the other hand, it may be claimed that the register imposes too large a burden on small companies. We try to outline a taxonomy of self-regulatory initiatives and analyze their effects on competition and market structure.

Introduction: What is self-regulation?

Before entering the domain of self-regulatory measures related to publicity through e-mail, we need

to examine what we mean by the term "self-regulation". It is an ambiguous term and has been used to refer to everything from codes of conduct and trustmarks to working markets. Often self-regulation is also used as a term that refers to more international rules and frameworks.[1] The object of self-regulation varies.[2]

We will not offer any clear-cut definition. The reason for this is that there is none, to our understanding. We will, however, offer a number of different forms of self-regulation that we think can usefully be studied as concrete example of the fuzzy concept of self-regulation. There are degrees of self-regulation in most initiatives, and there are many more besides the ones we will be discussing.

We have tentatively distinguished between the following forms:

The first is **codes of conduct and labeling**. These are sets of rules that industry complies with freely. There might be some accountability structures built into these rules, but it is not necessary to have such structures, or even enforcement structures, for an alternative to be called a code of conduct.[3]

The second is **an extended version of codes of conduct and labeling**, where there are accountability and enforcement institutions connected to the codes. This might be the case when industry offers a service for customers that wish to complain, for example, about the quality of a service or product. These complaint agencies can then be viewed as instances of self-regulation, where the company may be bound by the agency's decision, if it has agreed to the relevant codes of conduct.

The third is a simple **black-list**, where customers list companies that they feel have wronged them, We have an example of this in Sweden - *svartalistan.com* - and interestingly the owner of the site has laid down a code of conduct for his own service; he gives the companies involved in claims and or complaints a certain amount of time to defend their behavior before blacklisting them.[4]

The fourth case that can be worth distinguishing is the case where the self-regulatory component simply consists of a **perfect market situation**, where the rules of supply and demand eradicate any possible problems. The reason we want to include this is that we feel that it is often assumed that self-regulation has to consist of pronounced initiatives and codes enunciated in different ways. Sometimes the choices of actors on the market, individually made, may regulate a market ever as efficiently as a certain code of conduct.

Self-regulation - economic perspectives

Why is self-regulation interesting from a law and economics perspective? Often the answer given to why we should choose self-regulation consists of some more or less veiled reference to efficiency and economic gain. Self-regulation, it is presumed, is more flexible and dynamic, and better suited to be used in change-intensive markets like the information technology market.[5]

This argument needs to be clarified. Why is self-regulation to be preferred to legislation (government regulation) or to no regulation at all?

We believe that one possible answer would be that there are cases where the choice of self-regulation maximizes the utility of all involved parties, when compared to legislation and no regulation at all.

For this to be true, a number of simple conditions need to be fulfilled:

1) Compliance. The actors addressed by the self-regulatory initiative must be likely to comply with it in as high a degree as they would with government regulation.

2) Balance. The self-regulatory initiative has to improve the utilities of all the actors, without making it worse for some of the actors.

These two conditions are reflections of one and the same factor: the self-regulatory initiative must achieve a pareto-efficient utility distribution. There should be no way of increasing the utility for any involved party without reducing it for someone else in applying any of the other forms of regulation.

3) Clarity. The self-regulatory initiative also needs to create a predictable legal situation, so that the information and interpretation costs are as low as, or lower than, the alternative forms of regulation.

This could seem to follow from the first two, but it is worth mentioning separately. One possible drawback with self-regulatory initiatives is that they tend to be vague and hard to interpret. It should be clear to the organizations and individuals involved which rights and obligations they have. If self-regulatory systems are too vague, the parties may choose traditional legislation after all, entailing more costs for everyone.

4) Cost-efficiency. The costs of maintaining and updating the self-regulatory initiative needs to be as low as or lower than that of the alternatives.

This might seem a strange condition, especially as the maintenance costs of no regulation would seem to be zero. We would like to claim, however, that this is not the case. The maintenance costs of no regulation is equal to the constant re-examining of the choice not to regulate, and therefore often quite high.

5) Long-term stability. The self-regulatory initiatives need to be stable in comparison with the other alternatives. That is: it must be shown that self-regulation can be a viable long-term alternative, or that any combination of self-regulation and a later change of form of regulation can be shown to be cost efficient.

This is an important condition. Self-regulation acts over time, and the self-regulatory initiatives need not only to be efficient in a short-term perspective, they need also to be stable in long-term perspectives.[6] It is hard to argue for the choice of a self-regulatory alternative, if we know that it will deteriorate over time and leave everyone worse off.

6) Competition neutrality. The self-regulatory initiative needs to be neutral to competition, and should not benefit some of the actors behind it, while hurting others.

This condition is equally important, and ought to be checked thoroughly. The possibility that large companies use a self-regulatory initiative to create entry barriers for potential competitors should not be underestimated.

7) Coordination. At least national, but preferably international, coordination is necessary in order to create strong standards. Public and private sector initiatives should be coordinated.

The targets of advertisement cannot be expected to apprehend the self-regulatory measures if they are too diverging. Companies, SMEs in particular, cannot possibly keep up-to-date with miscellaneous systems in different countries. One of the advantages with self-regulation is that it allows smoother and quicker international cooperation: companies and consumers should profit from that.

8) Control. Logos and labels must be protected so that organizations that are not entitled to use them do not copy them in their advertisement. That will undermine consumer confidence.

9) Complement. Many of the rights provided by self-regulation are already covered by the law. In

order for self-regulation to add value to traditional legislation the two should be complementary to one another. The cost of redundancy in the legal system should not be underestimated, since it results in extra interpretation and compliance costs.

Above all, self-regulation **provides a tool** to comply with the law. Registers such as e-robinson and Nix in the case studies below are useful both for information collectors and the people whose information is collected. Through the registers more people can be covered at the same time, thereby reducing the amount of time each organization and each individual has to put into scanning who wants advertisement and who does not.

10) Categorizing customers. The systems probably need development. Most people want some advertisement, but probably have preferences.

The Nix and e-robinson registers are quite primitive in the sense that they only distinguish between people who do not wish to receive advertisement in general and those who do not wish to receive any advertisement at all. This is certainly an important first step, but the next step would be to categorize the segment of people who wish to receive advertisement, in order to determine exactly which kinds of advertisement they are interested in.

The spam issue - economic perspectives

Spam is fascinating from an economic as well as from a legal perspective. The term "spam" is as ambiguous as "self-regulation". It is often confused with unsolicited commercial e-mail. Spam, however, does not have to be commercial. It can simply be information, or fraudulent messages, or meaningless noise.

Spam, in general, is mail communications that we have not asked for, and do not want.

It is important to recognize that there exists such a thing as mail that we have not asked for, but that we do want and that we find useful. The spam issue often seems to obscure this fact. It is our firm belief that some unsolicited commercial and non-commercial messages will still be welcomed by the individual user in his or her daily communication.

The object of stopping spam, then, is chiefly to eradicate e-mail communications that the user feels is unwanted and unsolicited. The message's content is not our chief concern.

Is this then an area wher we should suspect to see self-regulation? Virgina Haufler outlines a number of criteria for markets that are typically open for self-regulation. By applying these we can try to understand if the spam issue is likely to be a candidate for self-regulatory initiatives. [7]

Hauflers criteria are: [8]

1) There must exist a high risk for national or international government regulation.

2) Relatively low economic competition, but high asset specificity.

3) High probability of transnational activism.

4) Reputation as a key asset of the company or industry involved

5) High levels of learning and information exchange.

It can be noticed that almost all of the five criteria match the current spam situation. There is a high risk, almost a certainty, that regulation will be introduced in the European Union. It is slightly more

undecided in the US, and if the pattern follows the general privacy situation, that legislation will be weaker. The economic competition in on-line marketing is high, so there is some doubt as to whether this criterion holds. The asset specificity is high as well - there are no alternative networks to choose from. Criteria 3-5 are also present in the spam context. Self-regulation should thus be expected in this area.

Incentives for spammers

The economics of spam is depressing to consider. If we start with commercial fraudulent spam, we find that the sending of such spam is a rational act. While this may seem a strong statement, it is nevertheless true.

A person that is considering to market a certain fraudulent product will need to assess the following costs:

1) The cost of producing the marketing materials

2) The cost of sending the marketing materials

3) The expected sanction cost (i.e. the risk of getting caught multiplied by the severity of the punishment)

4) The number of positive respondents (defrauded customers)

All the costs are zero, or next to zero. Producing an e-mail is the work of a few seconds. Sending an e-mail is free. The risk of getting caught is minimal - given that you use some sort of basic, anonymizing technique.

And the number of positive respondents will also be next to zero. But as long as it is not equal to zero - and it isn't - the sending of spam is individually rational.

A numeric example shows this clearly: if I send out one million e-mails selling a product that costs 10 euro, and have a 0.001 chance of getting caught and sentenced to, say, a year in prison (valued at my yearly income at, say, 30 000 euro), the respondent rate only needs to be 3 in one million, or 0,000003, for it to be rational for me to try. Spammers of fraudulent products have great reasons for what they do.

If we move to non-commercial spam - political messages, for example - the situation is very much the same. The political spammers utility will presumably be sympathy for a certain cause, and the value of this will often be priced even higher than the utility of 10 euro in the earlier example, so the political spammer requires even less response to deem it rational to send out millions of e-mails.

The negative impact of spamming

The examples above show clearly the incentives of the spammers. What they do not show is the costs generated by spam for others, or the externalities of the spam-market. The external costs of the spam-market - if indeed we can speak of such a market - are easily found in the reduced value of the Internet, and e-mail in particular, as a communication medium. Spam reduces the value of e-mail as a communication, and thus also as a marketing, medium.

The user is forced to sift through and filter his or her emails to find the relevant and informative content. The time this takes is crucial in understanding the costs of spam. We can even construct a breaking point or noise point: when the value of the content and communication in e-mail systems is less than the value of the time needed to sort and search these same communications, it will be

rational to abandon this type of communication, or re-design the systems as not to allow any noise whatsoever.

Presumably we will never end up in such a situation. But what might very well happen is that e-mail systems are re-designed to accept only accredited and authorized communications. The formerly open channel will then be closed, and its value to marketers quickly reduced to zero.

As this short economic analysis shows, the spam issue must be addressed in some way. In the following section we will examine what form of regulation is best suited to the problem as such.

Spam and self-regulation

It is hardly an easy task to regulate spam. The chief problem is that we are dealing with one communication system that is used in two ways by two different groups of actors. The first group is legitimate marketers, the second more or less fraudulent spammers or noisemakers.

Spam as a case of the prisoner's dilemma

The problem can be analyzed in terms of the classical prisoner's dilemma.[9]

The legitimate marketers are offering services to the users, and the users can choose to cooperate (partake of the information and give some time) or defect (delete information, set up filters, deny access to themselves, an act that will save some more time and privacy). The marketers can choose to offer legitimate information in a value-added form (cooperate), or to simply offer sub-quality, bad advertising that is not targeted or value-added in any sense that might sell a few more products and give the company more revenues in the short term (defect). The payoffs are simple: If both the marketers and consumers cooperate they will have an information flow that will work for their mutual benefit.

The values are exemplified below:

	Send value-added information	Send bad advertising
Partake of information	(10,10)	(0,15)
Delete and filter information	(15, 0)	(5,5)

The rational strategy for both parties is to go for the strategy where good, value-added information is sent on the part of the marketer, and the customer partakes of that information. If the user, however, thinks that the marketer is going to send noise, she will choose to delete it immediately and save time. The marketer, on the other hand, knows that if he or she takes a short-term perspective it is rational to send bad, but selling, advertising.

The end result therefore is that the marketer sends bad advertising and that the user deletes it. This is a perfect description of much of the direct mail market today, but it need not be the future of e-mail communication and marketing.

Different opponents triggering different scenarios

It can be assumed that rational marketers will realize that they will play an iterated set of the prisoners dilemma. They will need to market again, and they will therefore go for the strategy where they send value-added information. In a sense, we can also say that the consumer knows that he or she will presumably buy products in the future, and that those products will presumably be marketed in an advantageous way, and therefore will choose to partake of the information. In an iterated play

of this game we will see an equilibrium that gravitates towards the rational strategy of providing and partaking of good-quality information.

This is where the problem with spammers comes into the picture. Spammers know that they will *not* be playing an iterated version of the prisoners' dilemma. They will only play once. Especially the ones with fraudulent intent. They never meant to establish a good relation with their victims anyway.

The user/customer will therefore be playing the game above with two different opponents, and will not know whether or not the opponent is of the iterative type or the single-case type. This will lead to a situation where the user incurs a cost for evaluating the sender of every message, and depending on the volume of single-case spammers, the value of the communication will deteriorate.

Self-regulation may solve the dilemma

Considering the above, is it possible to draw any conclusions as to what form of regulation would be preferable in the case of spam? We think so.

Relying on no regulation at all is a strategy that seems high-cost for both users and marketers. It would seem to create a situation where we become dependant on the good will of the spammers; if the volume of spam exceeds a certain level, the value of the networks as a marketing vehicle for marketers, and a communication medium for users, will erode quickly. This alternative then could only be supported if it were to be accompanied by some sort of technical innovation that could lead to the identification of legitimate marketers and the expulsion of spammers.[10] There have been some attempts at such innovations, such as commercial e-mail solutions, where the sender pays for the communication to the user, thus enhancing the value of receiving (if not reading) the e-mails. As of today, it would seem that no such programs have become dominant enough to completely free us of the need for regulatory action.[11]

As for government regulation it seems that it could only end up in a situation where it recommends some sort of simple regulatory solution such as opt-in or opt-out.[12] These solutions are unsatisfactory in that they do not allow for the possibility that some e-mail communications might prove beneficial to both parties even though they do not adhere to such simple rules. There is no guarantee that an opt-in mail will prove interesting, and equally no guarantee that a completely unsolicited e-mail will prove to be entirely uninteresting. This possibility suggests that legislative models focusing on such issues will not be harnessing the full communicative value of the networks, and also that it will not be pareto-efficient.

Furthermore, we find that the legislative models seem to create hitherto unexamined and non-existent costs. One such cost is the mandatory cost of checking the e-mail addresses in a marketing communication against national databases containing blocking information. The Swedish national text discussing the implementation of the EU e-commerce directive does not clearly state, to take only one example, whether or not the legal duty to check such databases is limited to a certain number. It may imply that the marketer is expected to examine all available databases nationally and internationally, and when failing will be held liable for that failure. This is clearly an absurd situation.

Despite this, strong lobbying alternatives seem to favor legislation.[13]

What, then, can be said of self-regulation? It would seem that the possibility exists that self-regulatory measures might very well be the best form of regulation we can choose in solving the spam issue. If this is the case will of course depend on the design of that self-regulatory framework.

Case studies: Sweden, France and international

We will now examine self-regulatory initiatives in the publicity field in Sweden and France, namely The Swedish Direct Marketers Association's, SWEDMA's, Nix rules and register, the French self-regulatory body BVP's recommendations and the French e-robinson register. Similar international initiatives from the International Chamber of Commerce, ICC, and EASA, European Advertising Standards Alliance, are also presented.

Self-regulatory initiative in Sweden: SWEDMA

The SWEDMA[14] framework builds on an international attempt to form a database of recipients not interested in receiving unsolicited commercial e-mail, the Nix database.[15] The basic idea is to establish a database in which users can register that they do not want to partake of unsolicited e-mail.[16]

If companies still send e-mail to these users/consumers, they will be held responsible in SWEDMA's council for ethics, and if they choose to disregard that they can be taken to court. This is due to the fact that SWEDMA through its self-regulatory set of rules, intends to create an established code of conduct saying that the notion of *good marketing practice* should include consulting the database. This, in turn, provides detailed guidelines for the government legislation, since the Swedish marketing law in §4 states that all marketing must comply with the established codes of conduct.

The SWEDMA initiative, then, consists of a code of conduct, a self-regulatory process, and the possibility of a governmental process. It is thus more of a co-regulatory attempt to attack the spam issue, than a self-regulatory. The close connection with the government, and the incorporation if the rules in the concept good marketing practice seems to fuse the rules of SWEDMA with regular government regulation.

Still, there are advantages over strict government regulation. Firstly, SWEDMA can change its rules more often than the government, and with less transaction costs. It can be assumed that this will be needed, since the practice of e-mail marketing is evolving. Secondly, SWEDMA clearly states that there is only one database to consider. They can do this since they host and manage that database, and this gives them an advantage over government regulation, where the government has to trust other actors to establish such databases. Thirdly, the SWEDMA rules are international, harking back to the International Chamber of Commerce-rules on marketing. This is a great advantage over national law, and since e-mail is an international communication medium, a greatly reduced cost. SWEDMA's cooperation with other parties over the world might create a one-stop-shop for those that do not want to receive unsolicited e-mails.

Self-regulation in France: BVP, FEVAD and Geste

The French government encourages self-regulatory measures to render regulation of modern information and communication technology more efficient. Yet, several rights and obligations are mentioned in laws.

For example a person has a right to[17]

- receive information about why information is collected
- ask if an organization has information about him or her
- receive any information that an organization has about him or her
- require that any untruthful information be corrected
- oppose any information
- information should not be kept eternally

Organizations that collect information have obligations corresponding to those rights. *La Commission Nationale Informatique et Libertés* (CNIL)[18], a French independent government

authority, is in charge of controlling computer registers kept by either the public or private sector, proposing new regulation in the field and informing people about their rights.[19]

Private sector initiatives in France

In order for these rights to be implemented, CNIL encourages the adoption of codes of conduct.[20] Another option is a filtering system, a mere technical measure. The opt-out- system, indicating that every e-mail address can be used until the people concerned oppose to the reception of certain messages, has been included both in the EU e-commerce directive and the guidelines on publicity on the Internet by the International Chamber of Commerce (ICC) from 1998.

The opt-out-system has also been adopted by the BVP, *Bureau de Vérification de la Publicité*, a French organization for self-regulation in the publicity sector in France.[21] BVP's objective is to promote a loyal, truthful and decent publicity in the interest of professionals of publicity, consumers and the general public. To this end, BVP gives guidance to every form of media in France before introduction of a new advertisement, it controls media on demand, and can require a modification of a certain campaign, or even its termination. Members of the BVP support the self-regulatory system and comply with BVP's recommendations "Publicité sur Internet", which are based on the ICC guidelines.[22]

The call for a tool to realize the opt-out system has been addressed by FEVAD in France (*Fédération des entreprises de ventes à distance*)[23], representing 320 distance and correspondence sales companies in the country. The federation has created an opposition site, the *E-Robinson List* or *Stop-Publicité*.[24] The site is administered by *l'Union Francaise du Marketing Direct* (UFMD). Anyone can register his or her e-mail address on the e-robinson website, which will result in fewer commercial e-mails to that person from members of FEVAD and any other French or foreign companies with which FEVAD has agreed to cooperate. An important distinction here is that you can only refuse to receive e-mails from companies with which you do not have any commercial relation.

Geste, *Groupement des Editeurs de Services en Ligne*, is another French non-for-profit organization involved in publicity issues on the net. Their objective is to create favorable conditions for development of online services, to organize and develop the profession of editor of online services. Geste participates in the debate about legislation and self-regulation.[25]

International cooperation

The International Chamber of Commerce, ICC, is greatly involved in self-regulatory measures on the net, and publicity is no exception. It concludes that the marketing scene has changed, since media owners no longer exist and former intermediaries such as publishers and broadcasters are no longer needed. The new definition of an advertiser or marketer seems to be "any person or company posting an electronic commercial message." It is in their own interest to observe self-regulatory guidelines. "Consumers and marketers should seek to cooperate in order to minimize the potential cost and to enhance efficiency savings of electronic networks."[26]

In order to promote this development, ICC has developed a set of guidelines for the private sector to use: ICC Guidelines on Advertising and Marketing on the Internet from 2 April 1998. These guidelines seem to have served as an important reference for private sector organizations in Sweden and in France, as they have developed their own recommendations for electronic advertisement.

European cooperation for self-regulation

On a European level, self-regulatory measures in the publicity field are coordinated through the **EASA** (**European Advertising Standards Alliance**), a non-profit Brussels-based organization.[27]

Among the members are national advertising self-regulatory organizations as well as organizations representing the advertising industry in Europe, such as BVP in France and MarknadsEtiska Rådet (MER), through Confederation of Swedish Enterprise (*Svenskt Näringsliv*)[28] in Sweden. Currently there are 28 self-regulatory bodies (SRO's) among the members, out of which 24 are from 22 European countries and the other 4 are from non-European countries.

The Alliance defines self-regulation in the advertising sector as "the recognition by the advertising industry (advertisers, agencies and the media) that advertising should comply to a set of ethical rules, namely that it should be legal, decent, honest and truthful, prepared with a sense of social responsibility to the consumer and society as a whole and with due respect to the rules of fair competition... This is achieved through the establishment of a set of rules and principles of best practice to which the advertising industry voluntarily agrees to be bound... The rules are applied by self-regulatory organizations (SROs) set up for this purpose and funded by the advertising industry itself."[29]

The case studies versus the self-regulatory criteria

We also need to check the SWEDMA-framework and the BVP recommendations against the criteria we laid down above.

1) (and 2) Are SWEDMA's and BVP's initiatives pareto-efficient? Our tentative answer is yes. There seem to be no obvious changes that could be made that would not change the utilities of one or more of the concerned parties for the worse.

2) See above.

3) Do the initiatives create a predictable situation? Again, our answer is a tentative yes. The rules are simple and straightforward and the framework answers the questions we sketched in dealing with the legislative alternative.

4) Are the updating and maintenance costs acceptable? Yes. The technical solution of databases to check against might be expensive, but it will nevertheless be cheaper than to end up in an unpredictable situation with a law that is fuzzy and hard to interpret.

5) Are the initiatives stable? This is perhaps the issue where we feel the most doubt. If the growth of spammers is great, the framework will erode quickly. But there is no reason to think that a law or not regulating at all would result in a more stable situation. The only possibility is a law with really severe sanctions, and it might very well be argued that such a law would reduce the marketing value of e-mail in itself. Still the framework seems to offer no remedy to the problem of differentiated senders, and this is a weak point.

6) Are the initiatives competitively neutral? Yes. There is no difference made between small and large companies and the fees suggested are not prohibitively high.

7) Are the initiatives coordinated nationally and internationally? Yes, nationally they are promoted by strong sector organizations. The Swedish initiative is better coordinated than the French in the sense that the Nix rules include the database of non-mail-receivers, whereas in France the recommendations and database are owned by different organizations. As far as international coordination is concerned, both systems have been inspired by the ICC guidelines[30], but neither country has chosen an identical path, which is unfortunate.

8) Is control conducted in a satisfactory way? Yes, both the French and the Swedish initiatives include corrective aspects in case of non-compliance.

9) Do the initiatives complement government regulation? Yes, more so in Sweden than in France, since in Sweden, SWEDMA actually has the role of defining a legal notion, but there seems to be good communication with government institutions in both countries.

10) Do the systems categorize users? No, neither system take into account the fact that most users probably want some, but not all kinds of publicity.

In sum, it seems that the self-regulatory initiative of SWEDMA and BVP/FEVAD might be examples of some of the most economically efficient alternatives available today. That is not to say that they are over-effective, rather it might be said that they seem to be the most efficient alternatives today.

Comparison of French and Swedish initiatives

It is interesting to note that both the Swedish Nix rules for marketing through e-mail and the French BVP recommendations refer to the ICC guidelines on Advertising and Marketing on the Internet from 2 April 1998. It is equally curious that neither set of recommendations follow the ICC guidelines entirely. The ICC guidelines could have provided an international standard, facilitating cross-border advertisement. Now companies need to consult the rules and recommendations in each country just as with traditional legislation. There is presently no international unanimity as to whether the country of origin or the country of destination applies to advertising and marketing on the Internet.[31] In France it is said that any publicity message that is received in France is covered by French law, but there is no international agreement confirming it.

One difference between the self-regulatory standards is somewhat related to traditional legislation. The Swedish marketing law requires companies to comply with good marketing practice. The aim of SWEDMA is primarily to define that concept in detail through their guidelines. Those who comply with the SWEDMA Nix standard should be presumed to comply with good marketing practice. France does not have a similar connection between law and self-regulation in this field, but self-regulation is regarded as a useful tool to comply with the law.

The stronger connection that Sweden has between law and self-regulation in this field may actually be preferable. Traditional legislation is not very efficient in practice. It requires the individual to defend his or her own rights, contacting any organization that may have information about him or her. With the aid of self-regulation, the organizations that collect the information can focus on potential customers, who actually desire the advertisement. They also avoid potential fines and prison terms, which would be the consequence of non-compliance with the law, with self-regulation they can correct actions at an earlier stage.

Another difference is that SWEDMA has chosen to include the Nix register in the recommendations themselves.[32] Hence, using the register as a tool is part of the same regime, whereas in France the recommendations and the register are kept by different organizations (BVP recommendations versus the e-robinson register) and using the register is not required in the recommendations. Such registers are not mentioned in the ICC guidelines either. This situation is slightly strange from a coordination perspective. The most efficient situation should be when the organization issuing the rules also hosts the database.

Furthermore, the Nix rules include a basic principle stating that marketing through e-mail should be restricted and directed to a homogenous target group that has been selected according to certain criteria.[33] Such a principle is not used by ICC or BVP. On the other hand, Nix has omitted ICC recommendations regarding protection of children, decency, loyalty and truthfulness, as well as respect of different cultures, which BVP has included. This may suggest that the Swedish rules are more nationally oriented than the French ones. Yet, there is one reference in the SWEDMA rules to advertisement that is directed to a receiver in a foreign country, that the first line of the message

should include the word "advertisement" in the appropriate language.[34] Such a requirement does not appear in the French recommendations.

Conclusions

We have tried to show under what conditions self-regulation will be a viable alternative, and we have especially focused on the issue of spam, and the different initiatives in Sweden and France that we have studied.

Our findings suggest that self-regulatory initiatives might be used to solve the problem of spam, but also that the problem is a highly complex one, and that the stability of all applicable solutions must be called into question. We have shown that the spam-problem can be framed in terms of a dual prisoner'sdilemma, where spammers play single-instance games and legitimate marketers try to play iterated games. When the volume of spammers exceeds a certain, as of yet unknown, tolerance level the open networks will cease to function as marketing tools.

There exists a real and concrete risk that the value of networks as marketing and communication tools will erode quickly, and that we will see fragmented and isolated communication networks with little or no openness in the future.

Self-regulation, whether it be a code of conduct, a label, a black-list or merely a well-functioning market, can serve as an important complement to law, in that it provides detailed guidelines where the law only gives a general rule. Also, self-regulation can offer the necessary tools for companies to be able to comply with the law. This is particularly elaborated in the Swedish standard.

Similarly, the need for international coordination must not be underestimated, and this is actually a great advantage of self-regulation compared to law. Informal international cooperation is far quicker and smoother than formal circumstances. Yet, our case studies show that even though Swedish and French self-regulatory initiatives in the publicity field overlap, they are not identical. The self-regulatory initiatives remain fragmented, and it is uncertain if they can be organized into coherent international solutions. Understanding the causes and effects of this fragmentation is one of the major problems today.

Furthermore, the self-regulatory measures taken must be respected by, and provide utility for, all parties involved, not altering competition. They must be cost-efficient and protected from fraudulent third parties. Predictability and long-term stability are other vital components. This seems to be achieved to a certain degree in the examples we have given.

The remaining question pertains to the stability of the solutions offered. Can this problem be solved with self-regulatory measures in a long-term perspective? Our intuitions, and some of our theory, seems to indicate a negative answer to that question.

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[1] See Haufler, Virginia A Public Role for the Private Sector: Industry Self-Regulation in the Global Economy (CEIP 2001)

[2] See Haufler, Ibid and for an example of financial markets see De Jong, A. Dejong, D, Mertens, G and Wasley, Charles "The Role of Self-Regulation in Corporate Governance: Evidence from the Netherlands*" Simon School of Business Working Paper* FR 00-20

[3] To this category we also count trustmarks and trustmark programs, such as TRUSTe or BBB-Online.

[4] See Svarta Listan at [http://www.svartalistan.com]

[5] For an analysis of an intra-firm perspective of self-regulation see Turnbull, S "Corporate Charters with Competitive Advantages" *St. John's Law Review*, Vol. 89, 2000

[6] A contrary view, and an interesting example of a case where self-regulation is thought to be used to create a situation where regulatory governmental action will be more efficient is presented in Hetcher, S.A. "The FTC as a Internet Privacy Norm Entrepreneur" in *Vanderbilt Law Review*, Vol. 53, No. 6, 2000.

[7] We do this in spite of the existing legislation, since we feel that there is great risk that the legislation will fail and that there will be a need for alternative approaches.

[8] Haufler, p 3

[9] For an introduction see, for example, Hargreaves, Shaun P and Varoufakis, Yanis *Game Theory: A Critical Introduction* (Routledge 1995) pp 146-197

[10] This is examined at some length in Sorkin, D "Technical and Legal Approaches to Unsolicited Electronic Mail" University of San Francisco Law Review, Vol. 35, No. 2, Winter 2001. professor Sorkin is also sceptical of self-regulatory initiatives, stating that "Informal responses such as social pressure and industry self-regulation have been almost entirely ineffectual in battling spam."

[11] The Swedish national postal service cancelled its project bonusmail.se, which provided such an opportunity.

[12] This is the case in the Swedish implementation of the e-commerce directive.

[13] One example is Coalition Against Unsolicited Commercial Email CAUCE, at http://www.cauce.org

[14] www.swedma.se

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[32] Nix article 9.1.

[33] Nix art. 4

[34] Nix. art. 5