Co-regulation of advertising in the United Kingdom: regulators as corporate bodies and the effect on citizen empowerment

Jelena Dzakula

Faculty of Media, Arts and Design

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A thesis submitted in partial fulfilment of the requirements of the University
of Westminster for the degree of Doctor of Philosophy

December 2014

Abstract

The subject matter of this thesis is a regulatory innovation termed co-regulation: a mode of regulation that includes formal involvement of both state and non-state actors. Its emergence and development is the result of two broad and significant changes in the nature of the statehood: the emergence of the regulatory state and the shift from government to governance. In the regulatory state, the dominant mode of intervention in economy and society is regulation, thus forms such as co-regulation are used to 'govern' or 'steer' the society. In addition, with the shift to governance, there is a greater reliance on non-state actors to perform this 'steering'.

Since co-regulation is used to implement public policy objectives, which has traditionally been the role of government departments, but it implies formalized and substantive role of non-state actors, it is a qualitatively new regulatory development that justifies research interest into its nature. Consequently, it should be evaluated as any other form of governance: to what extent it can be described as democratic, and precisely this is the basis for the normative framework developed for this thesis that has been used as a tool to evaluate the nature and quality of co-regulation.

One of the basic premises of this research is that any form of governance should have as its ultimate goal the achievement of public interest objectives. It has been further argued that public interest objectives can be achieved only if institutional structures of regulatory bodies enable transparency, deliberative participation by the citizens, and enable citizens to hold the regulators to account. Only by providing such structures, co-regulatory bodies would empower the citizens to be the ultimate authority and could thus be considered a democratic form of governance.

The case studies chosen to evaluate whether this normative ideal has been achieved in practice comprise three different bodies: Ofcom, ASA and ATVOD. What has in particular been looked at is the way Ofcom handled the delegation of regulatory functions to ASA and ATVOD, and the way these bodies dealt with the regulation of

alcohol ads and product placement. These studies involve an element of controversy and conflicting interests and as such represent the most suitable test in order to determine whether the possibilities offered by co-regulation to be a truly democratic form of governance have been achieved.

The main conclusion reached is that, mainly due to NPM reforms, citizens are confined to the role of the consumers, where their active engagement is seen in terms of complaints and regulators are held accountable for the level of service they provide in handling these complaints. However, this does not empower the citizens. Therefore, it appears that Ofcom, ASA and ATVOD are not characterized by institutional structures that would enable democratic governance: there are no transparent institutional structures that would enable the public to perform the role of the citizens and deliberate regarding regulatory decisions and hold Ofcom, ASA and ATVOD to account. The institutional structures modelled on the premises of corporate governance are not empowering citizens, but are instead creating consumers.

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List of Abbreviations

AAC – Advertising Advisory Committee

AC - Advisory Committee

ACE - Advisory Committee for England

ACNI - Advisory Committee for Northern Ireland

ACOD - Advisory Committee for Older and Disabled

ACS - Advisory Committee for Scotland

ACW - Advisory Committee for Wales

AHL – Action on Hearing Loss

AR – Annual Report

ASA – Advertising Standards Authority

ASBOF – Advertising Standards Board of Finance

ATVOD – Authority for Television on Demand

AVMS Directive – Audiovisual Media Services Directive

BASBOF – Broadcast Advertising Standards Board of Finance

BBFC - British Board of Film Classification

BCAP – Broadcast Committee of Advertising Practice

BIS – Department for Business, Innovation and Skills

BMA – British Medical Association

CA - Consumer Association

CAP – Committee of Advertising Practice

CAT - Competition Appeals Tribunal

CCP - Communications Consumer Panel

CSO – Civil Society Organisation

DCMS – Department for Culture, Media and Sport

DCOA - Deregulation and Contracting Out Act 1994

EC- European Commission

ERP - Expenditure Review Programme

FAQ – Frequently Asked Questions

FOIA - Freedom of Information Act 2002

HBI - The Hans Bredow Institut

IBA - Independent Broadcasting Authority

ICO - The Information Commissioner's Office

ICSTIS- The Independent Committee for the Supervision of Standards of Telephone Information Services

ICTs – Information and Communications Technologies

IMCB - Mobile Classification Body

IPSO - Independent Press Standards Organisation

ITA -Independent Television Authority

ITC - Independent Television Commission

IWF - Internet Watch Foundation

JCIO - Judicial Conduct Investigations Office

KPI – Key Performance Indicator

MoU - Memorandum of Understanding

MP – Member of Parliament

NAO - National Audit Office

NCC- National Consumer Council

NGO – Non-governmental Organisation

NPM - New Public Management

Ofcom - Office of Communications

ORR - The Office of Rail Regulation

PCC - Press Complaints Commission

ScHARR - - School of Health and Related Research

The Panel - Communications Consumer Panel

UCL – University College London

UK – United Kingdom

VLV – Voice of the Listener and Viewer

VoD - Video on demand

Acknowledgements

I am very thankful to all those who have supported me through the strenuous and exciting PhD journey. But, first and foremost, I would like to thank my Director of Studies, Dr Maria Michalis, for her patience, trust, encouragement, advice, intellectual support, and friendship. I could not have wished for a better mentor for all these years and I can without doubt say that this work would have not been completed or even started without her support. I am up to this day still amazed and incredibly grateful that she has a smile on her face whenever she sees me.

I would also like to thank everyone at CAMRI who have helped me over the years: Pete Goodwin, Anthony Mcnicholas, Jeanette Steemers, Winston Mano, Daya Thussu, Alessandro D'Arma, Roza Tsagarousianou, Geoffrey Davies, and Fauzia Ahmad. I am absolutely sure that no other department in the world would have tolerated me and my attitude, nonchalance, bad jokes, over-confidence, misunderstandings, incessant drinks invitations and fun-lovingness above all. In addition to forming one of the best media departments in the world, you are certainly and more importantly a group of extremely kind individuals.

Finally, I would like to thank my parents, my grandparents, the remainder of my vast family, my most amazing friends and all the loved ones for their tolerance, support and love over the years. The fear of disappointing you all made me work through long hours. You kept asking and I can now say that the school is finally over!

Declaration

I declare that all the material contained in this thesis is my own work.

1. Chapter One: Introduction

> *'Democracy claimed to be government of the people, by the people, for the people – only if governance can be shown to be governance of the people, by the people, for the people can it be accepted as a valuable innovation… Neither democracy nor governance is easy'*
>
> *(Benz and Papadopoulos, 2006: xiv).*

The purpose of this chapter is to introduce the main parameters of the research in terms of the subject matter and methodology. The discussion begins with situating co-regulation, the main topic of research, into the wider political and regulatory context in the United Kingdom (UK). Co-regulation is further defined as a mode of regulation that includes formal involvement of both state and non-state actors, and its relevance for research is justified. The discussion then narrows down to the choice of specific case studies, namely Ofcom, the UK's communications regulator, and the way it delegated certain regulatory powers to the Advertising Standards Authority (ASA) and the Authority for Television on Demand (ATVOD), thus creating co-regulatory systems, and the way these co-regulatory bodies subsequently handled the regulation of alcohol advertisements and product placement.

Since the main aim of this thesis is to establish whether citizens are empowered by the creation of co-regulatory bodies, specific research objectives linked to this aim are further elaborated on. They are the following: determining to what extent Ofcom, ASA and ATVOD are transparent, and whether their institutional structures are enabling the citizens to participate in deliberation and hold them accountable for their work.

This chapter further elaborates research methods employed, which are document analysis, semi-structured interviews and secondary research, and discusses their advantages and disadvantages. Finally, the last section is outlining the contribution to knowledge this thesis hopes to achieve.

1.1   Regulatory state and new modes of governance

In 2004, the newly established regulatory agency for the converged communications sector in the UK, Office of Communications (Ofcom), delegated its powers to regulate advertising in broadcast media to the Advertising Standard Authority (Broadcast) (ASA(B)), a separate legal entity established within ASA, which was previously a self-regulator for advertising in non-broadcast media. In this manner, Ofcom established the first co-regulatory body through contracting out arrangements, and later repeated this model in 2010 when it delegated its statutory obligations to regulate advertising in video on demand (VoD) services to ASA (Non-broadcast) and the regulation of editorial content in VoD services to the Authority for Television on Demand (ATVOD), which had also been originally established as a self-regulator in 2006.

Thus, Ofcom acted on its statutory duty to promote self- and light-touch regulation as stated in the Communications Act 2003, which sets its regulatory remit and responsibilities, and created a co-regulatory system for the regulation of audiovisual commercial communications in the UK. However, Ofcom is also obliged by the provisions in the same Act to further the interest of citizens and consumers, and this research aims to establish to what extent Ofcom has fulfilled this statutory duty with the delegation of a fraction of its functions to co-regulatory bodies, what the nature of this mode of regulation is, what the implications of this delegation are for the role of citizens, and what wider factors have influenced institutional structures of these regulatory bodies.

Before defining the concept of co-regulation, it is necessary to establish the context of its development since this mode of regulation has been seen as part of the wider transformations of the role and nature of statehood. These transformations refer to the change of the dominant pattern of government interventions in the society and economy,

and, in particular, the move to the regulatory state within which there is a shift from government to governance.

Firstly, the regulatory state refers to the type of state that has developed after the 1970s in Western Europe and whose main mode of intervention in the economy and society is regulation (Thatcher, 2002: 860; McGowan and Wallace, 1996: 563; King, 2007: 1). Regulation, a form of control or intervention, is defined as 'collective intentional restraints on industry behaviour with the goal of achieving public (economic and social) goals' (Latzer et al: 2006: 154; Latzer, 2003: 134).

States have three different ways of public intervention in the economy: income redistribution through taxing and spending the public funds; macroeconomic stabilisation with main instruments fiscal, monetary, industrial and labour policy; and market regulation (Majone, 1996: 54; Majone, 1999: 140-141). All states use all these functions, however, which one is dominant depends on the particular state in question and the historical period examined. Thus, if a state is characterised as a regulatory one, its main function is to develop regulatory policies (Majone, 1997: 140; Moran, 2003: 6) rather than intervene in the form of public ownership, activist industrial and labour market policies, or through control of public services by governments (King, 2007: 4).

Traditionally, regulation has been the responsibility of state institutions, and this mode of regulation is referred to as statutory, hierarchical, state, traditional, or command and control regulation. Here the state formulates the rules in the statute through its legislative branch, enforces the rules by hierarchical executive branch, and sanctions non-compliance through courts or its judicial branch (Puppis, 2007: 330; Latzer et al, 2006: 154; Baldwin and Cave, 1999: 2; Doyle, 1997: 36). When it comes to broadcast media regulation in the UK, both editorial and advertising content have traditionally been regulated by statutory bodies. Initially, the Independent Television Authority (ITA) was set up in 1954 that later became the Independent Broadcasting Authority (IBA), then the Independent Television Commission (ITC), and was finally abolished with the creation of Ofcom, which in a way presents a continuation of the traditional way of arms-length regulation in this sector through statutory agencies. The shift to co-regulation, on the other hand, presents a novelty since it enables greater and qualitatively different involvement of the industry in the regulation of its own activities, and it presents another important change in the nature of statehood.

Not only did the main function of the state change with the emergence of the regulatory state, but the way the regulatory function itself is performed has altered too. The regulatory state is characterised by a combination of both state and non-state regulatory mechanisms and actors, and the increasing variety of regulatory tools (King, 2007: 5, 8). There has been an emergence of new actors or 'at least a significant re-allocation of power among old actors' (Majone, 1997: 153). This shift is referred to as the shift from government to governance.

Although the term governance might have 'too many meanings to be useful' (Rhodes, 1997: 15), there are essentially two overarching understandings. The first is used as a synonym for governing, which can be defined as 'all those activities of social, political and administrative actors that can be seen as purposeful efforts to guide, steer, control, or manage (sectors or facets of) societies' (Kooiman, 1993: 2). Governing was traditionally the responsibility of national governments and it referred to the degree of control government and political actors were able to exert over economic and social activities (Kjaer, 2004: 11); it was seen as 'the capacity of governments to make and implement policy – in other words, to steer the society' (Pierre and Peters, 2000: 1).

However, the changes in the nature of the state that came as a result of the privatisation of previously state-owned industries, the subsequent need to control them through regulation, changes in the administrative branch under the aegis of New Public Management (NPM) that sought to bring corporate ethos and managerialism into the organisation of state activities, and the consequential delegation of functions to non-state actors partly due to the incentive to separate the political strategic and operative tasks, led to the fragmentation of the political system, the creation of policy networks, and the proliferation of actors involved in the delivery of public services (Kochler Koch, 1999: 4; Kjaer, 2004: 4-5, 34; Rhodes, 2003: King, 2007: 19; Latzer, 2003: 138).

NPM reforms are of crucial relevance for this thesis since not only they have been one of the main drivers behind the creation of co-regulation, but also because they have shaped its most pronounced structures and features. NPM is a broad term used to refer to a number of changes in government policies and organisation of state since 1980s that aimed to modernize the public sector and make it more efficient and responsive. NPM ideas dominated bureaucratic reform agenda across the globe and it is widely recognised that this broad label encompasses a number of distinct 'waves of reform' with the first

wave being limited to principally strategic policy making and a few countries such as USA, UK and France (Pollitt, 1984, 1990; Hood, 1991: 3-4).

The second wave, linked to economic downturn of the 1970s, the government 'overload thesis' and perceived unsustainability of the Western welfare state, brought to the fore the desire to make government more business-like by increasing efficiency, creating more value for money, and enhancing responsiveness towards citizens. As Osborne and Gaebler (1992) famously claimed, 'entrepreneurial government' is both worldwide and 'inevitable' (pp. 325–8). During this time, major government reform policies have been made and the reforms spread more widely across the globe (King, 1976; Held, 1984).

Finally, the so-called third wave of NPM reforms in the late 1990s is characterised by the shift of emphasis towards 'governance', 'partnerships', 'joined-up government'/'whole of government', and then to 'trust' and 'transparency'. Since the second wave of reforms produced a number of arm's length governing units, both co-ordination and accountability problems began to appear, hence the reforms further developed (Pollitt and Bouckaert, 2011: 5-9). At the core of this wave of reforms was an attempt to move beyond the old argument between the state and business, and to show that complex modern societies could only be effectively governed through complex networks of actors, drawn from government itself, the market sector, and civil society. The emphasis was on networks, partnerships, and not on competition (Pollitt and Bouckaert, 2011: 116). Over time, these three waves of reform crystallised into more specific set of recipes for public sector reform, and are now widely known as NPM reforms (Pollitt and Bouckaert, 2011: 9).

At the higher level of NPM reforms, it is a general theory or doctrine that the public sector can be improved by importing business concepts, techniques, and values, and the manifestation of this can be seen on two levels: one of them is a broader, structural level and the other one is a more specific level. Some of the former are the following:

- Promotion of decentralized government through a wide variety of alternative service delivery mechanisms, including quasi-markets of public and private service providers;
- Contracting out;

- The shift toward privatisation and quasi-privatisation with emphasis on 'subsidiarity' in service provision;

- Creation of semi-autonomous agencies for service delivery;

- Strengthening the strategic, as opposed to the operational role of the centre;

- Fragmentation of bureaucratic units: splitting large bureaucracies into smaller, more fragmented ones; and

- Promotion of competition between providers of public services.

On the other, more specific level, we have seen the following:

- Incentivisation down more economic lines;

- Orientation towards outcomes and efficiency;

- Consumer orientation in terms of offering choice;

- Accountability for results; and

- Performance management, especially through the measurement of outputs (Pollitt, 2003; Pollitt and Bouckaert, 2011: 10; Kettl, 2005: 1; Hood, 1991: 3-4).

NPM reform has been particularly influential in the UK, especially with Mrs Thatcher's consecutive Conservative governments, and arguably with succeeding New Labour administration where the third wave of NPM reforms can be observed (Pollitt and Bouckaert, 2011: 310-319).

Hence, governing is not the sole responsibility of the state: governance as governing is now seen as a 'system of co-production of norms and public goods where the co-producers are different kinds of actors' (Bertolini, 2011: 8, 11-12); it is defined as 'an exercise in the management of networks' (Moran, 2003: 12-13), and this is what has been termed in the literature as 'new modes of governance': the steering of society is not performed solely by government but by a variety of actors and regulatory tools; 'networks are the defining characteristic of governance' (Bevir and Rhodes, 2003: 55-6).

Thus, we come to the second meaning of governance that can be seen as 'the patterns that emerge from governing activities of social, political, and administrative actors' (Kooiman 1993: 2). Governing is performed through different 'modes' or 'patterns of social co-ordination' and with the involvement of non-state actors we can talk about new

modes of governance (Kjaer, 2004: 41). New modes of governance are characterised by changes in terms of policy, politics and polity, or 'the sphere of authority between the public and the private, institutional forms and patterns of decision-making and different types of policy instrument in the space between hard and soft law' (Diedrichs, Rainers and Wessels, 2011: 20-21).

When it comes to policy or content, there is a growing reliance on competition regulation, a shift from sector-specific to general regulation, from detailed legal prescription to broad provisions, liberalisation of rules, and reliance on soft law, which refers to rules that are not specified in statute (Latzer et al, 203: 128-129). In terms of processes or politics, there is a shift from formal decision-making to negotiation and bargaining. And finally, when it comes to the changes in polity, there is firstly a shift towards greater reliance on self- and co-regulation, which can be seen as the horizontal extension of government (Rhodes, 1997; Schmitter, 2001), and secondly a greater influence of supra-national, international, and regional bodies, such as the European Union, which is seen as the vertical extension of government (Latzer et al, 2003: 130; Puppis, 2007: 331). Thus, to describe the changes involved, Grabosky (2012) talks about regulatory pluralism, where there are more actors in the regulatory space (p. 2), and Julia Black (2001) refers to the 'post-regulatory' world in which governments no longer monopolise regulation (p. 231).

New modes of governance are often described in terms of the power shift in policy-making from government, state, and administrations to a network of different stakeholders. They refer to a network of control that is grounded less on legal rules and more on informal mechanisms executed by a variety of stakeholders (Meier, 2011: 156). The question is, however, whether co-regulation in the audiovisual media sector does actually represent a power shift or it is just another way to perhaps 'wrap the government' (Lunt and Livingstone, 2012: 68), and this is what this study aims to establish.

Thus, to use the often quoted example of steering and rowing, in the regulatory state, the state is seen as establishing broad policy objectives, or steering, while the rowing or implementation of policy objectives and the delivery of services is performed by a range of non-state actors through new modes of governance (Bevir, 2007: viii-ix). Rhodes' (2002, 2005) concept of the 'hollowing out of the state' has often been used to describe the changes in the state after the emergence of the increasing reliance on new modes of

governance, where the power of the British state has been eroded due to the involvement of non-state actors, the emergence of policy networks, and the influence of the European Union. The important question that emerges is what has been lost with these changes and, if the 'hollowing out of the state' thesis is correct, who will guard the public interest and ensure regulation balances the interest of every section of the society. However, before we tackle these questions, it is important to define co-regulation in more detail.

1.2.   Co-regulation VS self-regulation

As noted, with the rise of the regulatory state there has been an increased reliance on regulation as a form of intervention and on non-state actors to implement it. The discussion about new modes of governance in the audiovisual media sector usually involves reference to co- and self-regulation.

Self-regulation is seen as the regulation of organisations by themselves where they specify and enforce the rules, and monitor their implementation. The regulation, at least when it comes to pure self-regulation, is not imposed by the state that usually has no involvement. However, as many point out, self-regulation is a very rare occurrence in practice and many self-regulatory systems are characterised by some form of state involvement (Bartle and Vass, 2005: 19; Ogus, 1999: 587; Gunningham and Rees, 1997: 364-365). Thus, Moran (2003) is right to argue that 'self-regulation is a regulatory ideology mobilized to legitimize any number of particular arrangements' (p. 67).

More significantly, with the rise of the regulatory state, there has been an enclosure or formalisation of the existing self-regulatory mechanisms. At least in the UK, self-regulation has developed as a rather informal arrangement with no explicit rules and it has been dependent on social norms without a significant role of law or public scrutiny; the so-called 'gentlemen club' (Moran, 2003). King (2007) claims that this state of affairs when it comes to self-regulation existed until the early 1970s in the UK (p. 43). However, with the rise of the regulatory state, self-regulation has been endorsed by the state, but not self-regulation in its purest forms, but the one characterised by the so-called 'regulatory formalism' or greater involvement by the state and statutory prescriptions (King, 2007: 51-52). Ogus also observes that self-regulation has been 'subjected to a

greater degree of formalization and the imposition of external controls' (Ogus, 1995: 97). As Bartle and Vass (2005) point out 'the context of self-regulation today is therefore one of 'enclosure' by the regulatory state. Where self-regulation operates, it operates with the sanction, or support or threat of the regulatory state' (pp. 3-4); the regulatory state now 'envelops' all forms of self-regulation creating self-regulation 'within' the regulatory state' (Bartle and Vass, 2005: 43).

This 'enclosure' of self-regulation truthfully describes the transformations of major self-regulatory systems in the audiovisual media in the UK in the 2000s. ASA, established in 1961 for the regulation of advertising in non-broadcast media, PhonePayPlus, established in 1986 to regulate premium or phone-paid services, and ATVOD, set up in 2006 for the regulation of content in VoD, had all been self-regulatory bodies, which have been transformed to enable some sort of state control and involvement, thus creating co-regulatory systems. However, this does not apply to self-regulation of the press, which recently underwent a process of judicial inquiry led by Lord Justice Leveson following the so-called 'phone hacking scandal'. Self-regulation of the press by the Press Complaints Commission (PCC) arguably failed to be efficient and credible, but regulation of the press in the UK escaped any kind of state involvement and it remains one of the rare examples of pure self-regulation.

For these reasons, and to avoid confusion between self- and co-regulation often found in the literature, the term self-regulation in this research is used to refer to its pure form where there is no involvement from the state.

However, co-regulation is in essence the form that is found in practice and describes more precisely regulatory models. Co-regulation is seen as a point on the continuum between the opposites: statutory and self-regulation. It can be perceived as self-regulation with public oversight or ratified by the state; it is self-regulation with a legal basis operating within a framework provided by the state (Latzer, 2003: 135; Puppis, 2007: 332). Essentially, it is a form of regulation where there is a combination of state involvement in the form of legal, organisational, financial, or personnel contributions, and societal/private activities (Gunningham and Rees, 1997: 366; Latzer, 2003: 136). As McGonagle (2002) claims, 'the term co-regulation is one of many shades, with each shade being distinguished by the degree of involvement of the various parties' (p. 15-25).

Giving a precise definition has proven to be difficult since, as Prosser (2007) claims, co-regulation is not a concept that corresponds to a fixed reality – the design of a system and the balance of responsibilities between state and non-state actors will vary from country to country and from sector to sector (p. 101). And, as he adds, the use of different concepts of regulation as simplistic often has a political function and it is less helpful trying to create restrictive definitions of different types of regulation; 'it is much more important to assess them through the application of normative principles' (Prosser, 2007: 99), which is what the aim of this research is.

However, although these claims are correct, it is necessary to adopt a definition for the purposes of this study. The one outlined by the Hans Bredow Institut in their study on co-regulatory measures in the media sector in the EU published in 2006 seems precise enough and, at the same time, not too restrictive. A regulatory system can be classified as co-regulatory when 'non-state actors are either making, enforcing the rules or sanctioning non-compliance, and when the following criteria are met: the system is established to achieve public policy goals, there is a legal connection between state and non-state regulation, the state leaves discretionary powers to a non-state regulatory body, and the state uses regulatory resources to influence the outcome of the regulatory process and ensure the fulfilment of regulatory goals' (HBI, 2006: 35).

Defined it this way, co-regulation is indeed a new form of governance, a qualitatively new regulatory development: it is set up to reach public policy objectives, has a clear remit and connection with the state, and non-state actors are involved in performing functions that have traditionally been associated with the government.

Undoubtedly, the involvement of non-state actors to deliver public policy objectives and perform regulation - that is, as defined above, intentional intervention in the activities of industry players - poses several risks. New modes of governance imply a change in the role and nature of government and signal a weakening of the state-centred view of power and societal steering in the interest of the public, which has been dominant for centuries (Torfing, 2010: 6). Consequently, several questions emerge: what the role of the state is, who has the power in this mode of regulation and in whose interest it is exercised, whether the industry would be able and willing to curtail its own activities in order to achieve regulatory objectives, who will control these arrangements and ensure their

accountability, and what the role of the citizens is.

Sorensen and Torfing (2005) sum up the arguments that lie behind the shift to new modes of governance clearly:

> 'If the state is seen as the legitimate form of governance due to the sovereign power of elected politicians, then the 'hollowing out' of the state due to the new forms of governance which are seen as an 'illegitimate form of unaccountable and corrupt elite politics that takes place behind closed doors', this represents the 'erosion of liberal democracy and popular sovereignty'. This view rests on 'the myth that MPs are capable of making sound, just and democratic decisions without input and aid from a broad range of societal actors. This myth is dangerous, not only because it retains an unrealistic image of the capabilities of the politicians, but also because it prevents the open and constructive debate of the democratic potentials and problems of network governance. Governance networks are not a democratic panacea, but no outright enemy of democracy either' (p. 198).

Therefore, new modes of governance do not just pose risks, but also present an opportunity as will be illustrated in the discussion regarding the reasons for their development. As defined above, co-regulation entails the involvement of 'non-state' actors, which is much wider than industry players and could include civic society organisations, general public and all interested stakeholders. New modes of governance have the potential to be an open and flexible type of governing based on the participation and interaction of a range of public and private actors in diverse institutional settings. In this perspective, they have been seen as a normative yardstick 'embracing civic and professional groups within multistakeholder networks of deliberation on media regulation, and providing a basis for principled action and encouraging inclusive mechanisms such as public hearings. [Co-regulation] can be seen as a more inclusive form of governance in comparison to state regulation, involving expanding number of social, political and economic actors' (d'Haenens, Mansell, and Sarikakis, 2010: 131).

As Torfing (2010) claims, 'these new forms of governance chime well with both the neoliberalist individualism and the postmodern decentering of society because they invoke the principle of "regulated self-regulation," which permits individual and collective actors to work together to find joint solutions while maintaining a large degree of operational autonomy' (p. 2). Whether co-regulation would realise its potential depends on why it has developed and how it has been designed. As Prosser (2007) claims, the shape co-regulation takes is a political decision; the term co-regulation is just a political slogan and it needs to be established empirically what it actually represents (p. 103). This is closely connected to why co-regulation has developed initially and why it has been endorsed. Although one of the research objectives for this study is to establish why co-regulation developed in the UK in the structural form it did and which factors have shaped its institutional design, there are various explanations found in the literature that explain in differing ways the origins of the shift to new modes of governance and co-regulation, and provide not only the background for this research but also a way to analyse its findings, as the next section explains.

1.3. Co-regulation between the state and the market: origins, potentials and challenges

There are three different strands to explain why co-regulation and other new modes of regulation more generally have developed or should be encouraged to develop: to achieve better regulation in terms of smarter and more efficient regulation and thus overcome the challenges traditional regulation is perceived to be facing; to hand back the responsibility to the society and achieve greater legitimacy; and due to the belief that the market provides better outcomes than regulation and intervention in general.

Traditional regulation, it has been argued, faces severe difficulties due to the speed of technological developments such as digitisation, technological convergence and the rise of the Internet, and economic and social changes, namely the processes of commercialisation and globalisation (Puppis, 2007: 332). These developments have led to claims that the state displays a 'knowledge gap' since there is a difficulty for regulators to gain knowledge and understand the systems they are regulating: 'law is a blunt tool for

intervening in other complex systems and cultures, including the economy and the media' (Prosser, 2007: 100; HBI, 2006: 2).

In addition, it has been asserted that traditional regulation ignores the interests of the regulated industry and thus might cause resistance rather than co-operation, and that it does not stimulate creative industries effectively: 'innovation and commitment cannot be imposed by law' (Saurwein, 2011: 334). Moreover, certain objectives, such as media pluralism and content diversity are difficult to operationalise into effective laws (d'Haenens, 2007: 324). What is crucial is the constitutional reason for a distance between politics and the media, (d'Haenens, 2007: 324), and new forms of regulation are seen as a solution for the dilemma how to reconcile media freedom and media regulation (Puppis, 2007: 332-333).

Finally, a very important argument for the development of new modes of governance in the audiovisual media sector is the Internet, which is considered unsuitable for traditional regulatory approaches (Palzer and Schauer, 2007: 235; Marsden, 2011).

Consequently, it is believed that participation of industry actors through self- and co-regulation would solve these problems (Puppis, 2007: 332), and help cope with the risks and failures of traditional regulation (HBI, 2005: 9). In this perspective, new modes of governance are seen as a pragmatic response to the common perception that regulatory frameworks must quickly adapt, be flexible and continually optimised to maintain relevance and effectiveness in a rapidly changing market, and technological and societal conditions (Marsden, 2004: 77-78; Prosser, 2007: 102-103; d'Haenens, 2007: 324). This would enable regulators to use the knowledge and expertise of those regulated and others with an interest such as citizens and consumers (Prosser, 2007: 102-103; Baldwin and Cave, 1999; Majone, 1996: 23; Ogus, 2003; Puppis, 2007: 332). This would then lead to the creation of better and more realistic rules that would have the potential to gain more support and be easier to ensure compliance with (Palzer and Schauer, 2007: 238).

The second argument for the development of new modes of governance sees them as a response to the disillusionment with liberal democracy and the governments in Western societies. New modes of governance are seen as a way to give back the responsibility to the society where it belongs; media governance is supposed to create a platform that

empowers previously neglected stakeholders, mainly civil society and the public, and simultaneously encourage the state and media organisations to assume their obligations towards society. The concept of media governance is conceptualised as a multistakeholder approach that is envisaged to tackle complex conflicts of interest in media policy by integrating neglected stakeholder interests on various levels (Puppis, 2007: 337-338). It has emerged as a response to the perceived crisis of the state expressed in different assumptions. According to the 'overloaded government' thesis, the government has not only expanded its reach, but also its promises and aspirations in order to attract voters. Thus a vicious circle has been created where the government has had to grow in order to meet demands but at the same time it has become less effective (Held, 2006: 234). On the other hand, 'the legitimation crisis' thesis explains the crisis of democracy and the state in the 1960s and 1970s as the result of eroded power of the state and its legitimacy due to the effect of the capital on politics (Habermas, 1976; Held, 2006: 192-194). In addition, there was disillusionment with political life due to the perceived apathy and lack of interest in political life among the voters, elitism of political parties, massive non-participation and disinterest on behalf of the public, superficial political debate, emphasis on politicians' personalities and not on their policies, arguments replaced by sound bites, and the policy process resembling a marketing campaign (Fishkin, 1991: 1-3). These factors have triggered new thinking about political life and democracy and new forms of political institutions. In this perspective, regulation is seen as an enterprise, emphasising collaboration between government, the industry, and citizens (Prosser, 2010: 1).

This view of governing and regulation has been largely promoted, or wished to be promoted, by the New Labour in the UK during their time in the government from 1994 to 2010. However, their success has been debated (Giddens, 2000; Powell, 1999). It was their attempt to promote a view of social democracy through the so-called 'third way': a form of governing between state regulation and free markets that encouraged participation of people in a plurality of non-state organizations in civil society, joined-up government and public and private partnerships (Giddens, 1998; Beaumont, 2003: 191). For New Labour, new regulatory forms offered a means for increasing 'public engagement, transparency, and accountability so as to produce consensus and to balance the interests of government, commerce and the public' (Lunt and Livingstone, 2012:

178).

However, there was another response to the perceived crisis of the state. The final view on new modes of governance comes from the belief in markets as the optimal mode of societal regulation and control. Under this perspective, self-regulation is the preferred way, because it interferes as little as possible with the operation of the market. The main actor in self-regulation is the industry, not the consumer (Prosser, 2007: 102-103). This view has been driven by neoliberal ideology and governments supporting it, such as the Thatcher Government in the UK, which have not only recommended the privatisation of public enterprises, the contracting out of public services, and the commercialisation of the public sector, but also the limitation of the role of elected governments to the formulation of overall policy objectives, and the delivery of public services in the hands of private actors and quasi autonomous public agencies. The goal was to integrate private organisations and firms in public governance through the formation of networks and partnerships (Torfing, 2010: 6). In this perspective, self-regulation has been mostly introduced to keep the state off regulation (Puppis, 2007: 333).

Thus, there is a supposedly ideology-free argument for new modes of governance that sees them as a practical response to technological and societal challenges governments are facing. However, this perspective might only represent a 'conception of media marked by market forces which are disguised as technological determinism' (Williams, 1974: 1983). This is especially so bearing in mind that new modes of governance are also developed and endorsed due to the pressures from different ideological, political and economic interests that are trying to promote their own view of regulation (Puppis, 2007: 332; Latzer, 2003: 138). In this case, they would represent a certain ideology. The question is what kind of ideology co-regulation represents in the UK: is it just a way to enable the commercial interests to be in charge of the regulation of their activities with symbolic involvement from the state, or is it a form of governance that would enable wide participation and empower a number of stakeholders, including the citizens, civil society, the state and the industry. Thus, the debate about new modes of governance often focuses on the question what they actually represent: the state, the market, or something in between. Governance can be seen as 'either a neoliberal attempt to "roll

back the state" or as the promise of a new democratic order based on associations in civil society that escape the systemic logics implicit to state and market' (Torfing, 2010: 7).

When it comes to co-regulation in particular, it has largely been seen as between the state and the market: a panacea for all the problems both traditional and self-regulation are facing, and as a way to reap the advantages both have to offer. The inherent problems of the state and markets call for the development of new modes of governance: 'no single actor, public or private, has the knowledge and capacity to solve complex, dynamic, and diversified problems' (Torfing, 2010: 6).

With all the advantages self-regulation might possess that have been listed above in terms of expertise, greater flexibility and production of more realistic rules, it is claimed that it lacks democratic legitimacy, sufficient sanctions and enforcement mechanisms, and that it is in essence a vehicle of industry to pursue its own interest and fend off government regulation (Palzer and Schauer, 2008: 241; d'Haenens, 2007: 324; Puppis, 2007: 333, 335). This might be evident when it comes to press self-regulation in Britain, that has been widely considered unsuccessful, firstly in the 1980s that resulted in the Calcutt's report leading to the abolishment of the Press Council and establishment of the Press Complaints Commission (PCC) in 1991, and most recently with the inquiry into the self-regulation of the press following the so-called 'phone-hacking scandal' by the Lord Justice Leveson.

On the other hand, state regulation has problems dealing with societal and technological changes and complexity (Torfing, 2010: 6), but at the same time it offers the advantages of being established by democratically appointed authorities (Prosser, 2007: 103), and it is not challenged in terms of its authority to express the general interest (Boddewyn, 1989: 20-21).

Co-regulation is thus seen as the best alternative since it promises to tap the potentials of both self- and statutory regulation while at the same time preventing their risks: participation and representation can be prescribed by law (Latzer et al, 2006: 168), and it implies an important although shared role for the state in order to enable some public oversight and prioritisation of public interest goals. It also implies the involvement of civic and professional groups (d'Haenens, 2007: 324; Prosser, 2007: 103), and thus in a

way ensures regulation in the public interest (Puppis, 2007: 335).

However, critics of co-regulatory methods argue that industry will not reveal insider knowledge to regulators but will instead use it as a means to obtain weaker standards since they have a strong incentive and even a legal obligation to their shareholders to put bottom-line concerns ahead of the public interest. Moreover, the government might pursue industry's agenda rather than the public's agenda due to lack of transparency. Critics of co-regulation express profound scepticism whether this process that gives industry a greater voice in government regulation could yield improved social outcomes (Hirscht, 2001: 238).

With regard to advertising, while many industry players in the UK claim that they have a long-term interest in protecting the consumers and maintaining advertising standards and thus they are proponents of self-regulation, some still think that advertising influence is so strong that it needs statutory regulation (Dacko and Hart, 2005: 2). In addition, there is a suspicion that co-regulation is not always in the public interest; there is a debate as to whether a move to co-regulation will benefit the industry at the expense of consumers. 'Why does the industry want to take on a structure that will cost around £4 million per year?' (Dacko and Hart, 2005: 12).

Therefore, co-regulation might be seen as offering either 'the best or the worst of both worlds, either a system in which private and public interests are effectively reconciled, or one in which neither is respected and any values are subjected to unprincipled bargaining between the state and private interests' (Prosser, 2007: 103). In addition, co-regulation is a form of governance, and it needs to be established whether certain normative considerations have been taken into account when it has been created and designed in the UK. One of the basic premises of this research, as it will be explained later in the normative chapter, is that any form of governance should have as its ultimate goal the achievement of public interest objectives. In order for this goal to be attained, co-regulatory systems need to be designed in such a way that enables citizens to participate in deliberation regarding regulatory decisions, and hold the regulators accountable. It is the purpose of this thesis to discover whether co-regulatory bodies studied enable this.

The next section of this chapter proceeds to describe co-regulatory bodies that have emerged in the UK and outlines case studies that will be used to test the normative framework that is established in the next chapter. It is followed by the elaboration of the research objectives and a discussion of the methodology and research design.

1.4.   Co-regulation of the audiovisual commercial communications in the UK and case studies

This research is concerned with co-regulatory bodies that exist in the UK with regards to regulation of commercial communications, which is a term used for advertising that accompanies both traditional broadcasting and VoD services. As the following paragraphs will illustrate, the co-regulatory space in the UK is fragmented with a number of different co-regulators. Since the primary concern of this research is co-regulation as an institutional form of regulation, a choice of case studies was needed that allowed the study of more than one co-regulator. Thus, the regulation of commercial communications in audiovisual media services has been used as a case study that covers the work of ASA, ATVOD and Ofcom. In addition, it is in the area of advertising where co-regulation has been the dominant and the preferred regulatory choice due to the perception that the industry and the public have a joint interest: decent and legal ads (Boddewyn, 2008).

The term commercial communications has been introduced with the European Union's Audiovisual Media Services Directive (AVMS Directive) in 2007 to reflect the changes brought about by the development of new platforms for the delivery of content and advertising, namely the Internet and mobile phones, and new advertising techniques, such as product placement and split screen advertising in addition to more traditional spot advertising and teleshopping. Thus, audiovisual commercial communications cover all forms of advertising delivered over different platforms.

When it comes to co-regulatory bodies, in 2004, Ofcom, as a newly established regulator for the converged communications sector in the UK, delegated its responsibility for the regulation of broadcast advertising to ASA (Broadcast), a separate legal entity established

on this occasion within ASA. Thus, ASA, which has traditionally been a self-regulatory body for advertising in non-broadcast media, was divided into two legal entities: ASA (B) became a co-regulator for broadcast ads while ASA remained a self-regulator for non-broadcast ads. By creating ASA (B), Ofcom relied on its statutory duty to promote self- and co-regulation were possible as laid down in the Communications Act 2003, and it created for the first time a model for co-regulation that it would later repeat in 2010 with the delegation of responsibilities to regulate advertising in video on demand media services to ASA, and regulation of editorial content to the Authority for Television on Demand (ATVOD). These three bodies (ASA(B), ASA, and ATVOD) represent the same model of co-regulation: contracting out has been used as a means to delegate functions, set the remit and institutional structure of co-regulators, and Ofcom decided not to create new bodies but to transform the already existing self-regulators into co-regulators.

As it has been stated, ATVOD is the co-regulator for editorial content in VoD services, but it has been included in this study since it has the responsibility to regulate product placement, which has been widely regarded as a form of commercial communications and not editorial content (Woods, 2008: 231; AVMS Directive). However, Ofcom made a decision to include it in the regulation of editorial content and subsequently delegate its regulation in VoD services to ATVOD, and keep the regulation of it in traditional broadcasting under its remit.

Thus a paradox emerges. Although Ofcom was created as a response to the challenges created by technological convergence and the perceived need to have one regulatory body since it no longer made sense to regulate communications services separately when the choice of delivery method was becoming increasingly divorced from the nature of the content delivered (Prosser, 2010: 163), by establishing co-regulatory systems Ofcom further fragmented the regulatory space. More importantly, it has done so on the basis of the principles that go against the rationale for its creation since the same type of commercial communications content is regulated by different bodies on the basis of the platform over which it is being delivered. For example, Ofcom regulates product placement in traditional linear broadcasting, while ATVOD regulates it in VoD services. ASA(B) regulates advertising in linear TV services while ASA (Non-broadcast) regulates it in VoD services. Thus, there is another paradox since Ofcom promotes platform-specific regulation against the increasing move towards technology-neutral regulation.

In addition, although ASA has been delegated functions to create what has been called a one-stop-shop for advertising, Ofcom still retained a number of functions in relation to advertising, such as the duration of breaks, scheduling, and political advertising. It seems that convergence has been little more than a rhetorical device.

Therefore, to cover the co-regulation of audiovisual commercial communications in the UK, three bodies are studied: Ofcom, ASA and ATVOD.

A separate note needs to be made regarding the structure of ASA and why it is in essence one regulatory institution although it has a rather complex structure internally. ASA is a regulator that has two major functions in relation to advertising: setting the regulatory codes; and enforcement of the same codes by handling complaints in relation to them, and monitoring compliance. The first function is the responsibility of two committees: BCAP sets the regulatory codes for advertising in broadcast media, and CAP sets the rules when it comes to ads in non-broadcast media. These committees are entirely self-regulatory; their members are industry players.

The second role in relation to code enforcement is divided between the executives that are employed by ASA, and ASA Council. ASA Council decides on adjudications, and it is made up of the majority of independent members: it has eight independent members, an independent Chair, and four industry members. There is a distinction between ASA Council for adjudications when it comes to broadcast and non-broadcast ads, however it is minor: the independent members are the same, as well as three industry members. The only difference is that there is one separate industry member that adjudicates on broadcast and non-broadcast ads.

Furthermore, this system is funded by industry levy, which is collected by separate entities within ASA: ASBOF for non-broadcast ads, and BASBOF for broadcast ads.

Thus, although ASA is one legal and public facing entity, it has the characteristics of a Swiss watch, as they proudly like to claim at ASA (Shahriar Coupal, private interview 2013). But what is important to note is that there are separate committees for code-making and separate structures that collect the funding, but ASA Council is in essence comprised of the same people and the same executive team serves the entire system.

Moving forward, regulation of commercial communications has been chosen for additional reasons. To begin with, it is an area where there is a pronounced conflict

between commercial interest and the interest of citizens, consumers, and producers of content. Thus, it is valuable to establish empirically how well co-regulation is able to reconcile these competing interests. Advertising is very important for the funding of the content industry in the UK, thus this provides a good case study to see how the public interest is protected under commercial pressures and how the protection of consumers is balanced against the need to ensure feasible funding for content.

On the other hand, the advertising self- and now co-regulatory body, ASA, has been praised as an effective arrangement and one that might serve as a model for different countries (HBI, 2006: 154). Moreover, regulation of advertising entails striking a balance between freedom of speech and consumer protection, which is an area where co-regulation is seen as a promising regulatory mechanism (Marsden, 2011). The contracting out model on which this ASA and ATVOD are based is found particularly advantageous since it enables clear separation of responsibilities, statutory controls and state oversight while taking advantage of the benefit brought by the greater involvement of the industry (Latzer et al, 2006: 321). Thus, it is important to see whether this model fulfils the potential co-regulation offers, especially bearing in mind the recent failure of the Press Complaints Commission and the subsequent debate over the future of the press regulation. It seems that self-regulation is an inefficient and unaccountable model and co-regulation might be seen as a better alternative.

In addition, the context of regulation of commercial communications has changed over the last decade. Firstly, commercial content can now be delivered over different platforms, and it is especially important to see how co-regulation can function in the VoD environment. Secondly, regulatory provisions regarding commercial communications have been liberalised over the past years, and new, arguably controversial techniques have been made legal (Woods, 2007). Product placement is particularly important, since it enables commercial content to be merged with editorial content, which demanded strict and clear separation before the AVMS Directive came into force in 2007 and before it was transposed into the UK law with the Audiovisual Media Regulations 2009 and 2010.

Thus, this research is concerned with new developments regarding regulation of commercial communications on three different levels: new regulatory bodies, new forms

of commercial communications, and new platforms all against the background of increased and continuous liberalisation of advertising rules.

Finally, the rationale for the selection of particular case studies is outlined over the following paragraphs.

When it comes to ASA, regulation of alcohol ads has been chosen as the case study since it is a highly controversial area, there are conflicting social and industry goals, and it has been a highly contentious issue. It is set against the background of the UK Government's Alcohol Harm Reduction Strategy published in 2004, which has as its aim the reduction of harm caused by alcohol consumption and limiting notorious binge drinking especially when it comes to the young. One of its planned strategic actions has been to tighten the regulation of alcohol promotion (Cabinet Office, 2004: 5), and as a part of this plan, Ofcom was required to review broadcast advertising rules in 2004 (Ofcom, 2004: 2). Over the following years, a number of reports have been published, different public interest groups have lobbied for a complete ban on alcohol advertising, the Government persisted in developing its strategy in relation to alcohol promotion, and the regulators have continued to review the rules. This eventful decade has unfolded in parallel with the development of co-regulation.

When it comes to ATVOD, the regulation of product placement is the chosen case study for the reasons emphasised previously in this chapter, namely its highly controversial character that enables merging advertising with editorial content and consequential confusion and potential damage for the citizens. Thus, it is interesting to see whether a regulatory model that implies a great involvement of industry players is able to deal successfully with the regulation of such a controversial form of advertising. Regulation of product placement in VoD services is also an interesting case study since it draws the attention to the nature of VoD market and the difficulties implied in its regulation. Namely, this market in the UK is not entirely developed and it is extremely heterogeneous to the point where it is difficult to talk about 'the market' since the players are very different: from adult service providers, to small community channels, and catch up services of established broadcasters. In addition, product placement has only recently been permitted in the UK, thus this underdeveloped opportunity for the advertisers is coupled with an underdeveloped market. However, with the implementation of the

AVMS Directive, Ofcom has become obliged to regulate this market and its choice to establish a co-regulatory body to perform this function is arguably worthy of research.

In addition, Ofcom plays an important role in these co-regulatory systems and has been responsible for the contracting out, institutional design of the systems, and ensuring that they are able to, and indeed do, fulfil the regulatory tasks they have been charged with. Thus, its role is also researched for at least two reasons. As it has been outlined in the introduction, the rationale behind the development of co-regulation will determine its institutional shape as a new mode of governance and enable it to cope with the risks and fulfil its potential. Thus, it is important to establish how Ofcom made the decisions regarding co-regulation and its institutional structure. In addition, Ofcom reviewed the performance of co-regulatory bodies two years after they had been established and it would be important to see how this process was handled and in what way the decisions and adjustments were made.

And finally, the role of the state in the strict sense is rather limited when it comes to co-regulation. Codes drafted by co-regulatory bodies are subject to Parliamentary approval and there is a limited role for the Secretary of State that can initiate regulation if public policy objectives change. In addition, Ofcom is ultimately accountable to the Parliament for both its operation and the work of the co-regulatory bodies. In other words, the largest part of the regulation of commercial communications is performed through new modes of governance: there is very little government involvement and this is perhaps the most important reason for the particular choice of regulation of commercial communications as a case study for this research. If the ultimate aim is looking into new modes of governance, then an area where they have almost an exclusive responsibility is logical.

Moreover, it is worth emphasising that Ofcom's duty to promote effective forms of self-regulation as prescribed by the Article 4 of the Communications Act 2003 is very important and might be qualitative different in comparison to its other duties, which are related to maintenance of standards of communications services. This provision in essence allows Ofcom to create and design regulatory space, and this is perhaps the most important area where it is possible to see how the role of the citizens is conceptualised and to what extent it is important in relation to regulator models; it is here where we can

see if citizens are given an opportunity to practice their democratic rights and responsibilities.

Thus, to summarise, the case studies chosen are seen as the most suitable to test the normative framework developed for this thesis. As the next chapter will show, regulation involves redistribution of interests and benefits, and it should be aimed towards achieving a balance of these different interests fairly. Case studies that involve an element of controversy and conflicting interests are the most suitable test in order to determine whether the possibilities offered by co-regulation to be a truly democratic form of governance have been achieved.

Finally, it is important to mention other regulators that exist in the UK's audiovisual media sector and outline why they have not been included in this study.

Other forms of new modes of governance in the media sector in the UK are mainly self-regulatory and/or are concerned with the regulation of services that are not seen as audiovisual and thus fall outside the scope of this study. They are PhonePayPlus, the Internet Watch Foundation (IWF), Independent Mobile Classification Body (IMCB), British Board of Film Classification (BBFC), the BBC Trust, and the Press Complaints Commission (PCC).

In 2007, PhonePayPlus, which had previously been a self-regulatory body known as ICSTIS, was transformed into a co-regulatory body by Ofcom. It regulates phone-paid services: premium rate goods and services that can be bought by charging the cost to phone bills and pre-pay accounts. Among other things, these include adult entertainment content that can be received via mobile phones, computers or TV devices. Although this model of co-regulation is similar to ASA and ATVOD, PhonePayPlus stays out of the scope of this research since it is not responsible for the regulation of audiovisual commercial communication.

IWF is an independent self-regulatory body established in 1996 by the Internet industry and funded by the EU and the industry to provide the UK Internet Hotline to report criminal online content, mainly child sexual abuse content and criminally obscene adult content. It also provides a classification system that gives the Internet Service Providers a 'notice and takedown' service that alerts them to the criminal content so they can remove it from their networks.

IMCB, established in 2004, is also an independent self-regulatory body that provides a classification framework for mobile content through its Code of Practice, which has been designed by the four major UK mobile operators to help them self-regulate content available on mobile phones. It is formed as a subsidiary of PhonePayPlus and it does not itself classify or block mobile content, but it provides the classification content and investigates complaints from both consumers and content providers about its classification.

The British Board of Film Classification is an independent self-regulatory body that has solely been concerned with classification of cinema films since 1912 and videos/ DVDs since 1984.

These three bodies (IWF, IMCB, BBFC) are all self-regulatory bodies whose main responsibility is the classification of content and thus they fall outside the scope of this research.

The BBC Trust is the governing body of the BBC that ensures the Corporation fulfils its remit. It can be classified as a self-regulator, with responsibility for regulating an individual organisation, although, with the recent involvement of Ofcom in the assessment of the commercial impact of proposed new or significantly amended BBC services, its self-regulatory status can be questioned.

And finally, the PCC is an independent self-regulatory body that deals with complaints about the editorial content of newspapers and magazines. It was established in 1991 and it enforces the Code of Practice framed by the newspaper and periodical industry. As mentioned above, following the so-called 'hacking scandal' and the inquiry by Lord Justice Leveson, the PCC has ceased to exist in the form known before and it has been replaced by what is now called Independent Press Standards Organisation (Ipso).

To summarise, the case studies chosen for this research comprise of three different bodies: Ofcom, ASA and ATVOD. What is in particular being looked at is the way Ofcom handled the delegation of regulatory functions to ASA and ATVOD, and the way these bodies dealt with the regulation of alcohol ads and product placement. The next section outlines the specific research questions and briefly justifies them with reference

to the normative framework.

1.5.   Research objectives

As discussed previously, new modes of governance have the potential to be an open and flexible type of governing creating multistakeholder networks of deliberation on media regulation. They can be seen as a more inclusive form of governance in comparison to state regulation (d'Haenens, Mansell, and Sarikakis, 2010: 131) and are supposed to create a platform that empowers previously neglected stakeholders, mainly civil society and the public (Puppis, 2007: 337-338). However, this research aims to establish whether this potential has been fulfilled when it comes to co-regulation of commercial communications in the UK and whether this mode of regulation truly represents a qualitative new mode of governing or it is just another way to wrap the government (Lunt and Livingstone, 2012: 68) or perhaps free operation of markets. As Prosser (2007) claims, co-regulation is a political slogan (p. 103), and it is important to empirically establish what it represents in practice.

As it will be discussed further in Chapter Three, the fundamental idea behind the normative framework adopted is that, at least in democracies such as the UK, the political power is ultimately the power of the public; of free and equal citizens (Rawls, 1993: 136, 217). This refers to the notion that power needs to be authorized by the citizens and exercised in their interest: the ultimate goal of any form of political association is the attainment of common good or results that are in the public interest (Honohan, 2002: 21). Thus, the claim is that co-regulatory bodies in the UK should operate in the public interest and that the citizens should have the ultimate authority in both determining what the public interest is and ensuring it is implemented in specific regulatory decisions. From these premises it is developed that the main elements of this normative framework are that in order for regulation to achieve public interest objectives, institutional structures are needed that enable influential deliberation by the citizens, transparency and accountability.

Thus, this research evaluates to what extent Ofcom, ASA and ATVOD are transparent and whether there are opportunities for citizens to deliberate and hold ASA, ATVOD and Ofcom to account.

Specific research questions are the following:

1. How transparent are decision-making processes when it comes to Ofcom's work in relation to co-regulatory bodies, and ASA's and ATVOD's regulation of alcohol ads and product placement? To what extent is there transparency when it comes to who makes the decisions, through which processes, based on what information, and what are the justifications for decisions?

2. What are the institutional structures that provide opportunities for citizen input, either direct or through representatives, in the process through which Ofcom established co-regulatory bodies, and in the processes ASA and ATVOD make decisions regarding regulation of alcohol ads and product placement? Have they enabled citizens to deliberate and how influential have these mechanisms been in the decision-making processes? Have these institutional structures enabled the citizens to have any decision-making powers?

3. What are the accountability mechanisms that are available to citizens when it comes to ASA and ATVOD, and equally with regard to Ofcom's processes of decision-making in relation to co-regulation of commercial communications? How effective have these mechanisms been?

In addition, wider contextual and institutional factors are looked at that have influenced the way in which not only co-regulation developed, but also why it took the institutional form it did. Thus, there is an additional sub-question:

• Which actors and factors have been influential in the delegation of regulatory powers to ASA and ATVOD and in designing their institutional structure? How prominent have normative considerations regarding citizen involvement been in this discourse?

The answers to these research questions would enable reaching conclusions regarding the overarching research objective of this study and establish whether the citizens have the power in these co-regulatory arrangements and whether co-regulatory bodies exercise their power in the interest of the citizens. In turn, this would lead to conclusions about the nature of co-regulation of commercial communications and whether it presents a new way of governance that gives more power to the citizens or it is just another way to either wrap the government or the market.

The following section of the chapter discusses the methods and research design that have been used in order to reach conclusions regarding these research objectives.

1.6.   Methodology and primary sources

This section discusses the methodological choices made in this study, it elaborates on the advantages and disadvantages of the chosen methods, and provides details regarding the research design employed. It further details the range of the primary sources used.

The research for this thesis is based on a triangulation of methods: documentary analysis, semi-structured interviews, and secondary research.

The primary research method has been document analysis, which is the method most often used in media research (Humphreys, 1994; Levy, 1999). Documents that have been used for this analysis are primary sources, or in other words, 'the paper trail' left behind by the regulatory bodies studied. The usual definition of documents is those that have not been produced specifically for the purpose of research or at the request of the researcher but are 'simply out there' as Bryman (2004) famously stated, ready to be collected and analysed (p. 381).

Primary sources are further defined as documents written by people who were active participants in the process and are thus seen as representing facts. The idea is that they reveal something real about the process in an authentic way, and are therefore regarded as reliable in the research literature (Karppinen and Moe, 2012: 181). And it is in this manner that documents have been used for this research: as sources of information regarding the real world of the regulatory process. They represent a source of

information regarding actions, interests, and decisions of regulatory actors as well as the forces behind particular developments (Karppinen and Moe, 2012: 183).

Document analysis has been used for all three major research areas: transparency, accountability and deliberative participation, as well as for the sub-question of the wider contextual influences. The following classes of documents have been looked at:

- Annual reports – total number 26 (ASA -11, ATVOD - 4, Ofcom - 11);
- Annual plans – total number 26 (ASA -11, ATVOD – 4, Ofcom -11);
- Meeting minutes – total number 678 (Ofcom's Main Board (204), Content Board (116), Nations Committee (19), Advisory Committee for Scotland (45), Advisory Committee for Wales (49), Advisory Committee for England (47), Advisory Committee for Northern Ireland (41), Advisory Committee for Older and Disabled (15), ATVOD's Board (30), the Communications Consumer Panel (112));
- Consultations – total number of 293 documents related to 9 different consultations;
- Adjudications - ASA (45);
- Newsletter and bulletins (indeterminate number);
- Media – 218 newspaper articles, indeterminate number of social media posts;
- Information Commissioner's decisions in relation to Freedom of Information requests complaints – 12 cases;
- Legislative Documents – Freedom of Information Act 2002, Communications Act 2002, Communications Act 2003, Deregulation and Contracting Out Act 1994, Audiovisual Media Services Regulations 2009, Audiovisual Media Services Regulations 2010, ASA Authorisation and Order, Memorandum of Understanding between Ofcom and ASA, Designations of functions ASA (Non-broadcast) and it reviewed version, ATVOD's Designation, etc;
- Ofcom's decisions regarding Freedom of Information requests – 828 cases;
- Research and monitoring reports – 11 in total;
- For the context: output of the Better Regulation Team at the Cabinet Office, EU relevant documents such as European Commission's 2001 White Paper on Governance;
- National Audit Office reports regarding Ofcom's work: total number of 4;

- Judicial cases: 77 related to Ofcom and 18 to ASA; and

- Various additional documents such as those explaining the structures of the regulators, terms of reference for certain structures, codes of conduct, etc.

Therefore, a total number of more than 2,500 documents have been looked at as primary sources.

The aims of the document analysis have been to establish whether the mechanisms for citizen involvement in rule-making, either direct or indirect, enable meaningful and consequential deliberation, whether there is sufficient transparency and to what extent existing accountability mechanisms enable citizens to hold ATVOD, ASA and Ofcom to account. Introduction to every analytical chapter gives more details as to the way document analysis has been used for these distinct research objectives.

Understandably, document analysis is not without its methodological problems and involves choices that can have consequences, such as selection of documents and ways to analyse them (Karppinen and Moe, 2012: 182). However, the main problem encountered has been of different nature and it is linked to the fact that most of the documents available and studied have been made for publication, such as annual reports and meeting minutes, which reflects the extent to which they can be considered credible, and a complete and authentic representation of the regulatory decision-making processes. This is not atypical for document analysis and it has been claimed in the literature that the researcher can never establish with certainty that documents record accurately and in an unbiased way what actually happened (Scott, 1990: 12).

This refers to one of the basic issues we need to consider when it comes to document analysis, and it is what Bryman (2012) calls documentary reality. Documents should be viewed as a distinct level of reality (Atkinson and Coffey, 2011) and consequently they should be examined in terms of the context in which they have been produced and in terms of their implied readership – they are written for a purpose and for a specific audience. Thus, for example, annual reports are meant to be a summary of regulatory objectives achieved in a particular year. All documents are influenced by the conditions of their production since they have an origin in a real world of political institutions and interests (Karppinen and Moe, 2012: 189). This is especially true of consultation documents for instance, since they mostly have a rhetorical function and can be used to

legitimise political actions that have already been taken on completely different grounds (Karppinen and Moe, 2012: 186), as it has proved to be the case and the analytical chapter on accountability will reveal.

This influences the credibility of the documents since they cannot be seen as evidence free from distortions, for example of decision-making processes and why certain decisions have been made, and they are not representative of the entire process. Thus, the motivation that lies behind the documents needs to be accounted for and they have to be evaluated with 'methodological distrust' (Scott, 1990: 22). The researcher therefore has adopted the claim that documents present a documentary reality, and should not be taken as being transparent representations of the reality of an organisation.

Thus, although it can be claimed that the documents studied have been produced under natural conditions unaffected by the researcher (Syvertsen, 2004a: 216), they have been influenced by other factors and it is not entirely true that, as Bryman (2001) claims, they are simply 'out there' (p. 370).

Nevertheless, document analysis has proven to be a very useful research method and has been conducted both prior to and following semi-structured interviews. It was also an excellent tool to use in order to ask better and more informed questions during the interviews and thus take more advantage of this research method.

Turning to semi-structured interviews, they have been used to complement the information gathered via document analysis and they have proven to be invaluable. Due to the nature of governance networks, many processes are left unrecorded, such as informal meetings or lobbying, in other words what can be fond in documents is limited (Karppinen and Moe, 2012: 186). And this has certainly proved to be the case when it comes to the research object of this study: interviews conducted have revealed much more than what documents contained.

This is one of the primary reasons why semi-structured interviews or as they are called 'conversation with a purpose' (Lindolf, 1995: 19) have been used: to establish the experience and motivation of participating actors, gain a deep insight into the policy process that cannot be attained by document research alone, such as personal agendas, and relationships between actors.

The way this method has been approached is by selecting the most relevant individuals in terms of their expertise and position within organisations and contacting them with a request for an interview. Around 120 e-mails have been sent and the final number of interviewed individuals is 24. The full list with the details can be found in the Appendix 1. A consent form has been read to every interviewee that contained the information about the research as well as the researcher, how the information would be used, what the overall purpose of the research is, and by whom the research has been funded since this has been of interest to a few interviewees. All of the interviews were recorded.

Although there have been issues in recruiting interviewees, they have been minor. The issues encountered during the conduct of semi-structured interviews have not in any way been atypical of the process: interviewees have partial and imprecise memory, they might think that they have knowledge of an issue, there is an impact of the material already made public, and there are conscious/unconscious efforts made by the actors to increase their reputation and role in the process (Goodwin, 1999: 22). To overcome these issues, the researcher has made an attempt to always interview more than one individual with a similar experience of the process or position within the organisation. For example, three different members of the ASA Council were interviewed.

To conclude the discussion regarding semi-structured interviews, despite the problems a researcher might encounter by using them, they have been more than useful for the purpose of this research, and this will be pointed out throughout the analytical chapters.

Finally, when it comes to the secondary sources, a range of statistical data, academic sources, industry reports, and press articles have been used mostly to form knowledge regarding the background to certain issues. However, there have been a few examples where secondary sources have revealed more in terms of the processes than primary sources, which will be pointed out in the thesis.

Therefore, a triangulation of research methods has been used, and the following paragraphs illustrate what the outcomes of their usage has been, in other words, in what way this research can represent contribution to the existing knowledge.

1.7.   Previous research and contribution to knowledge

This research contributes to the relatively scarce amount of literature on co-regulatory bodies. It focuses on the commercial communications sector in the UK. However, it is hoped that the results would contribute to the wider debates regarding media policy and regulation, such as the one on the future of press regulation, where there are some proposals referring to co-regulatory measures.

Co-regulation, in the form that is studied in this research, is a relatively recent development, which might explain the lack of literature on this topic. However, the work of Chris Marsden (2011) stands out as an exception and might be a sign that there is an increasing interest for these regulatory bodies. Marsden (2011) argues for increased reliance on this mode of regulation and claims it is the optimal solution when it comes to Human Rights and Freedom of Speech protection in the Internet environment. He does not look closely at ASA, but charts out the development of ATVOD and critically reflects on its work.

Apart from this publication where co-regulation is in the focus, ASA, ATVOD and co-regulation have been mentioned in literature that deals with media policy more widely: Feintuck (2006) claims that ASA is an efficient self-regulator partly due to the nature of the advertising industry where advertisers have in their interest to maintain consumer trust. On the other hand, Freedman (2008, 2012) claims it presents a neoliberal attempt to 'roll back the state' (p. 68).

Moreover, ASA and ATVOD have been looked at as part of bigger research projects attempting to map out and classify co-regulatory bodies in the media sector across member state of the European Union and selected countries globally: in 2006, the Hans Bredow Institut published the results of a research commissioned by the EC, Directorate for Information Society and Media, as a part of the review of the TVWF Directive; Latzer, Just, Saurwein and Slominski (2003) looked at co- and self-regulatory bodies across media and telecommunications markets in a study for the Austrian Academy of Science; in 2007, Latzer, Price, Saurwein, and Verhulst (2003) published their research on co- and self-regulation in communications markets that had been commissioned by Ofcom; and Thorsten and Held produced a study for German federal government in 2004.

What these studies have in common is that they have been funded by public or regulatory authorities, which is reflected in the issues they are concerned with, such as

the suitability of co- and self-regulation for the implementation of the provision in the EU Directives, potential legal obstacles for the use of these regulatory tools, and practical means to enable their successful functioning. However, success in these studies in not defined in terms of reaching public interest objectives. For example, Latzer, Price, Saurwein, and Verhulst (2003) take successful performance to mean adoption, awareness, attitude and action (p. 3). Consequently, the factors emphasised in these studies that would enable success are incentives for the industry to participate, means to enforce regulation, effective backstop powers by the state and resources to influence the outcome, regulatory culture and experience with alternative means of regulation, and clear legal basis and division of work.

Consequently, participation of stakeholders and the public, and institutional design that would enable wide deliberation are not singled out as a factor for successful functioning nor is successful functioning defined in terms of reaching objectives that are in the public interest.

Moreover, these studies do not directly tackle the potential issues that might arise from the shift to co-regulatory measures, such as democratic quality, public interest, or citizen involvement, although some are briefly mentioned. In the Hans Bredow Institut report (2006), it is argued that co-regulatory solutions are satisfactory provided there is transparency and openness to ensure democratic standards (p 5), although details are not provided how these are defined and whether co-regulatory systems they have looked at are transparent and open. They point out that there are discussions in some EU member states regarding the legal status of these bodies and democratic legitimacy and they add that even the systems that are ranked high in their assessment are subject to general criticism from consumer or parent associations for their decisions either to include or exclude interest groups, which is vital since the regulation is not completely in the hands of nation states (HBI, 2006: 6). However, these issues are not in the focus of this study and details are not provided.

What is important to mention is that ASA is generally ranked high in these projects in terms of efficiency, and it is claimed that contracting-out seems to lead to an appropriate system because there is a clear division of responsibilities between state and non-state actors.

When it comes to regulation of commercial communications in general, Boddewyn's work on self-regulation is particularly relevant. Although he discusses self-regulation and not co-regulation, he gives some valuable insights why reliance on industry to regulate itself when it comes to advertising might lead to achieving public interest objectives. Firstly, he claims that self-regulation is only one way of societal control in addition to the state, market, and spontaneous solidarity among members of the community, and should be evaluated in that light: as a partial and complementary solution (Boddewyn, 1989: 20-21). Secondly, his argument is that, provided it is properly institutionalised and supervised, self-regulation can safeguard the public interest since there is a partial overlap between the interest of the advertising industry and that of the public. It is in the interest of the industry to minimise unfavourable reactions from the community in the forms of a bad image and reputation, and it has as its goal that most practitioners behave properly; advertising industry operates in the public interest in order to protect its own interests. In addition, advertising is highly visible and identifiable, thus cannot be hidden from the public eye, and it also relies on other media to be distributed. This dependence on an intermediary provides a partial check on advertising practices (Boddewyn, 1989: 22-24). Boddewyn (1989) does however claim that self-regulation is not a panacea or a complete substitute for other forms of control (p. 23).

When it comes to academic literature on self- and co-regulation, it has mainly focused on the potential benefits and drawback of self-regulation and factors that would make it successful (Campbell, 1999; Lievens, Dumortier, and Ryan, 2007). However, success is mostly defined in terms of efficiency, and the factors do not differ significantly from those that came as the result of the large-scale studies mentioned above.

When it comes to the debate regarding citizen involvement in self- and co-regulation, Campbell (1999) claims that it is inconclusive whether public participation in rule making and enforcement is necessary for effective self-regulation (p. 762). Latzer et al. (2006) in their article on institutional variety of regulation in Austria look at stakeholder involvement, participation and representation in self- and co-regulatory bodies and claim that it is important in order to prevent non-state regulatory systems to operate in industry interest at the expense of the public interest. But, when it comes to new modes of governance in Austria, they come to the conclusion that there is no sufficient involvement (pp. 163-164).

When it comes to Ofcom, a recent publication by Lunt and Livingstone (2012) looks into detail at the work of Ofcom regarding four different case studies and how Ofcom defined and acted in the interest of citizens. Gibbons (2005) looked at Ofcom in relation to competition policy; and D'Arma and Steemers (2009) studied Ofcom in relation to children's television.

With Ofcom being established in 2003 and co-regulatory bodies in 2004 and 2010, the emergence of this mode of regulation represents a relatively recent regulatory development, hence the lack of the literature on the topic. However, this research aims to contribute to the emerging body of literature in a number of ways.

To begin with, this study presents the first critical study into the co-regulatory systems for regulation of commercial communications in the UK. It looks at the detailed operation of Ofcom, ASA and ATVOD, which have all been under-researched.

In addition, one of the major contributions of this research lies in the comprehensiveness of its approach: it looks at both the reasons behind the development of co-regulation, its functioning, as well as at the consequences of its institutional design on the way public interest is defined, consumers are protected and who is to be involved in its decision-making processes.

The results of this research aim to contribute to the debate about the nature of new modes of governance, whether they are in essence a qualitatively new form of governance between the state and the market, and what this form of regulation entails for the role of the citizens and the state, and the achievement of public interest objectives in media policy and consumer protection.

In addition, there is a debate regarding the unsuitability of the traditional government regulation for content distributed in the online environment, and since this research looks at how ASA and ATVOD regulated commercial communications in VoD, research findings would be valuable for this discussion too.

Another important contribution is for the area of communications research that looks at the means to engage citizens in governance processes, and this study looks closely at consultations and citizen and consumer representation in co-regulatory bodies and Ofcom and to what extent these mechanisms have enabled meaningful and

consequential involvement by the citizens. Accountability mechanisms are also examined, and research findings contribute to the debate regarding the influence of New Public Management reforms and Better Regulation agenda in the UK on accountability mechanisms and on citizen involvement in general.

Finally, at a broader level, this research also contributes to the debate about the role of the state and whether it can enable the protection of citizens and consumers under the pressures from globalization and commercial players.

1.8. Conclusion

The purpose of this chapter has been to introduce the parameters of the research: its main subject and justification for the choice, specific case studies, its purposes and objectives, research methods and design, and finally the way it contributes to the existing knowledge.

The regulatory form being looked at is co-regulation, which has been defined as a regulatory system where there is a division of labour between the state and non-state actors. Co-regulation has been placed into the context of wider changes in the nature of the state: namely growing focus on regulation, and, what is more, increased reliance on non-state actors to perform this regulation. This mode of regulation warrants research interest since it is qualitatively novel, and, for both empirical and normative reasons, it is important to establish whether it can claim to be operating in the public interest, as any form of governance should. It is claimed that co-regulation would be able to achieve public interest objectives if its institutional structures enable citizens to participate in the deliberation, hold regulators accountable, and if there is sufficient transparency. It is precisely these three issues that present the research objectives with the addition of a sub-question that is related to which wider intuitional factors have influenced the development of co-regulatory structures for participation, accountability and transparency. In order to be able to reach conclusions regarding these research objectives, a triangulation of research methods is employed: document analysis, semi-structured interviews and secondary research. Finally, this research aims to contribute in a number of ways to the existing knowledge.

2. Beyond models and towards principles: Citizen-centric normative framework for the evaluation of co-regulation

'It would be perfectly plausible to interpret the history of political theory as a series of attempts to formulate the best possible method of serving the public interest. Considered from this point of view, the various forms of political theory can be explained in terms of varying interpretations of the term 'public interest'

(Zarecor, 1959: 277).

The purpose of this chapter is to establish the normative framework that will be used for the evaluation of co-regulatory bodies responsible for the regulation of audiovisual commercial communications in the UK. The normative framework endorsed for this research draws upon media policy, political philosophy, deliberative democracy, certain strands within public administration theory, civic republicanism, and regulatory theory.

This chapter firstly discusses why co-regulation should be evaluated as any other form of governance and not only on the basis of its effectiveness and efficiency. Quite on the contrary, the basic premise upon which this normative framework is based is that the ultimate aim of any kind of political authority is achievement of public interest objectives, which is only possible in political associations where the citizens are the ultimate authority. In other words, in democracies.

Once the essential premises of the normative framework are established and defined, the chapter critically examines the way different disciplines have envisaged democracy to be achieved when it comes to new modes of governance. Finally, the conceptual framework

developed for this research is presented and citizens are placed at its center, while their role and duties are explained.

2. 1. In justification of the normative framework

In the face of technological and societal changes of the past decades, such as increasing complexity of the Internet, changing media consumption patterns, and proliferation of advertising techniques to name just a few, regulatory innovation, not only in the media sector, has been abundant. Co-regulation has been seen as an adequate solution for many issues, chiefly technological convergence when it comes to Ofcom's discourse. In addition, it has been seen as an adequate and successful solution, especially the way ASA has developed and operated in the UK. With Ofcom's determined insistence on its duty to promote self- and co-regulation as required by the 2003 Communications Act, and the EC's (2013) efforts to further expand the use of these regulatory tools and establish the best practice in the field of what they call 'voluntary multistakeholder action' (p. 2), co-regulation can only grow in importance and usage. However, similarly to self-regulation, which could not avoid a fiasco in the field of financial regulation globally and press regulation in the UK, co-regulation implies a large reliance on and involvement of the industry players. Thus, it is important for it to be a success unless it is to be termed 'preposterous' in the words of Joseph Stiglitz (2009) who used the expression to refer to self-regulation in the wake of the Global Financial Crisis.

But what would the criteria be for its success? How to evaluate co-regulation? The existing accounts are diverse and contradicting, both when it comes to academics and practitioners. The debate is no less varied when it comes to offering frameworks for evaluation with different disciplines developing accounts based on their view of what regulation is and should be, as it will be shown over the following paragraphs. This chapter offers a normative yardstick and develops it into a framework for evaluation with empirically applicable criteria for assessing the quality of co-regulation of commercial communications in the UK. This framework is based on a few key premises: co-regulation should be evaluated as any other form of governance; the ultimate objective of all forms of governance should be achieving objectives that are in the public interest; this is only possible if the regulatory system in hand can be described as, what has been

widely called, 'democratic'; and democracy ultimately depends on enabling active engagement of citizens.

Speaking about the first principle, on a more general note, it has been claimed that the outputs of new modes of governance are not different from those of government (Meier, 2011: 157). As it has been described in the introductory chapter, new modes of governance present ways to steer and control the society; their function is governing and they should be evaluated using the criteria to evaluate any form of governance. Furthermore, on a more specific note, this claim becomes evident by looking at the regulation of advertising in the UK: it is almost exclusively under the remit of either horizontal or vertical extensions of traditional government. Most of advertising regulation is made in Brussels by the EC and implemented by Ofcom and co-regulatory bodies, with the main role of the UK Government being Parliamentary approval of the regulations based on EU Directives that set a broad framework. However, implementation is subsequently under the remit of new modes of governance and it can be agued that broad policy objectives are changed at this stage. For example, 2003 Communications Act has a provision for Ofcom to 'promote effective self-regulation' with very few details on what 'effective' means and even fewer regarding the meaning of 'self-regulation'. The analysis of Ofcom's consultation documents has revealed that this regulator has over a number of years developed an elaborate set of 26 criteria for effective self- and co-regulation, which undeniably changes the simple provision in the statute. More importantly, Ofcom chose not to promote self- but *co*-regulation. Thus, evaluating co-regulatory bodies in any other way than traditional forms of government would be hard to justify; they are indeed performing policy making in their own right. In addition, an entire sub-section of economy, advertising, is under the regulatory remit of new modes of governance and, for that matter, it is an important sub-section both for the industry and the citizens.

These examples are useful in refuting another claim relevant for evaluation of new modes of governance. Certain authors, such as Majone (1999), and Just et al. (2003) specifically talking about media regulation, claim that regulatory bodies are not making political decisions, and should be evaluated accordingly on the basis of the intensity of

their regulatory intervention. However, it would be hard to justify that they are not engaged in some sort of re-distributive policies at least when it comes to benefiting certain interests at the expense of others. It is impossible to distinguish between economic decisions that can be resolved through expertise and social decisions based on value judgments (Michalis, 2007: 8; Prosser, 2010: 3).

Moving to the second key premise, it is claimed that the ultimate goal of the exercise of governing power is to achieve objectives that are beneficial for the whole society, that are in the public interest. Since actions and decisions of governance bodies affect the whole society, an assessment criterion is needed that takes this into account. As Flathman (1966) claims:

> 'In political life, one agent, government, acts in the name and on the behalf of all of the members of the system, and its actions apply to all […] the criteria used to evaluate action of government must take into account the full range of the effects of those actions. The adjectives 'public', 'common', and 'general' reflect recognition of these effects. This means that we can properly apply 'public interest' to a measure only when we have considered the full impact of the measure and have marshalled normative considerations relevant to justify that impact' (p. 5-6).

The ultimate goal of any form of political association is the attainment of common good or results that are in the public interest (Honohan, 2002: 21), and co-regulation should not be evaluated, as form of political and regulatory power, using any other yardsticks.

And when it comes to the third and the fourth important premises, that the achievement of public interest objectives is possible only in democratic forms of regulation which offer opportunities for deliberative involvement of citizens, these will be debated after we have elaborated in more detail what is meant by the public interest since there is a close interdependence between the way public interest, democratic governance, and citizens are conceptualised.

2.2. Defining public interest

The term public interest has been widely used in media studies as the ultimate measure to judge policy decisions (e.g. Freedman, 2008; Napoli, 2001; Iosifidis, 2011; Barnett, 2010; Aufderheide, 1999; McQuail, 1992; Harvey, 2009; Feintuck, 2004; Feintuck and Varney, 2006; Lunt and Livingstone, 2011). It has also been widely misused, especially in practice. Most recently and prominently, claims that it means 'what the public is interested in' instead of 'what is in the best interest of the public' have been used by tabloid newspapers, as revealed by the Leveson inquiry, as a justification for intrusion into privacy and illegal practices of phone hacking. It is beyond doubt that the term is controversial and open to (mis)interpretations, but, as Flathman claims, there is not much benefit in abandoning it:

> 'The problems associated with 'public interest' are among the crucial problems of politics. Determining justifiable governmental policy in the face of conflict and diversity is central to the political order; it is a problem which is never solved in any final sense but which we are constantly trying to solve. The much discussed difficulties with the concept are difficulties with morals and politics. We are free to abandon the concept, but if we do so we will simply have to wrestle with the problems under some other heading' (Flathman, 1966: 13).

While its popularity in media studies is undeniable, it is essentially a concept, at least one of the interpretations of it, originating from political philosophy where it has been referred to as common good, and it is in this sense that the term is used in this research. Defined in this sense, public interest is synonymous with common good, a concept that is more common in political sciences, and that has only recently been less preferred than public interest (Flathman, 1966: 14). In addition, the word 'interest' in public interest, refers to benefits, welfare, or goods, rather than referring to individualistic or subjective connotations, such as demands, desires or individual preferences (Flathman, 1966: 14); 'to say that something is in the public interest is to judge it as consistent with a political situation that is beneficial to everyone, if not immediately at least in the long run, and whether or not everyone realizes it' (Cassinelli, 1966: 46). Public interest defined in this

sense, as something beneficial to the whole society, has been mostly used in media studies. McQuail (1992) elaborates this and refers to specific benefits and defines public interest as 'the complex of supposed informational, cultural and social benefits to the wider society which go beyond the immediate, particular and individual interests of those who participate in public communication, whether as senders or receivers' (p. 3). Harvey (2009) refers to public interest as actions, behaviours or services that are of value to society as a whole, and it is rooted in the concept of general good, the good society and social well being. More importantly, she adds that the concept of public interest 'supersedes though it does not deny the imperatives of business and commercial interests, since the implementation of the public interest principles often relies on the wealth generated by business and commercial interests' (p. 4). Thus, public interest defined in this way encompasses different interests and sections of the society without giving primacy to any of them, and refers to different benefits that are good for the society, without discriminating between social, economic, or political ones. Acting in the public interest therefore does not imply neglecting certain aspects of the benefits, such as cultural, social, or economic, not does it imply marginalizing various sections of the society, be it either citizens, business interests, or political associations for example; public interest as common good goes beyond this particular interests and sections of the society and it essentially aims at balancing these when they are in conflict. And finally, public interest defined in this sense is seen as neither natural nor pre-determined. There is no single interpretation of it that can claim authority. This becomes obvious when it comes to particular regulatory decisions that need to be made, such as the regulation of alcohol ads and the balance that needs to be struck between the benefits this type of advertising offers for the funding of content and the damages it might cause by encouraging drinking. Thus, public interest can only be achieved politically through engagement of all sections of the society so no interests are neglected (Oldfield, 1998: 86).

Therefore, the way public interest has been defined in this chapter as common good, as actions or decisions that are beneficial for the whole society, presents a specific category of conceptualising public interest, something that has been termed unitary, substantive or normative theory of the public interest.

Public interest is seen here as an ethical or moral standard for evaluating specific public policies and a goal that political order should pursue (Cochran, 1974: 331; Held, 1970: 42-46; 135); it is a normative commitment to a principle that expresses the best interest of the society (Freedman, 2008: 64). However, there are three additional conceptualisations of the public interest: common interest, process and majoritarian theories. And although they will not be used as a normative yardstick for what co-regulatory bodies in the UK should achieve, some are often found in practice, thus it is important to outline them here.

Theory of the public interest that defines it as common interest sees it as those interests that all members of a community share and have in common (Held, 1970: 107; Berry, 1965: 190). The difficulty with this conceptualisation is that it is complex to meet the requirement to be in the interest of all members of a community, and in situations where there are conflicting and not common individual interests, this conceptualisation of the public interest is inapplicable (Held, 1970: 1119, 27).

When it comes to the process or proceduralist theories, public interest is identified with the outcome of a process provided that certain standards of due processes are observed (Cochran, 1974: 342). In this perspective, public interest is defined as a process and not a substantive goal. However, this view is not taken as appropriate to judge the actions and decisions of governmental actors since it does not offer substantial criteria by which to evaluate the results of the process. As Cochran (1974) claims, 'procedures are not self-justifying' (p. 346).

And finally, majoritarian/preponderance/ aggregationist or utilitarian theories see the public interest as aggregation or sum of individual interests (Held, 1970: 42-43). It is a perspective on public interest that sees it as what the public is interested in, the realisation of their desires and individual preferences (Freedman, 2008: 64). Despite the popularity of this conceptualisation of the public interest (Held, 1970; Zarecor, 1959), it has not been chosen as the appropriate yardstick for the evaluation because it does not

allow moving beyond individual interests and negotiating results that would benefit the whole society.

However, speaking about the definitions of public interest, another perspective needs to be mentioned. As Napoli (2001) very usefully points out, public interest can be defined on three different levels: conceptual, operational and applicational. So far, we have been talking about different ways of defining public interest at the conceptual level: the general meaning of the public interest and how its determinants are to be made. The operational level refers to specific values or principles associated with serving the public interest, while the applicational level is associated with specific policy actions taken or regulatory standards imposed. The relation between operational and applicational levels can be seen as the relation between strategy and practice and these three levels are linked in a sense that the way public interest is defined at the conceptual level implies the way it will be defined at the operational level and the way it will be applied (Napoli, 2001: 69-71). This link between different levels is very useful since, apart from political philosophy and normative literature in general, public interest at the conceptual level is rarely discussed in policy making and practice. But the way it is operationalised and applied not only speaks very clearly about what it actually means at the conceptual level but gives us a way to research it and gives clear indicators of what is meant when the term public interest is used. In this way, one can see whether public interest is used in the sense where it means common good, something beneficial for the whole society, or not.

The question arises, if we set the public interest defined as common good at the conceptual level to be the objective of regulation, what regulatory structures do we need in order to accomplish this? What form of new modes of governance is required? Different definitions of the public interest at the conceptual level imply a different conceptualisation of a few relevant categories for this discussion: the public, interests, society, and consequently what is meant by government and its purpose (Cochran, 1974: 328; Zarecor, 1959: 277; Cassinelli, 1958: 58). Regulatory and critical debate not just in the media and communications sector but more widely (Clarke et al, 2007) has been preoccupied with the persistent discussion between what the public wants and what would be in the best interest of the public (Freedman, 2008) and the consequential

mapping out of these contrasting conceptualisations onto different conceptualisations of the public (either as citizens or consumers) and different models of regulation (either liberal pluralism or social democracy for example) (Lunt and Livingstone, 2012). Ultimately, political forms vary directly with the interpretation of public interest (Zarecor, 1959: 280) as well as the conceptualisation of the role of the public.

Thus, if the aim of regulation is achievement of common good, what institutional structures are needed? Another premise of this normative framework is that the only way for public interest objectives to be achieved is if the public is the authority: the essence of what governing should be whatever institutional form it takes. The fundamental idea is, at least in democracies such as the UK, that the political power is ultimately the power of the public; of free and equal citizens (Rawls, 1993: 136, 217). This not only refers to the notion that power needs to be exercised in the interest of the public but that it also needs to be authorised by the citizens: these two premises are interdependent. These are the founding principles of both the democratic theory and civic republicanism, which have shaped the literature on, or at least some strands within these, government, governance, regulation and public administration, and which have had in their focus the questions of the right form of governance and its ultimate purpose. The word 'democracy' is derived from the word *demokratia*, the root meanings of which are *demos* (people) and *kratos* (rule). Thus, democracy refers to the form of government in which the people rule (Held, 2006: 1), or in the words of Abraham Lincoln, democracy is 'rule *by* the people and *for* the people'. In civic republicanism, republic is the optimal choice when it comes to government and it refers to, as Cicero has put it, '*res publica, res populi*': the form of government where people are both the primary concern of government and the source of its authority; government should exercise its power to act in the common interest, and the citizens retain the rights over the exercise of power (Honohan, 2002: 32, 81). Thus, the foundation of the normative framework used to evaluate co-regulatory bodies in the UK is that they should operate in the public interest and for this it is essential that the citizens should have the ultimate authority in both determining what the public interest is and ensuring it is implemented in specific regulatory decisions. Democratic governance, seen as more legitimate than any other form, is important for both intrinsic and instrumental reasons – people should be the fundamental authority, and their involvement in governance is essential since all of those who are subject to the exercise

of public power should partake in its control to reduce the risk of domination and to promote informed policy choices (Follesdal, 2011: 92).

But how to apply these wide principles when it comes to new modes of governance? How to ensure that 'the people are the authority' when we speak about co-regulation of commercial communications in the UK? And how to conceptualise the people?

When it comes to more traditional organisation of governance, implementation of regulation is under the remit of the administrative branch of the state and the authority of the people is ensured through one of the main pillars of democratic theory - separation of powers and the democratic processes it entails. Laws enacted by the legislative branch are implemented by the executive branch that is embedded within certain democratic processes: regular elections, parliamentary scrutiny, rule by law, and accountability to the courts, just to name a few. Administrative branch is, through Ministerial responsibility, accountable to the Parliament elected by the citizen, and thus some sort of a link is established with citizen authority. This institutional organisation has provided the citizens with a framework within which their will has been implemented and with means to control and hold accountable the state apparatus through periodical elections.

However, new modes of governance break this circular relationship between the citizens and the administrative branch since regulation and its implementation have been undertaken by bodies that are to various degrees autonomous from elected government. Therefore, it is questionable whether they could be deemed democratic in the traditional sense. However, one of the main rationales for their development has been dissatisfaction with traditional democracies that base their legitimacy primarily on elections. Electoral accountability has not been seen as the solution for legitimacy more broadly and especially regulatory legitimacy since elections form the basis for selection of personalities and of broad approaches to social issues whereas regulatory decisions are much more specific and unpredictable (Prosser, 2010: 4). New modes of governance are partially the result of thinking about new ways to democratise political power, thus they

should not be judged according to the traditional criteria. But, governance is no panacea (Schmitter, 2006: 172), and it has created problems in its own right.

The question emerges, in absence of electoral accountability, what other sources are there for democratic legitimacy of new modes of governance (Prosser, 2010: 4)? Which mechanisms exist in order to ensure these new modes of governance implement the public will, operate in the public interest, and enable citizens to control them? Unfortunately, the increased salience of regulation in political and academic debates has not been accompanied by any consensus about its meaning or its legitimate role. Indeed, there are wide divergences between different versions of regulation and, in particular, different conceptions of its legitimacy (Prosser, 2010: 2). 'Popular control' would normally be operationalised as the degree to which policy decisions are responsive to the informed wishes of citizens assembled in the demos (Sorensen and Torfing, 2007: 263). But how to achieve this when it comes to new modes of governance? The following section discusses the existing solutions to these problems offered in the literature, and in what ways, if any at all, they have been used as the basis for the normative framework developed in this thesis.

2.3. Democracy and new modes of governance

Evidently, the assessment of the democratic quality of regulatory governance depends on two important points: how democracy is defined, and how different definitions of democracy can work when it comes to new modes of governance, neither of which is straightforward. If what is assumed in political science is correct, namely that the rise of new modes of governance goes along with a transformation of democracy (Dahl 1989: 311–322), then it cannot simply be assumed that the standard, representative liberal model of democracy in the nation state can be applied. A concept that conforms to the normative standards of democratic theory but which at the same time is adjusted to the realities of new modes of governance is needed (Benz and Papadopoulos, 2006: 4).

As it has been stated before, new modes of regulatory governance are not intrinsically undemocratic but their democratic quality depends on their particular form and functioning in a given context. However, linking democracy and governance is problematic for a few reasons. One of the issues arises with defining democracy and the best ways for it to operate in practice. As Held (2006) claims, 'democracy has become the leading standard of political legitimacy in the current era' (p. x), but it is 'more often invoked than described and more often described than defined' (Curtin, 2006: 135). As Benz and Papadopoulos (2006) state, 'the results of the debate on the democratic legitimacy of governance are so far not very convincing. One reason for that can be found in conceptual problems. The notion of governance is not very clear, and nor is there agreement about what democratic legitimacy requires' (p. 1). In addition, there are many different models of democracy, which further makes the matter complicated. As Lijphart's (1999, 2012) seminal work has shown, there are at least 36 different models of democracy when it comes to the nation states. Which one should be applied to new modes of governance? Or should a new model be developed?

Moreover, not only there is no consensus on what democratic governance should be, but the normative democratic theory does not significantly deal with the question of how the implementation of the laws needs to be organised and bodies designed in order to be democratic; it does not pay detailed attention to the organisation of regulation. It mostly deals with the democratic organization of states as a whole and how to make its two key principles of people's sovereignty and equality work in practice and has little to say about the organisation of public administration that is seen as an instrument for carrying out the will of the people (Olsen, 2010: 177). The conclusion seems to be self-evident: 'democratic theory is only weakly equipped to deal with the crucial normative issue of what the appropriate forms of democracy in fragmented societies are' (Papadopoulos, 2003: 486).

Nevertheless, although it is not clear how to construct relevant criteria for assessing the democratic performance of a governance network (Sorensen and Torfing, 2005: 207), this section provides a critical overview of different perspectives how rule *by* and *for* the people can be achieved when we talk about new modes of governance. It presents

different options offered in the literature and discusses their potential usability for the normative framework that is being developed in this research and that is elaborated in the later sections of this chapter.

We start with general political science and different democratic theories. Although they do not deal directly with regulatory governance, different authors and theories have been very influential across disciplines. As the chapter progresses, models that are found useful are discussed in more details. But, firstly, models that are not considered beneficial for the basis of our normative framework are debated, such as output legitimacy or liberal pluralism.

Although evaluating new modes of governance from the perspective of output legitimacy has been very influential across disciplines and in empirical research, it has been deemed unsuitable for this research. It originated in the work of the political theorist Fritz Scharpf but has subsequently been accepted in the regulatory theory most notably by Majone, and, specifically talking about co-regulation in the communications sector, by Just et al. (2003). In his analysis of the governance at the level of the European Union, Scharpf (1999) distinguishes between input and output legitimacy. Input legitimacy requires that the choices made by the political system are driven by the preferences of citizens, which entails a link between those who are being governed and those governing. However, Scharpf (1999) claims there is also a need for output legitimacy and this relates to the notion that those exercising political power are able to achieve a high degree of effectiveness in meeting regulatory objectives. He further claims that this type of legitimacy should be the normative framework when it comes to new modes of governance since input legitimacy is impossible to achieve (p. 46).

The problem with this normative framework is not only that input legitimacy is seen as unnecessary or, in the best case, instrumental in achieving efficiency, but also that the ultimate goal of output legitimacy is achieving consent (Scharpf, 1999: 49; Take, 2012: 3). Whether governance is performed in the public interest, how public interest is defined and who is to be involved in determining it are not relevant in this definition. As Scharpf

(2007) claims, the key function of legitimacy is 'to ensure voluntary compliance with unwelcome exercise of governing authority' (p. 3), and not to achieve results that are beneficial for the whole society. As Curtin (2006) puts it, 'legitimacy can be considered as the moral ground for obedience to power' (p. 135). Majone (1996) goes even further in reinforcing output legitimacy and claims that different types of legitimacy should be applied to different types of regulatory bodies: output legitimacy is sufficient if a regulator is not performing highly political and re-distributive functions, and this type of legitimacy is sufficient when it comes to the regulatory state. When it comes to media regulation, this view has been accepted by Just et al. (2003) who endorse a process and output oriented approach to legitimacy and claim that the normative framework applied should be based on the intensity of the regulatory intervention (pp. 147-151). However, for the purposes of this research it is taken that the ultimate goal of the exercise of governing power is not to achieve compliance through legitimacy but to achieve objectives that are beneficial for the whole society, that are in the public interest. For this reason, output legitimacy in terms of efficiency and consent would not be sufficient. Moreover, by enforcing output legitimacy, those who are affected by the regulatory decision are left out of the process of determining regulatory objectives that affect them. However, input legitimacy of governance networks is equally important in order to ensure democratic control and accountability (Sorensen and Torfing, 2007: 14).

Another similarly popular conceptualisation, liberal pluralism, is ruled out since the way public interest, the people and government are conceptualised is not congruent with the premises of this research. In liberal pluralism, public interest is seen as aggregation of individual interests, usually through voting, opinion polls and market research measures, and public is not seen as society or community but as aggregation of autonomous and isolated individuals or consumers that have individual preferences, interests or desires, defined in the literature as pre-political and pre-social (Cochran, 1974: 328-331; 338-340, 352; Zarecor, 1959: 279; Lunt and Livingstone, 2012). In the words of Margaret Thatcher, there is no such thing as society. Subsequently, the goal of politics and political associations is advancement and accommodation of individual interests, and government is seen as a neutral aggregator of individual preferences or as an arena for conflict resolution. This conceptualisation of the public, public interest, and politics does not enable the achievement of public interest as something beneficial for the whole society

since it denies the existence of a society that has common interests, but only accepts the notion of individuals with personal preferences. There is no common good since there is nothing which is good for the community as a whole; there are only goods or interests pursued by individuals and groups, since essentially, there is no community (Cochran, 1974: 328). Cochran (1974) calls this the politics of interest, where government is seen as a purposeless aggregate of interests rather than community's instrument in achievement of common good.

Speaking of liberalism, another influential political philosopher has been partially left out of this normative framework despite being named the most important figure in political science in the 20ᵗʰ century. John Rawls, a liberal in his conviction that people should pursue their own vision of the good, and a deliberationist in his insistence on 'reflective equilibrium' and public reason, he has been credited with reviving the interest in social justice with his 1971 book *A Theory of Justice*. He attempts to find a way to reconcile the competing claims of liberty and equality in what he calls 'justice as fairness'. He devised a 'thought experiment' where, in order to reach justice as fairness, in the so-called original position where people reach an agreement on the structure of the society, people need to deliberate under the 'veil of ignorance', lacking the knowledge of their own position and predispositions. In this way, nothing unjust or unfair would be proposed. In addition, this deliberation should be characterized by what Rawls calls 'reflective equilibrium' where people's abstract and particular principles of justice are debate and synced eventually in harmony.

Although his thinking offers an exceptional and overarching theory of society and social justice, there are various criticisms of Rawls' theory, perhaps most relevant of which being the one that it would be difficult applying it to practice, especially when it comes to regulatory governance. For example, placing citizens 'under the veil of ignorance' so that just decisions can be made would be not only impossible but perhaps even undesirable (Sandel, 1998: 80). In the words of Amartya Sen (2009), ideas about a perfectly just world do not help redress actual existing inequality (pp. 52–74).

While his thinking in *The Theory of Justice* would be hard to apply to regulatory governance, Rawl's second work, *Political Liberalism* (1993), addressed the question of political legitimacy and how citizens characterised by differences could create democratic governance. Although his insistence on the primacy of individual rights ahead of common good is not congruent with the principles this thesis is based upon, his work on the 'ideal of public reason' is partially used in this thesis. Rawls claims that the state must, in order to retain its legitimacy, commit to the "ideal of public reason', and for this reason he has been called deliberationist. Public reason giving, in the Rawlsian sense, involves justifying a particular position by way of reasons that people of different moral or political backgrounds could accept. His view is that public reason includes rules of inference and evidence, common sense, generally shared beliefs, the noncontroversial results of science, and public political values, and should apply to both citizens and administrators when engaged in public deliberation. These ideas are further elaborated upon in the next chapter since one of the main premises of this thesis is that deliberation is necessary since common good is not pre-political, and Rawls is one of the most influential theorist when it comes to what public deliberation should entail.

Another liberal who criticizes existing accounts for either trying to insert economics (neoliberalism and other aggregative models) or ethics and morality (Rawls and Habermas) into thinking about democracy and thus ignore the essence of what politics should be, Chantal Mouffe, offers an alternative model of democracy. Her account is based on a different conceptualisation of what political is, and thus consequently what the aim of political institutions should be. She claims that the existence of antagonistic conflicts and passions cannot be solved by deliberation, and that they will never be eliminated. Thus the aim of democracy is the creation of "vibrant 'agonistic' public sphere" or political institutions where these conflicts will be in a sense 'domesticated' and turned from antagonistic to agonistic and enable 'engagement across deep difference'. In a way, Mouffe tried to devise a   form of commonality or living together that does not erase differences (Mouffe, 1992, 2000). In Mouffe's words, 'the aim of democratic politics is to construct "them" in such a way that they are no longer perceived as an enemy to be destroyed, but as an "adversary": somebody whose ideas we combat but whose right to defend those ideas we do not put into question' (Mouffe 2000b: 101–2).

While it is acknowledged in this thesis that opposing views exist and that politics should not eradicate them, the problem with agonistic pluralism occurs with the question of how to reach political decisions and solutions. For Mouffe, politics is an arena that gives an opportunity for expression of conflict and while she admits that she does not offer a way to reach political decisions, this deems this view of politics unpractical for this normative framework that tries to prescribe how regulatory governance should work and in what ways decisions need to be made. In addition, she also believes that the objective of politics should not and cannot possibly be common good since it is impossible to eradicate our different views in order to achieve it and it would also not be democratically desirable since it would be oppressive of differences (Mouffe 1992: 5-6, 14).

But consensual solutions and particular decisions are essential, especially when it comes to regulation. For example, in the case of regulating product placement in VoD, Ofcom needed to make a decision whether to delegate this function to ASA, ATVOD or retain it under its own remit. As expected, there were competing claims and it cannot be said that the process leading to the final decision was in any way oppressive. VLV wished for either Ofcom or ASA and not ATVOD to regulate product placement, ATVOD wished to be delegated the functions, while Ofcom thought that there is no need to create another body. In these particular circumstances, Mouffe's conceptualisation of politics does not have much to offer in terms of particular decisions since, in circumstances like this, there is no possibility for different options to 'live together': the product placement in VoD can either be under the remit of ASA, OFCOM or ATVOD, and a balance between different interests should be made. Agonists have little interest in collective decisions of the sort that states and networks can produce, and which are seen as the essential task in more conventional models of democracy (Sorensen and Torfing, 2007: 267).

The normative frameworks used for this research all share the idea that achievement of common good is the ultimate objective of politics, which is only achievable through self-rule where the people actively make the decisions that determine the laws by which they

are governed. These frameworks are civic republicanism, participatory and deliberative democracy, and the way these have been applied in media policy, governance and regulatory theories.

Although the tradition of civic republicanism can be traced back to ancient thinkers such as Plato and Aristotle, many of the debates remain more than relevant and influential today. The essence of civic republicanism is its central claim that the purpose of the government is securing common good through political engagement by the citizens, very much in line with the thinking behind this thesis. Public interest is achieved through the process of discussion and debate that legitimately influence government and public administration (Lunt and Livingstone, 2012). It is believed that personal freedom is only possible through political participation and promotion of common good. The greatest contribution of civic republicanism to this thesis is its thinking about citizenship, and its focus on the organisation of the state from which arguments about accountability and the importance of institutional structures are developed.

There are two dominant strands of civic republicanism: the so called neo-Athenian or civic humanisms, today most notably represented by communitarianism and authors such as Alasdair MacIntyre, Michael Sandel, Charles Taylor, Michael Walzer, Amitai Etzioni, and Hannah Arendt; and neo-Roman republicanism, with writers such as Machiavelli and Madison and more contemporary Quentin Skinner and Philip Pettit. Although they share their focus on citizens and primacy of civic virtue that is seen as both promotion of common good and political participation, they differ in their view of political participation. For neo-Athenians, it is seen as the essence of existence, while neo-Republicans view it in a more instrumental way. For Skinner, civic virtue and political participation are instrumental as a way to personal freedom. Nevertheless, civic republicanism is the basis of the thinking about citizenship in this thesis, which will be further elaborated in this chapter as a special section.

Moreover, civic republicanism places emphasis on the institutional framework, something that this thesis adopts as well as other political and governance publications. Political institutions are not just seen as providing neutral framework for citizen

engagement, but a key factor in determining the influence and shape of the same: 'Only in a good regime is the good man the same as the good citizen' (Aristotle: Politics 1332b32). Hence, a great onus and responsibility is placed on the institutional design that would enable citizens to perform their political duties and provide them with capabilities and resources. New forms of governance demand the transformation of citizens from 'demanding consumers of public services to responsible co-producers of governance' (Newman, 2005: 45) against the background of civic disengagement and apathy when it comes to representative democracy (Skelcher and Torfing, 2010: 74). Thus, great emphasis is placed on the institutional design of governance that would enable this transformation (Skelcher and Torfing, 2010: 72), correct the imbalances of the asymmetrical allocation of power, resources, and communicative capabilities and provide resources, ensure freedom and rights are guaranteed in practice (Take, 2012: 4). Institutional structures are seen as crucial for ensuring that the appropriate conceptualisation of citizenship (Held, 1991: 22) and democratic legitimacy (Benz and Papadopoulos, 2006: 273) work in practice. As Michael Schudson (1999) has systematically shown in outlining the history of citizenship in America, the way political life is structured through institutions directly affects the role of citizens, their involvement in political life, and what is ultimately expected of them, a view that is shared by Habermas in his *Between Facts and Norms* (1996) where he claims that the structure of the state determines the role and the involvement of the citizens.

As Benz and Papadopoulos (2006) claim, democratic governance has never been easy. Motivating citizens to participate in democratic decision-making procedures and to cross the border between private and public interests appears to be 'as difficult as convincing elected representatives to behave in transparent and accountable ways' (p. xii,), but an appropriate institutional framework is one of the essential steps in ensuring this works. It is recognised that other influences are important as well and that institutions only offer an opportunity that might not be used, due to for example social inequalities, capacities, resources, wish to commit, and other influences that might create informal obstacles to otherwise formally recognized rights and opportunities (Fraser, 1991: 66; Sen, 1979). However, this thesis retains its focus on institutions for the reasons outlined above.

Additionally, it is recognised in civic republicanism that politics should be the arena of both debate and action, thus delegation plays a prominent role. However, with delegation, the questions of power, control and abuse of that power appear and thinkers in this strand of political theory pay great attention to devising ways to protect citizens from arbitrary power of the state not only by ensuring they are the authors of the laws they are governed by but also through mixed constitution, separation of powers, the principle of checks and balances, and a strong sense of the rule of law. This framework, as well as other authors, borrows the issue of accountability from this thinking. If the people are to remain the ultimate authority, the issue of accountability is essential to provide some degree of control to citizens: without citizens that are engaged in both deliberation and accountability there is no guarantee that political institutions will not be taken over by sectional interests and used to act against public interests; we cannot safely leave politics to the politicians (Honohan, 2002: 149). In order to enable citizens to control co-regulatory bodies and ensure the deliberation about the public interest is translated into regulatory actions, accountability is also seen as important since decision makers will act according to stakeholder preference only when they are held accountable. Thus, the achievement of regulatory decisions that would be beneficial for citizens presupposes their active involvement through both deliberation and accountability (Take, 2012: 3; Mansell, 2012).

Moving on to other frameworks, two theories of democratic governance have been most influential in the development of this normative framework. While participatory and deliberative theories of democracy share a common target of improving legitimacy by increasing citizen involvement in governance, which would in turn enable them to acquire democratic skills of civic virtue (Macpherson, 1977) and lead to the achievement of common good, they differ in their view on what exactly this participation should entail. 'Participationists' are not particular about forms of participation but are more interested in creating equal and impactful opportunities to participate, while 'deliberationists' focus more on the qualities of the discussion leading to choices. Despite their differences, these theorists should not be seen as strongly opposed (Papadopoulos and Warrin, 2007:450-451), and have both been deemed useful for this normative framework with their different areas of emphasis.

Speaking of participatory democracy, authors such as Barber and Pateman have been particularly useful. Benjamin Barbers's (1984) support for 'strong democracy' and civic participation as opposed to 'thin' democracy that is rooted in rights rather than obligations is very much in line with the basic thinking this thesis promotes. Consequently, his work has been used in defining what influential participation should entail. Similarly, Carol Pateman's (1970) work and especially her distinction between pseudo, partial and full participation have been especially useful in both developing a normative framework and evaluating the structures for citizen participation offered by Ofcom, ASA and ATVOD. As Pateman (1970) claims, democracy entails full and equal, not partial participation at all levels and in the whole structure.

In contrast, deliberative democracy focuses on 'qualitative aspects of the conversation that precedes decisions rather than on a mathematical decision rule' (Chambers 2003: 316) and it represents a shift from 'voting-centric' to 'talk-centric democratic theory' (Chambers 2003: 308). Since the deliberative turn in the democratic theory in 1990s, 'deliberative democracy has gone from strength to strength' (Dryzek and Niemeyer, 2010: 3). Even when we speak about regulation, there is more emphasis on deliberation as a way of improving governance, rather that placing it under control of elected representatives (Prosser, 2010: 5). In the words of Julia Black (2001), 'it is no longer controversial that arrangements for effective participation of stakeholders and the public are an essential part of good regulatory design' in different stages of their work (p. 231). Regulators are seen as providing a forum in which deliberation can take place with the major role of regulatory institutions being to provide procedural means for resolving problems through deliberation (Prosser, 2010: 8-9). The main argument behind deliberation is that decisions are legitimate only if they are based on public-reason giving resulting from a process of inclusive and equitable deliberation, in which citizens can participate and in which they are promoted to cooperate freely (Bohman, 1996; Elster, 1998: 8). The essence of legitimacy is located in the right, capacity and opportunity of those affected by a collective decision to participate in consequential deliberation about its content (Dryzek, 2010: 3). Democratic legitimacy does not stem from the aggregation of the preferences of all, but from 'the deliberation of all' (Manin, 1985: 357).

Jürgen Habermas, one of the most influential proponents of deliberative democracy, presents the basis of the thinking about deliberation in his theory about deliberative democracy in *Between Facts and Norms* (1996). He claims that legal norms are grounded in communicative action that is communication directed towards understanding people grounded in deliberation. 'Only those statutes may claim legitimacy that can meet with the assent…of all citizens in a discursive process of legislation that in turn has been legally constituted' (Habermas, 1996: 110). This is the legal autonomy: 'citizens are able to understand themselves also as authors of the law to which they are subject as addressees' (Habermas, 1996: 449). Deliberative democracy is an association whose affairs are governed by the public deliberation of its members (Cohen, 2009: 16).

Therefore, deliberative democracy is closely aligned with the basic premises of this thesis by placing emphasis on deliberation to determine what is in the public interest and by placing the citizens at the center of this deliberation. Public interest is not seen as given and predetermined, but should be the result of wide-ranging, meaningful and influential deliberation. Thus, the role of co-regulators should be to enable deliberation about how the public interest, conceptualised as benefits for the whole society, should be operationalised and applied when it comes to specific regulatory decisions. Deliberation is crucial since 'without deliberation, democratic choices are not exercised in a meaningful way. If the preferences that determine the results of democratic procedures are unreflective or ignorant, then they lose their claim to political authority over us' (Fishkin, 1991: 29). As Bohman (1996) claims, 'mere maximization of direct citizen involvement is not sufficient for optimal decision making' (p. 242). Consequently, deliberative democracy is one of the most important theories used to build the normative framework for this research, and there are additional reasons for this, apart from the unsuitability of other theories outlined above.

New modes of regulatory governance and the way they have been operationalised in the UK are the results of the thinking by social democrats and their political programme as applied by the successive New Labour Governments from 1997 to 2010. The social democratic view is that democracy is best achieved if there is a dispersal of state power in order to enable collaborative, multistakeholder governance with wide engagement by

civil society bodies and the public in a participatory or deliberative democracy (Lunt and Livingstone, 2012: 19). Consequently there has been a shift from government to governance and a range of means for participation and deliberation have been developed in order for the regulators to work as institutions in the public sphere: independent research, consumer consultations, deliberative forums, citizen panels, and use of citizen involvement in the governing boards of public institutions to name just a few (Newman, 2005: 129; Jessop, 2000; Lunt and Livingstone, 2012: 3, 6, 19, 22).

Thus, relying mostly on deliberative democracy to develop the normative framework not only gives us a yardstick to evaluate new modes of governance but it also gives us a tool to determine the success of regulatory innovations promoted by the New Labour and determine how deliberative solutions work in practice. Subsequently, this evaluation could further lead to theory building.

Deliberative democracy has also been very influential when it comes to regulatory and governance theories, and this is where a number of authors try to develop ways to apply democratic principles to new modes of governance.

Speaking of the regulatory theory, although Ayres and Braithwaite's (1992) thinking about responsive regulation is one of the most influential normative accounts of regulation, their focus on responsiveness of the regulators to the industry being regulated makes their account inept for this thesis since the role of the citizens is not considered. Grabosky criticizes their focus (2012) and says that there is great regulatory potential when it comes to non-state actors but he does not develop this further and mostly concentrates on what has caused this increased potential. This leaves us with Julia Black and Tony Prosser as the main authors that deal with politics of regulation, both in favour of applying principles of deliberative democracy to regulation, while Martin Lodge and Martin Cave offer valuable contribution to the thinking about regulatory transparency and accountability.

Speaking of Prosser and his contribution to this thesis, he claims there are two regulatory

visions: regulation as an infringement of privacy, and regulation as an enterprise or government in miniature, and it is the latter that resembles the way co-regulation is viewed in this thesis. Prosser (2010) emphasises regulatory participation and deliberation and develops two models of deliberation: internal, where there is inclusion of major interest in the decision-making, and external- where outside views are sought by the regulators as foundation for evidence-based decisions. Julia Black also develops a conceptualisation of participation in regulation and distinguished between thin and thick proceduralisation while favouring the latter and modelling it according to the Habermasian model of deliberative democracy (Black, 2000: 597). She develops it further and claims that deliberation needs to be mediated since there might be blockages to communication due to different logic of deliberants, modes of discourses, techniques of argument, and language and validity claims (Black, 2000: 33). And this should be the role for regulators, to be the mediators but leave the last decisions to be made by the citizens (Black, 2000: 34).

When it comes to governance studies, the so-called second generation of governance scholars deals with the questions of democratic quality or implications of new modes of governance, and there seems to be a consensus among the leading scholars in this discipline that while governance networks certainly represent a threat to representative democracy they do not necessarily endanger democracy as such because they can become central in development of new forms of democracy (Jessop 2000; Pierre & Peters 2000: 67; Rhodes 1997a: 21; Skelcher, 2004), supplement representative democracy (Jessop, 2000: 17; Rhodes, 1997a: 9; 1997b: xiv), or enhance their flexibility (Kooiman, 1993: 36; 2000: 143).

Benz and Papadopoulos (2006) produce a valuable contribution to governance studies that discusses the implications for democracy of the shift to new modes of governance on national and international levels. They take democracy to mean, in the words of Abraham Lincoln, government *by* the people and *for* the people, and although they do not prescribe specific mechanisms this can be achieved, the chapters give a valuable evaluation of what is found in practice, which is more than useful for the research in this thesis.

However, Papadopoulos and Warrin (2007) do attempt to solve the problem of applying democratic criteria to network governance by developing specific criteria to evaluate the circular relationship between decision-makers and the citizenry, a necessary condition for democratic legitimacy. They produce the following dimensions: input legitimacy, which refers to openness and access, throughput legitimacy, meaning the quality of deliberation, output legitimacy which means efficiency and effectiveness, and the questions of transparency and accountability necessary for responsiveness (Papadopoulos and Warring, 2007: 445).

Another influential group of scholars within the governance school tackles the question of democratic governance although in a very different way. Skelcher et al. (2011) use the notion of 'democratic anchorage' and try to establish the relationship between governance networks and representative democracy and thus make the former democratic without resorting to models of democracy other than the liberal representative (p. 8). Democratic anchorage refers to the control of governance networks by democratically elected politicians (Sorensen, 2005: 352). This essentially refers to meta-governance: control of the formation, functioning, and development of networks by elected politicians aimed at regulating governance networks without hampering the scope of their self-regulation (Sorensen, 2005: 352; Kooiman, 1993: 2; Jessop, 2002: 240; Skelcher, 2004: 104). Similar thinking is represented by Cary Coglinese's (2010) writings about metaregulation and the need for oversight of self-regulation by entities that are more aligned with the public interest, or by Majone's (1996) famous idea 'nobody controls the agency yet the agency is under control' (p. 300). Similarly, the importance of metagovernance is emphasised by Heritier's notion of the 'shadow of hierarchy' (Heritier and Lehmkuhl, 2008) and Julia Black's discussion about constitutionalising self-regulation. What they all have in common is the view that new modes of regulatory governance need oversight by elected politicians in order to be democratic. However, although this thesis does not negate this, the focus of this research is to establish the extent to which the regulatory process itself is democratic rather than to what extent the involvement of politicians has made it democratic. This emphasis on the regulatory processes is for a number of reasons, most important of which is one of the rationales

for the development of new modes of regulatory governance and that is enhancement of democracy and provision of alternative means for empowering citizens (Sorensen and Torfing, 2007: 233, 243). New modes of governance developed due to perceived or actual lack of legitimacy of liberal representative democracies (Schumpeter, 1946; Behn, 2001; Keane, 2009) and the need to establish alternative channels of influence for citizens (Dahl, 1989). Habermas also claims that deliberation should be in locations other than the traditional political institutions of the legislature, in particularly in the administration since it needs to derive its legitimacy directly from the communicative power due to its wide discretions. He claims that direct democratisation of administrative and regulatory process is required (1996: 426, 440-442). In addition, certain media scholars have argued that state involvement is not necessarily a mandatory key success factor of media governance (Held, 2007: 353-354). Thus, it is actually important to evaluate whether the regulatory process is actually democratic, rather than focusing on the performance and role of elected politicians.

To summarise, what this section of the chapter has offered is an overview and critical discussion of what different disciplines have suggested when it comes to the conceptualisation of how democracy can work when it comes to new modes of regulatory governance. These different conceptualisations and debates present the basis for the normative framework developed in this thesis, which is an attempt to move beyond different models of democratic governance and evaluate co-regulation of commercial communications in the UK on the basis of the essential principle: the rule by the people, regardless of the form it actually takes. It is taken that, in order for regulation to achieve public interest objectives, institutional structures are needed that enable influential deliberation by the citizens, transparency and accountability.

However, another essential element of this framework needs to be elaborated upon, and that is the way citizens are defined and why they are at the center of this thesis.

2.4 On citizens: duties and power

As it has been outlined over the previous paragraphs, if co-regulation of commercial communications in the UK is to achieve objectives that are in the public interest,

institutional structures are needed that are transparent and enable influential participation by the citizens in terms of deliberation and accountability. While it is recognised that participation needs to be wide ranging and encompass all different sections of the society including business interests, the government, and civil society just to name a few, citizens are at the heart of this normative framework for a number of reasons.

It is claimed that new interactive forms of governance provide new arenas for empowered citizen participation (Fung and Wright, 2003; Warren, 2009). In the UK specifically, they are a part of New Labour's string of innovations in the area of regulation and governance with the aim of democratizing government and empowering the citizens in alternative ways. In particular, the concept of media governance is conceptualized as a multistakeholder approach that is supposed to integrate neglected stakeholders, such as the citizens and the civil society (Meier and Perrin, 2007: 338). Thus, one of the aims of this research is to determine whether co-regulation, as it has been operationalised in the UK, has managed to achieve these objectives since certain authors claim that new modes of regulation in the media sector actually represent neo-liberal attempt to role back the state (Freedman, 2008). Since one of the basic claims this thesis is based upon is that people should be the ultimate political authority, focusing on citizens in evaluating the quality of new forms of regulation is more than valid – it serves as a litmus test to determine whether co-regulation is truly a democratic means of regulation and whether it empowers citizens.

In addition, since, as Julia Black (2000) claims, society is plural and differentiated, there is no monopoly on knowledge and one person cannot and should not have the exclusive right to make decisions but they should be based on wide-ranging participation (p. 599), thus the engagement of citizens is essential, either direct or indirect. This is especially true when it comes to regulation: 'public interest is not something administrators alone are qualified to define' and regulatory institutions should not be seen as an arena for experts and professionals solely (Stivers, 2001: 251, 266). Therefore, there is the need for the citizens to affect the substances of the policies so as to be responsive to their best interest (Follesdal, 2011: 82). And, most importantly, one of the key aims of media regulation in general, and specifically Ofcom' work is to 'further the interest of citizens

and consumers', thus it is valuable to see if and how this has worked in practice.

However, the question is how citizens are defined and conceptualised and what kind of citizen participation is necessary when it comes to co-regulatory bodies? What is the ideal of citizenship and is the existing set of institutional structures when it comes to Ofcom, ASA and ATVOD enabling this ideal to be reached? Who are citizens for co-regulation, and how and where do they need to act or be?

When it comes to defining citizenship, a number of decisions need to be made across a few dimensions of the concept. To begin with, citizenship is usually seen as being comprised of three main elements. The first one is citizenship as legal status, defined by civil, political and social rights that guarantee citizens' protection in terms of law. Here, T.H. Marshall's account is well known in which he charts how these different rights have developed over the centuries in the UK (Marshall, 1981, 1985, 1992). Secondly, citizenship is seen as political agency with citizens actively participating in society's political institutions. And thirdly, citizenship can be defined in terms of identity and belonging to a political community as a source of that identity (Cohen 1999; Kymlicka and Norman 2000; Carens 2000). Although these elements are evidently interlinked, this thesis is considering the second dimension: citizenship as political agency, how it is defined and what it entails when it comes to main aspects of citizenship: rights or duties, passive or active, and private or public citizenship. There are two main traditions in defining political citizenship differing in their perspectives on these main dimensions of citizenship: liberal and civic republican (Waltman, 1998: 94).

The liberal tradition understands citizenship primarily as a legal status, in terms of rights (Lunt and Livingstone, 2012:31). Political engagement is seen in its instrumental value: it is an "important but occasional identity, a legal status rather than a fact of everyday life" (Walzer 1989, 215). Political liberty is seen negatively as a means to protect individual freedoms from interference by other individuals or the authorities themselves rather than participating in its formulation or execution. In addition, citizens exercise these freedoms primarily in private rather than in the political domain (Lunt and Livingstone, 2012: 31-2).

On the other hand, the republican model sees citizens primarily in terms of duties rather than rights, the principal of which being political engagement in pursuit of common good: citizens are, first and foremost, "political animals" (Aristotle *Politics*, 1275a8). Freedom is seen as positive with citizens co-authoring the laws that make them free and laws legitimate. Active participation in the processes of deliberation and decision-making ensures that individuals are citizens, not subjects. In essence, the republican model emphasises the second dimension of citizenship, that of political agency. In the words of Kymlicka, this version represents thick conceptualisation of citizenship in terms of duties and activity while the liberal is seen as thin – seeing citizenship as status and passivity (p. 354).

The difference between these two traditions is evident in today's debates in media regulation in the UK as it is mapped onto two different terms: citizens and consumers, and what they entail when it comes to regulation of media and communications. This has most remarkably been evident in the debates leading to the Communications Acts 2002 and 2003 and the establishment of Ofcom (Lunt and Livingstone, 2012, 2011).

What is important to emphasise is that the term 'consumer' refers to members of the public as individuals who have rights and preferences and the focus is on their negative freedoms - elimination of constraints when it comes to 'individual's preferences and choices' (Lunt and Livingstone, 2012: 41-8). Reference to consumers uses the language of marketplace where what is relevant is choice, desire, satisfaction, and preferences. As Steward (1992) claims, the regulatory state 'has brought about a reduced conception of citizenship, limited to that of the individual provided with the contractual rights of a consumer' (p. 54). Thus, when we talk about consumers, we talk about individual preferences and choice and the way these can be met and achieved.

And when it comes to citizens, as discussed, they are seen primarily in terms of political agency and their duties. What is important to note is that public interest includes both citizen and consumer interests. However, for the purposes of our research, there are two distinct issues: what the different interests of citizens and consumers are when it comes

to media and communications, and what these different interests are when it comes to governance and regulatory institutions.

For example, the interest of citizens when it comes to media content and communications services is related to plurality, diversity, and accessibility for example. Media have a democratic role to play, and, as citizens, we need a diversity of media content. As consumers, on the other hand, what we expect in this area is reasonable and fair prices, choice, good customer services, and possibility to switch between providers. Another example is the expectation of consumer protection when it comes to misleading advertising for example: as buyers of certain products or services, we would expect them to be advertised truthfully.

When it comes to governance and regulation, what we expect as citizens is the opportunity to be actively engaged and have decision-making powers. But, as consumers, it is misleading that there should be any expectations. Individuals do not have a choice when it comes to different regulatory bodies, thus cannot be seen as consumers, and the relationship is of entire different nature: we should expect to be given opportunities for active engagement in the decision-making processes since we are not *consuming* regulatory services in any way.

These distinctions are particularly important to bear in mind when it comes to one of our case studies: the duty of Ofcom to promote effective self-regulation. Here, citizens' interest should prevail since Ofcom is in essence designing governance institutions.

Thus, this framework adopts a view on citizenship that is more in line with the civic republican tradition and emphasizes active, political agency due to a few reasons. The perspective on public interest and politics endorsed in this normative framework presupposes active citizenship, which would differ from the view of citizenship emphasized in liberal democracies that focuses on rights of the citizens and their individual freedom. New modes of governance, if they are to fulfil the potential they offer, require active and engaged citizenry that is seen as not having only rights but also duties and one of them is being politically active and taking ownership of the public interest through engagement in deliberation and holding those in the power to account; new modes of governance need to be 'inhabited by active citizens' (Stivers, 2001: 247).

Having defined citizens in terms of their duties and political engagement, and having explained the emphasis in the previous sections on institutional structures and the extent to which they enable citizens to be politically active, it is important to explain that this thesis aims at discovering to what extent these institutional structures are enabling citizens to be seen as, what Nancy Fraser has famously termed, 'strong publics'. Nancy Fraser distinguishes between weak publics, publics whose deliberative practice consists exclusively in opinion-formation and does not encompass decision-making, and strong publics, publics whose discourse encompasses both opinion-formation and decision-making culminating in legally binding decisions (Fraser, 1991: 75).

Thus, the normative ideal is politically active and empowered citizenship engaged in deliberation, decision-making and holding those in the power to account. The question for this thesis is to what extent is the praxis of citizenship that is being enabled by institutional structures of co-regulation allowing this normative ideal to be reached? Are co-regulatory structures empowering the citizens and giving them political agency: power to produce political effects and make decisions? As Barber writes, 'people are apathetic, because they are powerless, not powerless because they are apathetic' (Barber 1984: 272).

Therefore, empowered, politically engaged citizens are in the focus of this research. Co-regulation of commercial communications in the UK, if it is to truly present a valid form of governing, should provide an institutional framework within which citizens are able to engage in meaningful and consequential deliberation regarding what would serve the public interest when it comes to specific regulatory choices and hold those in the power to account. The focus lies on the regulatory decision-making process itself and its institutional structures, and regulation is seen as providing a forum in which deliberation can take place (Prosser, 2010: 8).

2.5. Conclusion

The purpose of this chapter has been to establish the basis of the normative framework for evaluation of regulatory bodies responsible for the regulation of audiovisual

commercial communications in the UK. In addition, by critically assessing the existing literature relevant for the topic and developing a set of principles for the evaluation of Ofcom, ASA and ATVOD, this chapter serves as a justification for the particular normative choices made.

As it has been elaborated on in the previous chapter, co-regulation is a novel mode of governance that presents a qualitatively new way of formally involving non-state actors in regulation. As such, it warrants research interest, but it has not attracted a consensus in the literature on the criteria that are to be used for its evaluation. Although there are claims that regulatory bodies are not making political decisions, and should consequently be evaluated on the basis of their efficiency and effectiveness, they are dismissed on the basis of the assertions that implementation of regulation changes policy, it involves making re-distributive decisions, and most importantly, the case studies we are looking at, regulation of alcohol advertising and product placement, are completely in the hands of regulatory bodies that represent new modes of governance: there is very little government involvement.

Thus, it is claimed that Ofcom, ASA and ATVOD, as any other form of governance, need to be evaluated by using the criteria of what is widely referred to as democratic governance: the people should be the ultimate authority, which means that political power needs to be both authorized by them and exercised in their interest. Following a critical discussion of the way different disciplines have dealt with the issue of how to achieve democracy when it comes to new modes of governance, the chapter offers its basic normative framework that is focused on principles rather than different models of democracy. Consequently, it is argued that public interest objectives can be achieved only if institutional structures of regulatory bodies enable transparency, deliberative participation by the citizens, and enable citizens to hold the regulators to account. Only by providing such structures, co-regulatory bodies would empower the citizens to be the ultimate authority and could thus be considered a democratic form of governance.

The following chapter discusses in detail how these key concepts of transparency, deliberative participation, and accountability are defined, and in what ways they will be evaluated when it comes to Ofcom, ASA and ATVOD.

Chapter 3: Specifying the normative framework: Transparency, democratic, deliberative participation, and accountability

What differentiates political behaviour from market behaviour?

(Bohman and Rehg, 1997: xiii).

This chapter aims at defining in more details the key elements of the normative framework developed for evaluation of Ofcom, ASA and ATVOD. As the previous two chapters have shown, co-regulation, which is at the center of this thesis, is a novel mode of governance that presents a qualitatively new way of formally involving non-state actors in regulation. Thus, as a regulatory innovation, it entails the need to establish by research what its nature is and whether it can be described as democratic. As the discussion in Chapter Two has shown, a form of governance can be described as democratic if it empowers the citizens by providing them with transparent institutional structures that give them an opportunity to deliberate upon regulatory choices, and hold the regulators to account.

Since the discussion in the previous chapter only dealt with the discussion of the literature on democratic governance and provided the justification for the particular normative focus on the values of transparency, democratic, deliberative participation and accountability, this chapter provides a detailed discussion regarding their theoretical base and the way they will be assessed.

3.1. Transparency, its contribution to citizen empowerment and criteria for assessment

'Transparency is a term that has attained quasi-religious significance in debate over governance and institutional design' (Hood, 2006: 3). This is certainly the truth when it comes to the case studies chosen for this research since transparency is one of the main statutory principles not only Ofcom but also ASA and ATVOD must abide by. The following section will outline the theoretical thinking about transparency and the way it will be assessed whether its operationalization in practice matches this ideal.

When it comes to how transparency is normatively defined for the purposes of this research, what first needs to be emphasized is that there is a distinction between transparency and openness despite the fact that they are often used interchangeably as synonyms. Although openness is sometimes used for lay audience, some authors make more significant distinctions between the two. Heald (2006) claims that openness can be seen as a characteristic of an organization, while transparency requires 'external receptors capable of processing the information available' (Heald, 2006: 26). Other authors refer to openness as access to decision making arenas (Klijn et al, 2008; Beyers, 2004: 213).

What is adopted here is the distinction developed by Meijer et all (2012) where openness is seen as having two dimensions: transparency and participation (p. 11). Their definition of government openness is 'the extent to which citizens can monitor and influence government processes through access to government information and access to decision-making arenas' (Meijer et all, 2012: 13). Curtin and Medes (2011) refer to this as vision and voice: citizens need information to see what is happening inside government, and participation to voice their opinions about this. Vision and voice come together in the idea of informed debate: participants can voice their opinions on the basis of knowledge about decision-making processes (Meijer et all, 2012: 11). Thus, for the purposes of this

research, transparency is seen as having a different and narrower meaning than openness (Birkinshaw, 2006a: 178).

When it comes to how transparency is defined, in general it is taken to mean conduct of decision-making or public affairs in the open (Birkinshaw, 2006: 189). It refers to the availability of information about a public body that allows other actors to monitor the workings or performance of it (Grimmelikhuijsen 2012: 55). However, transparency is taken to have two very specific and distinct meanings.

The first one is related to decision-making according to clearly established, fixed and published rules rather than by ad hoc judgments or processes. In this sense it is clearly connected to the rule of law (Hood, 2006: 9).

The second meaning of transparency is more commonly referred to both in practice and in theory and it means governance that is intelligible and accessible to the general public, which means that information about its procedures and decisions is available to the public, as well as consequences of certain decisions, who benefits and who loses, and who makes the decisions and on the basis of what information (Black, 1997: 476; Hood, 2006: 5; Hood, 2001: 701). In other words, transparency in this sense means availability of comprehensive information regarding activities of a regulator that would enable the public to know not only what happens but also why. Transparency in this sense also requires that actions and decisions need to be explained in a way that is understandable and accessible to the public.

Thus, when we evaluate transparency of Ofcom, ASA and ATVOD, we evaluate to what extent they operate according to fixed and published rules, and to what extent information about their decision-making processes is available.

However, another point is worth making and that is that there is a preference towards optimal and not maximum level of transparency, which means that transparency is evaluated for it extrinsic and not intrinsic value. It has been recognized in the literature that more transparency is not necessarily a good thing (Lodge, 2004: 128). As Heald (2003) puts it, 'there is a trade-off between the value of sunlight and the danger of over-exposure' (p. 725), and there is a number of arguments for optimal level of transparency. Since transparency implies large costs and resources, inappropriate level might impede effectiveness and efficiency of regulators, privacy and confidentiality of decision-making needs to be protected to a certain extent, complete transparency might undermine the willingness of actors to deliberate openly, and it might decrease trust in governance (Heald, 2006: 60, 68-70, O'Neil, 2002). In addition, high demands of transparency might lead to blame avoidance, as Hood (2007; 2010: 993) famously argues, and they might result in deliberation moving to secluded venues (Torfing et al, 2012: 8). Thus, as Prat (2005) claims, it is not necessarily the truth that 'the more closely we are watched, the better we behave' as Bentham (2001: 277) famously claimed. There is also a value in ignorance for social functioning, as many authors claim (Heald, 2006: 60), and transparency can create a 'gotcha game' in which information is used by journalists and advocacy groups only to uncover things that go wrong (Grimmelikhuijsen, 2012: 295).

For all these reasons, transparency should be evaluated in terms of its extrinsic and not intrinsic value; in terms of what it contributes to other values (Heald, 2006: 70). Since the normative framework for this thesis is focused on the issues of deliberative participation and accountability, what we are evaluating is whether there is sufficient transparency for these variables. The purpose of transparency, its extrinsic value in this case is to what extent it provides the citizens with sufficient level of information in order to enable them to deliberate and hold the regulators accountable.

When it comes to accountability, it is widely acknowledged in the literature that transparency is an essential component and precondition of accountable governance (Birkinshaw, 2006: 51; Prat, 2006: 91). 'Without information, accountability will merely be the shadow of an idea lacking any substance' (Birkinshaw, 2006a: 194); accountability would simply not be possible without the necessary information to evaluate whether the

regulators are promoting the public interest. Transparency is a guarantee that we can know who did what, when, and why, which allows us to determine political, legal and administrative responsibilities (Brandsma et al 2008: 828; Torfing et al, 2012: 4; Prat, 2005: 862).

The literature review further revealed what classes of information need to be made transparent for an effective accountability mechanism to exist. They are the following:

- who makes the decisions so that the responsible individuals or regulators can be called to account ;

- what the decisions are;

- through which processes the decisions are made or in other words information related to actions such as deliberations, negotiations, and votes that took place among and between the decision makers during the decision-making process and were thus directly fed into the decision;

- what the justifications for the decisions are that would explain the rationale, facts and reason behind them;

- what the information and evidence is on which the decisions have been based, which is crucial for understanding the decisions and reasons behind them; and

- what the consequences of the decisions are for different stakeholders, which is the information without which it would be impossible to establish whether the regulators are performing their roles appropriately (Bovens, 2007, 2011; Prat, 2005: 862; Torfing et al, 2012: 16; Licht et al, 2014: 113-5; Mansbridge, 2009).

And speaking of participation, the public requires rights of access to information in order engage fully as citizens and to make democracy meaningful (Birkinshaw, 2006: 52; Torfing et al, 2012: 210; Welch, 2012: 94). However, transparency and participation are interdependent, and not only that information is crucial for participation, but participation increases transparency (Meijer et all, 2012: 14-15). This will become evident

as the analysis in Chapter Four progresses, as it is revealed that those who engage with the regulators are in a much better position when it comes to having access to sufficient level of information both in relation to further engagement and holding the regulators accountable. Nevertheless, the aim of the assessment of transparency in this part is to establish whether the citizens or their representatives have sufficient level of information to engage in deliberation.

Thus, so far, we have established that transparency has broadly two meanings: one of them is governance according to fixed and published rules, and the other is the extent to which information about the work of regulators is available. We have also determined that transparency will be evaluated against what is taken to be its core purpose for this research: providing the citizens with sufficient information to engage in deliberation and hold the regulators accountable. The assessment of whether transparency in practice is matching these normative ideals will be organized around different ways information can be made available to the citizens.

In general, there are two main ways of information provision (Piotrowski, 2007). The first channel of transparency is proactive release where information and documents are actively disseminated by the regulators. The analysis will attempt to assess the quality of the information released proactively in order to determine whether it is sufficient for accountability and deliberation.

A number of indicators for the quality of the information will be used and they are the following:

- reasonably complete, which means there is sufficient information to 'see the complete picture', and there is no or very little unnecessarily obscured or hidden data. If the information is not reasonably complete, a doubt is cast over it and the credibility of what is made visible is decreased;
- reasonably understandable, although it is recognised that this would depend on the audience and to what extent the regulators factor this into their practices;

- visible, which means accessible to a wide range of users for a variety of purposes, found with relative ease and publicised;

- reliable, which would depend on a few factors such as low level of mediation, raw or close to the source, primary data, verified by a third party;

- timely; and

- non-discriminatory, which means available to everyone in a non-proprietary format that is easy to process (Michenera and Berschb, 2013: 238; Hood, 2007).

However, what is of crucial importance for proactive release of information are regulators' websites. Since modern transparency is highly computer-mediated (Meijer, 2009: 258), the websites are the main gateways to the information made available and would thus be assessed in relation to four broad categories: transparency in the narrow sense, interactivity, usability, and website maturity. The way that information is organized on the websites and to what extent it is readily usable would largely influence whether the information and documents provided truly lead to increased transparency.

When it comes to the second channel of transparency, which is the possibility to request information, the operation of the Freedom of Information Act 2000 in the UK in relation to Ofcom, ASA and ATVOD will be assessed.

And the final essential ingredient of transparency is publicity. 'If transparency in practice is truly to match the definition of transparency and that is the conduct of public affairs in the open or otherwise subject to public scrutiny' (Birkinshaw, 2006: 189-91), publicity is crucial; the sole provision of information is not sufficient. When it comes to this factor, it will be assessed to what extent the transparency enabled by proactive release of information and Freedom of Information laws are used by the newspapers, and to what extent the regulators themselves are trying to increase publicity by using the opportunities provided for by the new media.

Thus, this section of the chapter has defined transparency as conduct of public bodies

according to fixed rules and in the open, and set the purposes of transparency to be provision of information for the citizens so they can engage in deliberation and hold the regulators to account. Moreover, this part has outlined the way transparency will be assessed when it comes to Ofcom, ASA and ATVOD. However, transparency is just the first step – what is needed is for the citizens to act on it and react to the information released (Roberts, 2011: 16-7). But how this 'acting and reacting' to information is defined normatively and how it will be evaluated will be outlined in the next two sections of this chapter.

3.2. Democratic and deliberative participation

As it has been discussed in the previous chapter, due to the nature of public interest that is not pre-determined and pre-political, citizen participation in governance implies deliberation. Deliberative participation that is seen as one of the essential elements of the normative framework developed for this thesis is largely based on the theories of deliberative democracy and those writings in other disciplines it has influenced. Not only that deliberative approach dominates democratic theory, but it has also been very influential in other theories and, more importantly, in practice (Bevir, 2010; Chambers, 2003: 315). As we have discussed in the previous chapter, basic tenets of deliberative democracy have largely influenced the way regulation should be structured (Black, 2001: 231). Regulators are seen as providing a forum in which deliberation can take place with the major role of the regulatory institutions being to provide procedural means for resolving problems through deliberation (Prosser, 2010: 8-9).

What this approach entails is that regulatory institutions are seen as legitimate insofar as they establish the framework for public deliberation (Cohen, 1987: 72; Manin, 1987: 351-2). As Fishkin (1991) claims,

> 'without deliberation political choices are not exercised in a meaningful way. If
> the preferences that determine the results of democratic procedures are

unreflective or ignorant, then they loose their claim to political authority over us. Deliberation is necessary if the claims for democracy are not to be de-legitimated' (Fishkin, 1991: 29).

As one of its most influential proponents, Jürgen Habermas, outlines in his thinking about deliberative democracy in *Between Facts and Norms* (1996), 'only those statutes may claim legitimacy that can meet with the assent…of all citizens in a discursive process of legislation that in turn has been legally constituted' (p. 110).

Consequently, what we aim to establish is whether the institutional structures that offer an opportunity for participation when it comes to Ofcom, ASA and ATVOD enable deliberation by the citizens. However, what is of interest is not only the quality of deliberation, but to what extent it is democratic as well. In the classical definition by Cohen (1989), 'collective outcomes are legitimate to the extent that all those subject to them have the right, capacity, and opportunity to participate in consequential deliberation about their content' (p. 28). This is the most quoted and classic definition of deliberative democracy that has been used by many other theorists in slightly different wordings (Dryzek, 2010: 22; Benhabib1996: 68). It contains all the relevant elements of both the deliberative and the democratic aspect, and the following paragraphs will elaborate in more details what they entail.

3.2.1. 'Deliberation' in deliberative democracy

When we are assessing deliberation we are assessing the 'qualitative aspects of the conversation that precedes decisions' (Chambers, 2003: 316). But what qualities should this conversation have if it is to be referred to as deliberation? 'Deliberation does not simply mean talk of any kind; the concept has a very specific meaning' (Steiner, 2008: 186).

As Dryzek claims, 'a system can be said to possess deliberative capacity to the degree it has structures to accommodate deliberation that is authentic' (Dryzek, 2010: 10). This is what Habermas (1970) calls the ideal speech situation. As the review of the literature has established, this 'authenticity' implies a number of criteria must be met, and they are discussed over the following paragraphs.

To begin with, deliberation has as its aim solving collective problems; it is a conversation about issues of common concern with the goal of finding solutions and making decisions that would be in the public interest (Chappell. 2012: 7,8; Fung 2007b; Thompson, 2008: 502; Benhabib, 1996: 68). It is a conversation with a purpose. Not all instances of discussion between citizens can be described as deliberation; this is the first condition that must be met. Thus, for the purposes of this research we are only evaluating fora where conversations about regulatory decisions are held.

What is closely linked with this criteria is that deliberation needs to be consequential: it must make a difference when it comes to determining or influencing collective outcomes (Dryzek and Niemeyer, 2010: 10; Chappell, 2012: 159); 'it is not the raw presence of deliberation in a conception of democracy, but rather its status and role that defines deliberative/non deliberative boundary' (Dryzek, 2000: 50). Thus, if there is a conversation about regulatory decisions that cannot in any way influence or reach the decision-makers, then this conversation cannot be seen as deliberation.

Another key characteristics of deliberation is what has been termed reciprocity or other-regarding. This refers to the need for the arguments, reasons and preferences to be in terms that are acceptable and understandable to others (Thompson, 2008: 504); reasons must be mutually justifiable (Gutmann and Thompson, 1996: 52-3). We cannot talk about deliberation if 'those to whom arguments are addressed cannot understand its essential content' (Gutmann and Thompson, 2004: 4). Reciprocity is also linked to the existence of concern for others (Chappell, 2012: 7, 47, 49; Cohen 1989, 33). This form of

reciprocity means that the reasons must be public and that the deliberation itself must take place in public since 'a public explanation of oneself and one's own reasons forces you to report only those reasons that others might plausibly be expected to share' (Goodin 2003, 63). It is seen that this publicness would minimize self-interested claims and the wish to exclusively pursue one's own interest.

Another key criteria is that the discussion in hand needs to be reasoned if it is to be seen as deliberative. This means that, in the words of Habermas, "no force except that of the better argument is exercised" (1975, p. 108). For the debate to be reasoned, arguments need to be carefully considered, all relevant perspectives must be taken into account and they need to be based on reason, the debate is to be impartial, and the final decisions must be made on the basis of this consideration of reasons and not some external force or threat (Chappell, 2012: 8; Elster, 1998: 8; Prosser, 2010: 6).

In addition, deliberation needs to be free of coercion, either implicit or explicit, threats, bribery, any form of constraint, tyranny and any type of domination of groups or ideology, and undue power advantage this would entail (Chappell, 2012: 70; Benhabib, 1996: 68).

And most importantly, the participants in the debate need to be committed to deliberation, willing to engage in debate and offer reasons and justifications for their preferences and positions (Chappell, 2012: 8). One of the key premises is that public interest or common good is not pre-determined but needs to be defined though deliberative processes, thus it is important for the participants to be committed to deliberation in the sense that they are also willing to change their preferences during the process: deliberation is a process of free and rational will and opinion formation (Dryzek 2000: 68; Chambers, 2003: 309; Steiner, 2008: 187). This commitment will also help with being other-regarding and provide reasons that they sincerely expect to be persuasive to others who share that commitment, and not just disguised self-interested preferences (Cohen, 2009: 26; Cohen, 1987: 76).

Having determined what different qualities 'authentic' refers to when we speak about deliberation, the issue of the democratic property is discussed next.

3.2.2. 'Democracy' in deliberative democracy

Another key aspect of deliberative democracy is manifestly democracy and this refers to the requirements of inclusion and equality. Deliberation is democratic if it involves everyone affected by the decisions made and if there is equality between different participants (Chappell, 2012: 7, 73; Benhabib, 1996: 69; Della Porta, 2013: 67). Since political decisions are imposed on all, it is reasonable that 'a legitimate decision is the one that results from the deliberation of all' (Manin, 1987, 351–2).

What inclusion refers to is the opportunity, right and ability of all affected actors to participate and influence or determine decisions (Dryzek, 2010: 10; Chappell, 2012: 9; Elster, 1998: 8; Dryzek and Niemeyer, 2010: 10).

For the purposes of this research, inclusion is evaluated along three different perspectives:

- franchise or the proportion of population being included;
- scope in terms of the range of issues being deliberated upon; and
- stages of decision-making of which inclusive deliberation is an essential part of (Dryzek, 2002: 87).

Thus, deliberation not only needs to include the entirety of the population, but it also needs to include all the issues that are subject to regulatory decisions, and it needs to be a part of all the stages of decision-making including the agenda-setting stage. Deliberation of a section of the population regarding a few final decisions cannot be described as inclusive deliberative democracy.

However, this perspective on inclusion poses at least two practical difficulties and one of them is the impracticalities of deliberating on all decisions. What deliberative theorists offer as a solution is that not everything should be deliberated upon as long as the decision what is to be left out is made through an inclusive, deliberative process. Thus, citizens do not need to debate upon all the issues, as far as they have made this choice through deliberation. Deliberative democrats 'do not insist that every practice in deliberative democracy be deliberative but rather that every practice should at some point in time be deliberatively justified' (Thompson, 2008: 515; Gutmann & Thompson 2004, Macedo 1999).

The other difficulty is with the inclusion of the entirety of the population and this is where the concept of representation is important. As Gutmann and Thompson (2004) state, democracy, including deliberative type, does not entail everyone to participate when it comes to all decisions; it does not necessarily entail direct democracy, which might be impossible and impractical. Thus, representatives should be relied upon, who also might be better deliberators. However, the important point to make is that those being represented must somehow select and authorize the representatives (Young, 1990: 128–33), otherwise there is the risk of, as Dryzek (2010) puts it, 'empowering an unaccountable elite' (Dryzek, 2010: 54). In addition, if there is representation, there should be communication with the constituents and accountability (Gutmann and Thompson, 2004: 30-1). Otherwise, we cannot speak about democracy.

Dryzek is also in favour of representation of discourse and not only of people: 'one way to ensure that a network is inclusive is to attend to effective discursive representation within it' (Dryzek, 2010: 132; Dryzek and Niemeyer, 2008: 481). He sees the presence of a range of discourses as a solution to the scale problem (Dryzek, 2010: 50). This can be achieved by mapping methods that would outline all the relevant discourses for a regulatory issue and subsequently determining which individuals best represent them, or it can be achieved by ethnographic studies (Dryzek, 2010: 53). This would also enable

inclusion of different ideas with all the relevant arguments adequately represented during deliberative processes (Chappell, 2012: 9).

Dryzek particularly emphasizes representation of discourses since without it a system runs the risk of becoming not only increasingly illegitimate over time but also highly ineffective in solving problems. He gives the example of financial networks being dominated by the discourse of market liberalism prior to the global crisis in 2008. This discursive dominance led to them being unable to reflect on their own flaws and deficiencies 'even in narrow financial terms, let alone in relation to social justice', which eventually led to their failure (Dryzek, 2010: 129).

However, inclusion is insufficient to enable achievement of democracy if there is no equality between those included. Democratic legitimacy requires deliberation among *equal* citizens (emphasis added, Gutmann, 1996: 344).

Equality refers to the equal right, opportunity and ability to participate, but also to influence to determine decisions (Chappell, 2012: 73). Distinction can be made between formal equality, which refers to minimal rights of participation in deliberation and voicing arguments, and substantive equality which means that citizens have roughly equal power, abilities and opportunities to influence political decision (Chappell, 2012: 73; Prosser, 2010: 6; Fishkin, 1991: 29). The participants are substantively equal if the existing distribution and asymmetries of power, resources, their capabilities, and pre-existing norms do not shape their chances to contribute to deliberation, and if that distribution does not play an authoritative role in their deliberation (Cohen, 1987: 74; Knight and Johnson, 1998: 293). And this later, substantive equality is difficult to achieve.

Different authors have offered different solutions and saw different issues as problems to substantive equality. Gutmann and Thompson (1996) see welfare redistribution as an essential part of deliberative systems since material inequality can led to the political one, and can lessen communicative capacity. Nancy Fraser (1992), on the other hand, is concerned with social inequality and to what extent it creates informal obstacles to equal

participation and deliberation even though the right to deliberate might be recognized formally (p. 66).

However, there are in essence two different conceptualizations of the conditions necessary for substantive equality: equality of resources, and equality of capacities (Knight and Johnson, 1987: 295). Rawls (1993) is for example in favour of the resources approach, while Sen (1992) is one of the most influential proponents of the capacities approach to equality. He claims that the resources approach is inadequate since it does not take into account individual differences in capabilities to take advantage of these resources (p. 34). Bohman (1996a) builds on Sen's argument and develops conception of deliberative equality that is primarily concerned with the capacities relevant for participation in deliberative processes (page 128). It is taken that for deliberation, the most necessary capacities are the cognitive ones that enable participants to effectively articulate and defend persuasive claims, without which there is no substantive equality (Knight and Johnson, 1987: 299). Equality is not just about equal access to deliberative fora, but the ability to have persuasive arguments, since, as we have stated above, 'no force except that of the better argument is exercised" (Habermas, 1975: 108).

However, the necessity of developing good arguments can place many sections of the public at a disadvantage, thus, action is needed for offsetting the effects of unequal capacities on democratic deliberation, as well as asymmetries in distribution of resources (Knight and Johnson, 1987: 280-1). This is important since the lack of politically relevant capacities violates the standard of legitimacy for binding decisions and makes democratic side unfeasible (Bohman, 1987: 341). If there is no equality, deliberation can serve as a mask for domination by 'absorbing the less powerful into a false 'we' that reflects the more powerful' (Fraser, 1992: 65). The solutions proposed in the literature are two-fold: wider state action and mediation by the regulators.

The debates about state action and support usually revolve around education and funding that would support deliberative associations and ensure citizens' access to deliberative fora (Cohen and Rogers, 1993; Cohen, 1987: 85; Bohman, 1987: 329-32). As

David Owen (2001) claims, deliberative democracy requires a well-educated public (page 124). However, the analysis in this thesis is primarily interested in the mediation and role of the regulators in creating structures that would present true opportunities for deliberative democracy.

As it becomes evident from all the criteria that need to be met in order to evaluate a participative forum as deliberative and democratic, these requirements place high expectations on the citizens and put forward various presuppositions: the belief that they have learning capacities, resources at their disposal, ability to create well-reasoned arguments, and are willing to engage in the process of deliberation that is reciprocal and other-regarding (Papadopoulos and Warrin, 2007: 456; Meier, 2011: 162). As Cohen (2009) claims, 'talk about the common good is one thing; sincere efforts to advance it are another. While public deliberation may be organized around appeals to the common good, is there any reason to think that even ideal deliberation would not consist in efforts to disguise personal or class advantage as the common advantage?' (Cohen, 2009: 26).

The solution to these issues not surprisingly lies in the power of deliberation. As advocated by many theorists, a lot of faith is placed in deliberation and its ability to change preferences, build cognitive and communicative resources, build knowledge, competences and motivation to engage in deliberation, and reconcile different conceptions of common good (Burkhalter, Gastil and Kelhshaw, 2002; Cohen, 1987: 76). Authentic deliberation can induce reflection upon preferences in noncoercive fashion (Dryzek 2000: 68), and engagement in deliberation helps citizens consider issues in a more public-spirited way (Gutmann and Thompson, 2004: 30; Elster 1998; Cohen 1989, 18–19). Experience with deliberative mini-publics shows that ordinary citizens can become capable deliberators (Dryzek, 2010: 50).

Therefore, institutional structures are needed that truthfully enable deliberation by all and it is the role of the regulators and the state to create and design these structures. It is taken that regulators, in addition to the state, need to have an active role in creating institutions that would enable democratic deliberation. As it has been discussed in the

introductory chapter, at the heart of new modes of governance should be the desire to create institutions that would empower the citizens to deliberate. This presupposes an effort to deal with inequalities and the conditions citizens live in that would prevent them from actively participating, and factor these problems in the design of the institutions. To what extent have the regulators made an effort to ensure everyone has substantial equality and to create institutions that would take into account the inequalities that exist? Are there efforts to take into account the realities of political participation and the condition the citizenship is in nowadays?

If this is not performed and if deliberation is not achieved, then deliberative fora 'are just public relations exercises designed to legitimate decisions that are actually taken in other arenas' (Papadopoulos and Warrin, 2007: 450). Designing institutions for meaningful deliberation is not simple and would require efforts from the regulators. As Meier (2011) claims, 'it would be naïve to assume that by simply gathering representatives of media organizations and civil society organizations around the table all participants would have the same power to co-determine the outcome of the deliberations. Without access to power of the possibility to hold media power accountable for deficits in the provision of public goods, interactions, coordination and participation, the governance regimes merely offer civil society freedom of speech within a consultation forum' (p. 162).

Thus, what we aim to assess when we talk about deliberative, democratic participation is in essence three distinct issues:

- the qualities of deliberation;
- the extent to which institutional structures are democratic in terms of inclusion and equality of participants; and
- the role of the regulators in enabling the first two conditions to be met.

The next section outlines the way the analysis will be structured.

3.2.3. Empowered space, public space and mini-publics

This thesis attempts at evaluating all the fora that enable citizens to voice their input, either directly or indirectly, into decision-making processes when it comes to Ofcom, ASA and ATVOD. These fora are classified on the basis of how much decisional power is granted to citizens. The distinction is well developed in the literature and thus there is the empowered space, public space, and minipublics.

Empowered space, mini-demoi, in the words of Nancy Fraser (1992) strong publics, or as Habermas (1998) calls it the center or will-formation forum, refers to formal institutional structures where the citizens or their representatives are empowered to make collectively binding decisions through deliberation. These structures provide opportunities for both deliberation and decision-making (Eriksen and Fossum, 2002: 402; Fraser, 1992, p.134; Dryzek, 2010: 11). This is what Carole Pateman would refer to as full participation (1970: 68).

When it comes to the regulatory bodies analysed in this thesis, Ofcom, ASA and ATVOD, the means of citizen engagement in the empowered space is through independent Board members that represent citizens' perspectives and have the power to make binding decisions. This is the only means through which citizens indirectly have the potential to deliberate regarding biding decisions.

Public space, general publics, weak publics (Fraser, 1992), or informal citizen deliberation refers to public spheres 'whose deliberative practice consists exclusively in opinion formation and does not also encompass decision making' (Fraser, 1992: 134). This space refers to the sphere of deliberation outside the political system where binding decisions are not made but issues of common concern are discussed (Eriksen and Fossum, 2002: 405). This is what Habermas has famously called the public sphere or later in his writings 'the periphery' or 'opinion-formation forum', which should ideally host free-ranging and wide-ranging deliberations among equal citizens.

To illustrate, public space for the purposes of this research is composed of the media and public interest groups, where the deliberation can take place independently of the regulators and where binding decisions are not made.

When it comes to the public space, the importance of influence is important. As we have discussed earlier in this chapter, a debate cannot be seen as deliberation if it does not contribute to the binding decisions. Thus, there needs to be a means of transmission between the public space and the empowered space; a way for the deliberation in the public space to influence the regulators (Habermas, 1998: 249; Dryzek, 2010: 11; Chappell, 2012: 159). Consequently, when pubic space is analysed, the issue of influence will be looked at and not just to what extent these spaces enable democratic deliberation.

And finally, speaking of mini-publics, they are structures for citizen input that are sponsored by regulators and thus are a part of the decision-making bodies, but they do not have the power to produce binding decisions. They are institutionalized fora for discussion of issues of common concern that have not been granted the powers to make binding decisions (Eriksen and Fossum, 2002: 406). Carole Pateman (1970) refers to these spaces as partial participation since citizens do not have formal decision-making powers. As she further claims, influence and power are closely related but are not synonyms: to be in a position to influence a decision is not the same thing as to be in a position to (to have the power to) determine the outcome or to make that decision (Pateman, 1970: 69).

Mini-publics refer to all different deliberative innovations that have burgeoned over the previous decades such as deliberative opinion polls, consensus conferences, citizens' juries, planning cells, and many others (Goodin and Dryzek, 2006: 220-1). Although there are reportedly as much as fifty-eight different types of minipublics, Ofcom, ASA and ATVOD do not use many ways to obtain the input from citizens without enabling them to make binding decision. They are the following: the Communications Consumer Panel and Advisory Committees when it comes to Ofcom, the Advertising Advisory Committee when it comes to ASA, and research, consultations, complaints, and public

meetings when it comes to all regulatory bodies studied in this thesis. These are the fora organised or sponsored by the regulators but which do not produce binding decisions. The aim of the analysis of minipublics is to determine the extent to which they enable democratic deliberation and whether they are influential when it comes to final decisions.

Therefore, the analysis will be organized around these three types of arenas for citizen input: empowered and public space, and minipublics.

Another final point that needs to be made when it comes to the assessment of democratic deliberation is that a systemic approach will be taken. What this entails is that not every single instance of talk and forum should exhibit the ideal characteristics of deliberation and democracy, but the system as a whole should (Mansbridge, 1999: 224; Parkinson, 2006: 174). The system as a whole should enable deliberation by equal citizens, although not every single fora that is a part of this system since different arenas can complement each other and fix their deficiencies (Christiano, 2012: 2). For example, the role of experts is not necessarily an issue as long as there are spaces for deliberation by the citizens. As Christiano (2012) puts it, 'systematic approach allows us to appreciate the division of labour' (p. 14). The problem arises if there is a primacy of experts' involvement and low level of citizen participation.

To summarize this section of the chapter, the assessment of institutional structures for citizen participation will focus on determining to what extent they provide an inclusive opportunity for equal citizens to engage in deliberation and influence final, biding decisions by the regulators. The analysis will be structured around three different types of arenas for citizen participation: empowered space, public space and minipublics, which all differ on the basis of whether they involve decision-making powers. Finally, a systemic approach is adopted that allows for different fora to be evaluated as a part of a system.

What follows is the discussion of the final essential element of the normative framework adopted for this thesis and that is democratic accountability. After the regulators have

ideally enabled citizens to deliberate on regulatory decisions and determine them, the only natural step is the opportunity for the citizens to hold the regulators accountable for the way they have implemented these decisions and acted according to the preferences of the citizens as expressed in these processes of democratic deliberation.

3.3. Democratic accountability

Although the concept of accountability is used widely in academic literature, public discourse, and by policy-makers and international organizations, it is often used with very different and vague meanings. The concept has come to stand as 'a general term for any mechanism that makes powerful institutions responsive to their particular publics' (Mulgan, 2003: 8). It is closely linked to and sometimes used synonymously with responsibility, transparency, answerability, responsiveness, liability, and controllability (Dawn, 1991: 22). However, Bovens (2007) claims that these concepts are not synonymous with accountability and are not sufficient to define accountability but are only constituent of it (p. 453). For example, Bovens (2007) claims that accountability should not be equated with controllability since 'accountability is a form of control, but not all forms of control are accountability mechanisms' (p. 454). In addition, accountability is an ex post mechanism of control (Elster, 1998: 254) and should be distinguished from other types of control in democratic societies.

Furthermore, Bovens (2007) states that 'some dimensions, such as transparency, are instrumental for accountability, but not constitutive of accountability; others, such as responsiveness, are more evaluative instead of analytical dimension' (p. 450). Mulgan (2003) and Thomas (1998: 351-352) attempt at length to distinguish accountability from concepts such as responsibility, moral obligation, control and responsiveness.

Thus, although accountability is closely connected with the above-mentioned terms, it represents an altogether distinct concept. For the purpose of this research, we adopt and slightly supplement the definition developed by Bovens (2007, 2010) and adopted by numerous authors since it seems to contain essential elements of accountability, it illustrates precisely its core meaning and purposes, and it makes it possible to

operationalise the concept for research purposes. However, before we proceed to the precise definition, there are two broad distinct conceptualizations of the term accountability that need clarifying: accountability as a virtue and accountability as a mechanism.

Speaking about accountability as a virtue, it is seen as a quality of organisations and the focus is on the behaviour of public actors. We are actually talking about 'being accountable' and the actual and active behaviour of public agents is assessed (Bovens, 2010: 949). The main items on the research agenda are the evaluation of the conduct of actors and the analysis of the factors that induce accountable behaviour. Accountability is the dependent variable; the outcome of a series of interactions between various factors, actors, and variables (Bovens, 2010: 957). Studying accountability as a virtue might prove to be a difficult task due to a number of factors such as the following: the standards for accountability as a virtue depend on circumstances, actors, type of organization and its institutional context, and political systems. Thus it would be difficult creating a standard of being accountable that can be measured on the same scale (Bovens, 2010: 949-950). Bovens (2010) states that Koppell (2005) for example identifies five different dimensions of accountability as a virtue, which are transparency, liability, controllability, responsibility, and responsiveness, but he claims that these are umbrella terms in themselves that need to be further clarified and operationalised (p. 950).

On the other hand, accountability as a mechanism is seen 'as an institutional relation or arrangement in which an actor can be held to account by a forum' and what is being assessed is not the behaviour of public actors but the way in which accountability arrangements operate and whether actors can be held accountable (Bovens, 2010: 946, 948). This is what one could also call passive accountability because actors are held to account by a forum, ex post facto, for their conduct (Bovens, 2010: 951). Studies that conceive accountability in this way focus on the relationship between agents and forums, and accountability is the independent variable, a factor that may or may not have an effect on the behaviour of actors (Bovens, 2010: 957). It is accountability defined in this way that is in the focus of this thesis.

Therefore, the characterisation of accountability taken as a basis for this research is the one that sees it as a mechanism and can be precisely defined as 'a relationship between an actor and a forum in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences' (Bovens, 2007: 447). Different authors have very similar definitions with little changes in the wording but with essentially the same meaning (Weale, 2011: 64; Arnull, 2002: 1-2; Mulgan, 2000; Graham, 1998: 483; Black, 2008: 150; Oliver, 1991: 22; Heritier and Lehmkuhl, 2011: 126).

However, this definition is partly criticized by several authors and needs to be supplemented. Less significantly, Curtin, Mair and Papadopoulos (2010) claim this is a 'thin' definition of accountability since it sees it 'simply as a social relationship between an actor and a forum' and thus offers a limited understanding of the concept (p. 938). Thus, a broader definition is needed that explores 'the links between this narrower conceptualisation of accountability and the other core themes of any political system, including its relationship to democratic representation' (Curtin, Mair and Papadopoulos, 2010: 938). On the other hand, they claim it is a very useful definition since it becomes possible to operationalise accountability and study it empirically with regards to different types of forums, actors and the nature of mechanisms (Curtin, Mair and Papadopoulos, 2010: 938). These claims, however, do not undermine the value of Bovens' definition nor the need to study how accountability operates in this narrow sense.

Furthermore, there is criticism of the conceptualization of accountability as principal-agent relationship, where one party is an agent making choices on behalf of a principal who is in the power to sanction the agent (Fearon, 2006: 55). Accountability presumes a principal–agent relationship of delegation and sees accountability as the appropriate mechanism of keeping the agent in line with the preferences of the principal (Kohler-Koch, 2010: 1118). This has been the dominant perspective on accountability and there have been two options: politicians in agency relationship with the electorate and the executive agencies in agency relations with the legislature (Ferejohn, 2006: 133-134). However, Philp (2009) claims this model needs to be contested for a few reasons. Firstly, it tends to see the relationship between the principal and agent as straightforward where

agents are acting on behalf of the people and are accountable to them. However, this is often not the case since agents tend to be accountable to administrative bodies or courts and not directly to the people. Thus, the people are the principals but the agents are not accountable to them (Philp, 2009: 30). Philp (2009) also adds that agents must not be directly accountable to the ones they serve and that identifying who the principals are is not identical to identifying to whom the agents should be accountable to (p. 30). However, this draws attention to an important question and that is the suitability of the forum. If the forum is not the principal in the accountability relationship, that there is the question of its suitability to hold the agent to account and the basis upon which the forum has the right to hold it to account. Such is the case with legal accountability where the question is whether the judges are competent to decide the legality of government action (Dawn, 1991: 27).

Thus, the definition of accountability adopted for the research is the following: a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct with respect to the principals, the forum can pose questions and pass judgement, and the actor may face consequences (Bovens, 2007: 447; Philp, 2009: 32).

3.3.1. Essential elements of an accountability mechanism

Looking more closely at this definition and operationalising it for research purposes, we conclude that if an arrangement is to be conceived as an accountability mechanisms, it needs to consist of the following stages or elements: the actor, the forum, the principal, and the relationship between the actor and the forum, which in itself consists of a few elements.

The actors are those exercising political authority (Weale, 2011: 65); they are the agents to whom a responsibility has been delegated and they can be individuals, officials or civil servants, or organizations, such as public institutions or agencies (Bovens, 2007: 450). In the specific case of this research, actors are Ofcom, ASA and ATVOD. For accountability mechanisms, it is crucial that the actor is, or feels, not only obliged to act on behalf of the principal (Fearon, 2006: 55), but also to feel obliged to inform the forum about his or her conduct, provide information, explanations and justifications by providing various types of data about the performance of tasks, about outcomes, or about procedures, depending on the case and type of accountability arrangement (Bovens, 2010: 952). The obligations of the actors such as giving explanations and justifications can be formal, informal of self-imposed (Bovens, 2007: 451).

Accountability forums can be specific persons, such as superiors, ministers or journalists, or organizations, such as parliaments, courts, audit offices, or the public (Bovens, 2007: 450). Forums are those entities that are empowered to sanction or reward the actor either by formal institutional or informal rules (Fearon, 2006: 55).

When it comes to the relationship between the actor and the forum, the actual account giving and account holding, it is multidimensional and consists of four elements or stages, although the number varies according to different authors. Firstly, standards or responsibilities that those who are held accountable are expected to meet need to be set, thus there is the standards-setting phase. Secondly, there needs to be the provision of information from the actor to the forum about actor's conduct in terms of, for example, data about performance of tasks, outcomes, procedures, or explanations and justifications. This is the actual account giving stage. Thirdly, there needs to be a possibility for the forum to interrogate the actor and to question the adequacy of the information or the legitimacy of the conduct; apply the standards set previously to ensure compliance and judge the actor's performance. This can be called the account holding or the discussion stage and it is the part of an accountability mechanism where there needs to be space for a critical debate. And finally, the forum may pass judgement on the conduct of the actor, such as approve or reward the actor for successful performance, or condemn it, give recommendations or impose sanctions; in any way produce some

consequences for the actor's conduct and fulfilment of responsibilities (Bovens, 2007: 451; Bovens, 2010: 952; Buchanan and Keohane, 2006: 426; Thomas, 1998: 352). This final stage is called the rectification stage, to borrow Mulgan's (2003) term.

When it comes to the final stage of accountability mechanisms, there is a debate on whether the possibility to impose sanctions is a constitutive element of accountability as a mechanism. Black (2008) for example states that the existence of sanctions should not be decisive whether accountability exists or not, but it only differentiates between its forms (p. 150) and Fearon (2006) represents the similar line of reasoning and claims that if there are no sanction we are still talking about accountability, although about a weaker notion of it that can be blurred with moral responsibility (p. 56).

On the other hand, Bovens (2010) claims that 'the possibility of sanctions – not the actual imposition of sanctions – makes the difference between the non-committal provision of information and being held to account', and should thus be considered as a basic element of accountability (p. 952; Bovens, 2007: 451). However, there seems to be issues with this presumption since then a number of bodies that cannot impose sanctions would be excluded as forums (such as ombudsmen). In addition, Mulgan (2003) states that 'accountability is incomplete without effective rectification' and that 'the full core sense of accountability not only includes the right of the forum to seek information from the actor but the right to 'impose remedies and sanctions' (pp. 9-10). Although Mulgan (2003) here clearly expresses that sanctions are essential for accountability, he also claims elsewhere that the lack of power to rectify does not totally 'cripple the effectiveness of an accountability agency' since public exposure and criticism are sometimes sufficient to make officials take remedial action on their own initiative (Mulgan, 2003: 112).

What appears to be important for accountability arrangements is that the dialogue or the relationship between the actor and the forum has to have a real effect on the conduct of the actor; the forum's response, whether in the form of sanctions or not, needs to make a 'practical difference' to the conduct of the actor, either retrospectively, prospectively, or both (Black, 2008: 150). Thus, the actor either has to suffer the consequences or take

the blame and undertake to put matters right if it should appear that errors have been made (p. Dawn, 1991: 22). Thus, Bovens (2010) proposes a reasonable solution to this dilemma by claiming that instead of using the term sanctions a better expression to be used is 'the actor may face consequences' (p. 952). This proposal seems appropriate since sanctions are not the only form of consequences actors can face for their conduct.

To summarize, for the purposes of this research, accountability is seen as a mechanisms and is defined as a relationship between an actor and a forum in which the actor has an obligation to explain and to justify his or her conduct with respect to the principal, the forum can pose questions and pass judgement, and the actor may face consequences (Bovens, 2007: 447; Philp, 2009: 32). Essential elements of an accountability mechanism are the actor, the forum, the principal, and the relationship between the actor and the forum, which in turn consists of the standard setting stage, account giving, account holding or discussion, and imposition of consequences or rectification stage.

3.3.2. Classification of accountability

Having dealt with the essential elements of accountability mechanisms, there are four key questions that need to be asked regarding accountability arrangements on the basis of which accountability can be classified into different types. They are the following: to whom is the actor to be accountable, who is the actor that should render the account, which aspect of its conduct is the account to be rendered about, and what is the nature of the accountability mechanism (Dawn, 1991: 23; Bovens, 2007: 454-455; Mulgan, 2003: 22-23). Although a relatively straightforward classification can be made and thus differentiate between different types of accountability, it is important to bear in mind that accountability is often imposed in more than one form to several bodies (Dawn, 1991: 28). As we will see later in this chapter, classification of accountability is important for the relationship between accountability and democracy and it raises some important normative issues.

On the basis of the first question, there are at least five different types of forums and thus types of accountability arrangements. This question is important since different forums assess actors on different aspects of their behaviour and apply different criteria (Bovens, 2007: 455).

Firstly, we can talk about political accountability when the actor is accountable to the politicians, to the legislative branch of the government: ministers, Houses of Parliament and their committees, local authorities, or any other members of the political sphere (Dawn, 1991: 23-14; Scott, 2000: 230). In this case, the mechanism of accountability operates in the opposite direction to that of delegation: civil servants are accountable to ministers who are in turn accountable to the Parliament and the Parliament is accountable to the public (Bovens, 2007: 455).

When it comes to the stage of rectification and political accountability, sanctions in this type of accountability are political and not legally coercive (Dawn, 1991: 24). The most obvious form sanctions take are political elections, which in addition provide an incentive for those in the power and for those who would want to be in the power to justify their use of power and explain what they would do (Weale, 2011: 65; Fearon, 2006: 56).

Secondly, we can talk about legal or judicial accountability when an actor is accountable to the courts, either civil or specialized administrative ones, and quasi-judicial bodies such as administrative tribunals (Bovens, 2007: 456; Mulgan, 2003: 33). To what extent a body is liable to legal accountability depends on its constitutional position and function, and the country's legal system (Mulgan, 2003: 76-77). This type of accountability is closely linked to the concept of the rule of law and it is generally understood as requiring public decision-makers to stay within legal boundaries, to establish that they have done so if there is action by the courts, and to make amends if found to have transgressed (Fisher, 2004: 504-505; Dawn, 1991: 26).

Thirdly, there is administrative accountability, which is accountability to non-political bodies such as audit commissions and offices, inspectors and controllers, ombudsmen,

and other bodies concerned with efficiency, effectiveness, value for money, and fairness to consumer, and ad hoc public inquiries (Dawn, 1991: 27; Bovens, 2007: 456; Scott, 2000: 230; Mulgan, 2003: 91). The effectiveness of this type of accountability depends on the development of administrative law of a particular country and the mechanisms such as the use of standards, guidelines and codes of practice, tribunals and enquiries, and various forms of audit, internal review, appeal and complaints procedures and performance indicators (Dawn, 1991: 27). The effectiveness of forums in this type of accountability depends on the extent of their legal powers and the extent of their resources (Mulgan, 2003: 98). With administrative accountability, there are no legally coercive sanctions but just the possibility of recommendations (Dawn, 1991: 27; Mulgan, 2003: 87).

Fourthly, there is public accountability or accountability to the general public or interested sections of the public, non-governmental organizations, interest groups, stakeholders, charities, associations, and various civil interest groups. This type of accountability emerged due to the rise of perceived lack of trust in government, so there has been an urge to make it more directly and explicitly accountable to the public. Public accountability usually involves public reporting, but there is no possibility for judgement and sanctions, and there is not always a clear forum where the actors report and could be debated with. So there is the question to what extent this type of accountability can be considered full accountability (Bovens, 2007: 457; Dawn, 1991: 25-26; Kohler-Koch, 2010: 1119; Mulgan, 2003: 100). Dawn (1991) also adds that the effectiveness of the accountability to the public depends on the availability of information hence freedom of the media, access to information or transparency, and freedom of speech play a crucial role (p. 25).

When we come to the question which aspect of the conduct is being assessed for accountability, Bovens (2007) asserts there is no clear classification since this question is closely linked to the one regarding who the forum is. There are many aspects of the conduct that can be assessed which often concurs with what the forum is, since they assess different aspects of the actor's behaviour.

There is an alternative way to classify accountability

according to this criteria and that is to take into account either procedures or processes or the product or outcome, a particular decision (particular accountability) or the general conduct and policy (general accountability). Moreover, the range of values a body can be accountable for can be divided according to economic values (including financial probity and value for money), social and procedural values (such as fairness, equality, and legality), and continuity or security values (such as social cohesion, universal service, and safety) (Behn 2001, 7-10; Bovens: 2007: 459- 460; Mulgan, 2003: 28, 31; Scott, 2002: 42).

Thus, there are different types of accountability mechanisms and they have been outlined over the previous paragraphs. The next section of this chapter explains why this classification is important and how different types of accountability will be evaluated with reference to one of the main premises of the normative framework developed for this thesis: the existence of institutional structures that would enable citizens to hold Ofcom, ASA and ATVOD to account.

3.3.3 Accountability and democratic governance

Finally, we come to the question why accountability is an important topic and how it is connected to the wider issue of democratic governance. There are claims that new modes of governance are characterized by a lack of accountability since there is no accountability through the traditional democratic channels to the elected representatives due to the hierarchical relationship being disrupted (Black, 2008: 150; Majone, 1994: 22). Regulatory regimes make political decisions but are operating at least partially independently from directly elected political decision-makers. And with all the changes in the regulatory state, it is increasingly difficult to control the regulatory system and trace responsibility (Morgan and Yeung, 2007: 221) since there is an increasing plurality of regulation, with the variety of its forms and venues (Lodge and Stirton, 2010: 350). Thus,

we come to the question what is actually considered democratic accountability, why it is important for democratic governance, and whether Ofcom, ASA and ATVOD are in reality less accountable to the citizens than hierarchical government.

When it comes to the contribution of accountability to democracy, many authors are very vague and attach various purposes to accountability without much explanation or theoretical underpinnings. They claim that accountability is at the heart of democracy, and that it is its foundational principle (Thomas, 1998: 348). However, Bovens (2007) offers a clear explanation of how democratic accountability can be conceptualized.

Bovens (2007) claims the democratic perspective of accountability sees it as a tool that helps citizens control those in the political and regulatory authority. In democracies, citizens are the main principals who grant authority to the agent, who is ultimately owned by the people, and accountability is a mechanism for people to exercise control over those to whom they have granted authority (Mulgan, 2003: 12; Bovens, 2007: 463; March and Olsen 1995: 141–81).

It is taken that actors would only act according to the preferences of the citizens if they are held accountable by them (Take, 2012: 3; Mansell, 2012). In the normative framework developed for this thesis, it is one of the three basic ingredients for regulatory governance to be considered democratic in addition to transparency and deliberative participation by the citizens. A responsive government is the one that acts in ways that citizens prefer, thus responsiveness is closely linked to accountability since one of the key purposes of accountability is to make sure agents are responsive to the wishes and interests of the principals; 'responsiveness is an end to which accountability is a means' (Mulgan, 2003: 21).

Thus, if accountability is to serve democracy in this way, certain conditions need to be met, such as the following: citizens need to be involved in the standards setting stage, they should be provided with sufficient level of information regarding actor's behaviour, there should be a forum for debate between the citizens and the actor, and the citizens

must have certain powers when it comes to the rectifications stage (Bovens, 2007: 465). In other words, citizens need to be engaged and empowered when it comes to all different stages of accountability mechanism.

However, the way analysis of accountability will be organized is around different types of accountability mechanisms. As we have discussed over the previous paragraphs, there are different types of accountabilities: public, judicial, administrative and political. What will not be assessed is political accountability. This research is concerned with the regulatory process itself and to what extent its structures provide the citizens with opportunities to engage in the decision-making processes and hold the regulators to account. The role of the politicians is something that is referred to as meta-governance and is not something that this thesis is concerned with. One of the purposes of new modes of governance has been to provide the citizens with means to engage directly, thus, the role of the politicians is not considered relevant for the purposes of this research.

Thus, what will be evaluated is public, judicial and administrative accountability. However, since we are ultimately interested in the power of the citizens to hold regulators accountable, we are also interested in the extent to which there is a link between judicial and administrative accountability and the citizens. In other words, are courts and administrative tribunals accountable to the citizens? Are they legitimate to be the forums on behalf of the citizens? This has been referred to in the literature as compounded accountability: the extent to which those holding governance bodies accountable are themselves accountable more widely for their performance as account-holders or forums (Mulgan, 2004: 66-7).

In this way, we are truly attempting at evaluating democratic accountability, or the extent to which citizens can hold Ofcom, ASA and ATVOD to account.

3.4 Conclusion

The aim of this Chapter has been to build and further specify the normative framework that has been developed and justified in Chapter Two.

As it has been discussed, new modes of governance assessed in this thesis, Ofcom, ASA and ATVOD, can claim to be democratic if they empower the citizens by providing them with transparent intuitional structures that would enable them to deliberate upon regulatory decisions, and hold the regulators to account. As the focus of the discussion in Chapter Two has been on justifying this particular normative stance taken, this Chapter has deal with specifying its key elements: transparency, democratic, deliberative participation and democratic accountability.

When it comes to transparency, we have established that it has broadly two meanings: one of them is governance according to fixed and published rules, and the other is the extent to which information about the work of regulators is available. We have also determined that transparency will be evaluated against what are taken to be its core purposes for this research: providing the citizens with sufficient information to engage in deliberation and hold the regulators accountable. Thus, different means of information provision will be evaluated according to the extent they meet these core purposes. And the final essential ingredient of effective transparency is defined as publicity, which will also be assessed.

Speaking of democratic, deliberative participation, the assessment of institutional structures for citizen participation will focus on determining to what extent they provide an inclusive opportunity for equal citizens to engage in deliberation and influence final, biding decisions by the regulators. The analysis will be structured around three different types of arenas for citizen participation: empowered space, public space and minipublics, which all differ on the basis of whether they imply decision-making powers. Lastly, a systemic approach is adopted that allows for different fora to be evaluated as a part of a system.

When it comes to the final element of the normative framework, democratic accountability, it is seen as a mechanism that enables citizens to control the regulators and make them responsive. This mechanism consists of four different stages: standard-setting, account giving, discussion, and rectification stage, and these different stages will be evaluated when it comes to different types of accountability arrangements: public, judicial and administrative accountability. In addition, it will be evaluated to what extent these different types of accountability mechanisms contribute to democratic accountability, which is the ability of citizens to hold the regulators accountable.

With this Chapter, the normative part of the thesis ends, and what follows is the first analytical Chapter that evaluates how transparency operates in practice when it comes to Ofcom, ASA and ATVOD.

4. Chapter Four: How transparent are Ofcom, ASA and ATVOD?

'It is only possible to form an empowered choice to the extent that the affected know what is going on in and around the networks'

(Sorensen and Torfing, 2006: 259).

Communications Act 2003 places an overarching duty on Ofcom 'to have regard in all cases to the principles under which regulatory activities should be transparent'. By contracting out duties for regulation of commercial communications in linear and non-linear TV to ASA and regulation of editorial content in VoD to ATVOD, Ofcom has transferred this primary principle to these bodies as well.

Although it has been claimed that, for example, Ofcom is unprecedented in its effort to be transparent (Freedman and Schlosberg, 2011: 45), and UK in general is, according to Transparency International, one of the rare countries in the world with highly transparent governance institutions, this chapter looks at the quality of the information available and how transparency in practice when it comes to Ofcom, ASA and ATVOD compares to transparency in normative terms.

As the discussion in Chapter Three has revealed, transparency has two main meanings: the first is related to decision-making according to clearly established, fixed and published rules, and the second refers to the availability of information about a public body that allows other actors to monitor the workings or performance of it. On the basis of this broad distinction, the evaluation of transparency when it comes to Ofcom, ASA and ATVOD will be organized in this Chapter.

However, when it comes to the second meaning of transparency, availability of information about the work of a public body, there are two main ways of information provision. The first channel of transparency is proactive release where documents and information are actively disseminated by the regulators, and the second is the option to request information enabled by different freedom of information laws. Thus, both proactive release of information and the operation of the Freedom of Information Act (FOIA) 2000 in the UK will be analysed.

Another point that must be made and that affects the analysis and organization of this Chapter is that transparency is seen in terms of its extrinsic and not intrinsic value. Its extrinsic value in the case of this research is to what extent it provides the citizens with sufficient level of information in order to enable them to deliberate and hold the regulators accountable. Therefore, it will be evaluated whether these two purposes are met.

Finally, this Chapter will discuss to what extent the information made available is publicised. Publicity is seen as crucial in enabling effective transparency since mere provision of information is not seen as sufficient.

Therefore, to summarise, the analysis in this chapter will start with evaluation of transparency in its meaning of governance according to fixed and published rules before it proceeds to assessment of proactive release of information, the value of information available for accountability and participation, the operation of FOIA 2000, and the extent of publicity of available information.

4.1. Transparency as published and fixed rules

One of the core meanings of transparency this research is evaluating is the existence of both *published* and *fixed* rules, and the following few paragraphs represent an assessment of these aspects when it comes to the regulatory bodies studied.

When it comes to the question whether the rules according to which Ofcom, ASA and ATVOD operate are published, the answer is that they are, and they are so for several reasons. The rules for the processes and procedures Ofcom, ASA and ATVOD are following are published on their websites, and, as the section analysing websites will show later on in this chapter, they are clearly labelled and easy to find. In addition, each of the separate structures within these bodies, such as Advisory Committees, Content Board when it comes to Ofcom, or Independent Reviewer and AAC when it comes to ASA, have their own set of procedures, which are as well published and clearly explained.

Establishing how and according to which principles and rules co-regulatory bodies and Ofcom work and co-operate does not require anything more than simple desk research and search of their websites. In terms of these being understandable, this might require specialized knowledge.

As to the reasons why these rules are published, the basis is found in the Communications Acts 2002 and 2003. Firstly, one of Ofcom's overarching and broad principles is to be transparent, and although Ofcom does to a certain extent has the power to define what this means, it is under a range of additional statutory duties in terms of publications, and one of them is the provision that it must establish and publish the rules regarding its committee proceedings (Communications Act 2002, sections 14 and 15).

Secondly, Article 22 of the Communications Act 2002 makes provisions for the FOIA 2000 to be applied to Ofcom, thus Ofcom is obliged to abide by the Information

Commissioner's Office (ICO) model publication scheme, which prescribes, among other things, that policies and procedures, such as current written protocols, policies and procedures for delivering services and responsibilities, must be published as well as other organizational structures and processes (ICO, 2014).

When it comes to co-regulatory bodies, Ofcom's obligations in terms of transparency of rules are to a certain extent transferred to ATVOD and ASA through Memorandums of Understandings (MoUs), which form a legal basis for their work. Firstly, MoU with ATVOD ensures that it needs to, in performing any of its functions, comply with any statutory obligations applying to Ofcom, and Ofcom's overarching principles are referred to in particular: 'to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed'.

Secondly, MoU with ASA, in addition to making reference to the above-mentioned principles, prescribes that ASA should design and publish procedures for handling complaints. Thus, Ofcom has transferred some of its statutory duties in terms of transparency to ATVOD and ASA. In addition, there is a general sense that transparency is something that needs to be achieved (Shahriar Coupal, private interview, 2014)[1], and this seems to work particularly well when it comes to making information about rules and procedures available to the public.

When it comes to the second part of the question, and that is whether the rules are fixed, what ensures this is the possibility of judicial review. Ofcom, ASA and ATVOD are all subject to judicial review for procedural issues, thus the level of compliance is very high. Ofcom is exceptionally particular when it comes to procedures. In addition, as Graham Howell[2] has remarked in the private interview with the researcher (2014), 'the issue for Ofcom is that every decision can get challenged, and the appeals system is such that companies challenge them through the courts, which is hugely resource intensive and

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[1] Shahriar Coupal, Director of the Advertising Committees CAP and BCAP, ASA
[2] Graham Howell, Director England and Secretary to the Corporation, Ofcom

expensive. Thus, Ofcom tries to make sure that if there is an appeal they win it, so they have to ensure their internal processes are absolutely 'watertight'. Therefore, a number of teams and employees scattered around the organisation are responsible for the procedures. And as Stewart Purvis [3] noted in the private interview (2013), there is a very legal culture at Ofcom with a high emphasis on due processes. Moreover, Philip Graf [4] (private interview, 2013) has remarked when asked the question whether there were major conflicts between the Content Board and the Main Board at Ofcom: 'No, most of the issues we had was with the lawyers on what we can and cannot do!'

When it comes to ATVOD and ASA, since Ofcom remains ultimately responsible for the duties is has contracted out under DCOA 1994, it ensures procedures are followed when it comes to ASA and ATVOD. Contracting out makes the rules fixed, which is considered one of the advantages of these arrangements. MoUs clearly set the duties and processes for all the parties and how they will work together. In addition, both ASA and ATVOD are subject to judicial review.

Therefore, when it comes to the first meaning of transparency, the analysis revealed no major issues. There is the statutory duty to publish information, and, since the threat of the judicial review is very strong, these procedural rules are also followed in practice.

The next section of this chapter takes the discussion forward towards evaluating the second meaning of transparency, and that it the availability of information regarding Ofcom's, ASA's and ATVOD's regulatory activities.

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[3] Stewart Purvis, currently a Professor at the City University London, previously Partner for Content and Standards, Ofcom
[4] Philip Graf, previously Chairman of the Content Board, Ofcom, currently Chairman of the Gambling Commission

4.2. Transparency as availability of information

As it has been discussed in the normative part of the thesis, namely in Chapter Three, and briefly mentioned in the introduction to this chapter, there are two main ways of information provision when it comes to the second meaning of transparency, which is availability of information about the work of public bodies. The first channel of transparency is proactive release where documents and information are actively disseminated by the regulators, and the second is the option to request information enabled by different freedom of information laws. Thus, we will assess both of these separately.

4.2.1. Analysis of proactive release of information

When it comes to evaluation of proactive dissemination of information, the analysis starts with regulators' websites since they are the main gateway for the information released proactively. Subsequently, the quality and usability of this information for the purposes of holding ASA, Ofcom and ATVOD accountable is evaluated. And finally, we look at the level of sufficiency of available information for participation and the relationship between participation and transparency.

4.2.1.1. Websites

Ofcom's, ASA's and ATVOD's websites are an excellent example of how the

development of ICTs has affected transparency both positively and negatively. Vast amount of information is available on their websites that can be accessed at any time and place. However, these websites are also an example of how ICTs can decrease transparency, in this case for those who are not online or 10% of the UK population (Ofcom, 2014), and for those small consumer organizations that find it difficult to download and print long and large amounts of documents (The Panel, 2006). Since regulators' website are the starting point for search and acquisition of information, those who are not able to use them effectively are heavily disadvantaged.

A number of criteria have been developed based on the literature review to analyse the quality of Ofcom's, ASA's and ATVOD's websites and these criteria have been organised around four broad categories: transparency in the narrow sense, interactivity, usability, and website maturity (Gant and Gant, 2002; Demchak et al, 2000; La Porte et al, 2002; Torres et al, 2006). Although it can be claimed that what is most important is to what extent information that is on the websites increases transparency, the way that information is organized and to what extent it is readily usable would largely influence whether the information and documents provided truly lead to increased transparency. Thus, all four categories are deemed important.

When it comes to transparency in the narrow sense or the content and information that is provided on the websites, what all three regulatory bodies have in common is the high quality and extent of the information provided about their internal organization, decision-making processes and procedures, as well as specific information about their remit, relevant legislation, different reports and publications. In addition, there is information regarding what the results of their regulatory activities can be when it comes to citizens and businesses and how they can get involved. This content is also regularly updated, and, in case of Ofcom and ASA, it is adjusted to suit and address different audience. For example, they both have special sections for different stakeholders such as citizens, consumers, the media and the industry, which would to a certain extent contain tailored content to address the needs for information of these different stakeholders. Ofcom also has content organised according to different areas it regulates, such as broadcasting, telecommunications or the post. There are no such options when it comes

to ATVOD, although it is important to bear in mind its remit is much more narrow in comparison to both Ofcom and ASA and it has a much shorter history. What is also explained is how these regulatory bodies work with other institutions, such as other regulators, government departments, and so on, with the links for these institutions being provided. All of these websites also have security and privacy statements.

However, what can be improved is the lack of contact information for the key people inside the organisations, since on the websites of ASA, ATVOD and Ofcom only general contact information can be found. This has also been pointed out in the private interview with Claire Milne (2013)[5]. There is also the lack of contact details for people responsible for content and technical support; there is only a general online form that can be filled in when it comes to Ofcom. This is important for transparency since there should be an easy way to contact staff if help is required in locating important data or reporting problems. And finally, in terms of content provided on the websites, there are no live broadcasts of important speeches or events, and regulators are not providing podcasts, but this is characteristic since there is very little so-called fishbowl or transparency in real time in general.

Although the discussion regarding interactivity overlaps with the issue of participation, interactive websites are also important for increased transparency regarding regulators' activities. When it comes to Ofcom's, ASA's and ATVOD's websites, level of convenience is high, and they offer the possibility of registering in order to receive updates or newsletters. What is missing however, is the degree of immediate feedback and means to interact with the people inside the regulators: there are no use of e-mail links or dialogue boxes to contact the people nor general areas or forums to post comments. There are general contact details and explanations how to complain, which is symptomatic of the way engagement with the citizens is conceptualised: in terms of complaints and not in terms of engagement on policy and regulatory issues, which will be

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[5] Claire Milne, previously the Chairman of the Consumer Forum for Communications, Ofcom, currently Visiting Senior Fellow in the Department of Media and Communications, LSE, and independent telecommunications policy consultant

discussed in much more details in the next chapter. This shows clearly that website are not a gateway for participation.

Speaking of usability, websites rank high, but only if we are talking about English language users and those without major disabilities. Ofcom and ASA have developed accessibility for visually impaired in terms of text size and colouring and a text phone in case of Ofcom, but a major issue is that there is no provision of audio or video files. In addition, there is very little information in minority languages with ASA and Ofcom providing only basic information in Welsh.

On the other hand, ease with which users can access the information and navigate the web portals is high, there is a 'What's new' and FAQs section (not when it comes to ATVOD), search engines, specialized databases, and a uniform layout, which all help using the websites. What would improve usability of these websites is a provision of a sitemap, an A to Z index, and a glossary for technical or difficult terms.

Finally, all the websites show a great level of maturity with very few broken links, and with a very good structure and arrangement of content both in terms of hierarchy of events and areas of regulation.

Thus, what can be concluded is that there are no major problems with the websites. Since they provide the main access point for all the information released by the regulators proactively, the way they are organized in no way presents an obstacle for transparency.

4.2.1.2 Value of proactive release of information for accountability

As it has been discussed in the normative chapter, transparency is evaluated for its extrinsic value or for the extent to which it enables the citizens to have sufficient information in order to participate in deliberations and hold Ofcom, ASA and ATVOD to account. This section of the chapter provides an analysis of the later: to what extent the information released proactively is sufficient to enable the citizens to hold the regulators accountable.

Provision of information is one of the most important elements of any accountability mechanism. Without the necessary data, it would be impossible to establish whether regulators are performing their objectives correctly. When it comes to the information necessary for accountability, many aspects of the conduct can be assessed: procedures or processes, decisions, actions or outcomes, a particular decision (particular accountability) or the general conduct and policy (general accountability). For the purposes of assessing transparency for accountability, it has been taken that knowing the following information is essential:

- who makes the decisions;
- through which processes (how) the decisions are made;
- what the decisions are;
- what the justifications for the decisions are;
- what the information and evidence is on which the decisions have been based; and
- what the consequences of the decisions are for different stakeholders (Bovens, 2007, 2011; Prat, 2005: 862; Torfing et al, 2012: 16; Licht et al, 2014: 113-5; Mansbridge, 2009).

Thus, the information provided proactively has been analysed in order to establish the extent to which it gives answers to these questions. Although the existence of fixed and published rules is also important for accountability since it gives indications as to who is responsible for what and what the processes are in general, what has been particularly analysed in this section are annual reports, meeting minutes, consultations, and

adjudication decisions since they contain the highest level of details when it comes to why and how certain decisions have been made, which is essential for accountability relations.

The quality of the provided information for accountability is measured against a set of criteria:

- reasonably complete, which means there is sufficient information to 'see the complete picture', and there is none or very little unnecessarily obscured or hidden data. If the information is not reasonably complete, a doubt is cast over it and the credibility of what is made visible is decreased;
- reasonably understandable, although it is recognized that this would depend on the audience and to what extent the regulators factor this into their practices;
- visible, which means accessible to a wide range of users for a variety of purposes, found with relative ease, and publicised;
- reliable, which would depend on a few factors such as low level of mediation, raw or close to the source, primary data, and verified by a third party;
- timely; and
- non-discriminatory, which means available to everyone in a non-proprietary format that is easy to process (Michenera and Berschb, 2013: 238; Hood, 2007).

A number of these criteria have been met across the range of different sets of documents studied. Documents proactively released by Ofcom, ASA and ATOD are reasonably understandable, although this can be debated since it largely depends on the audience and does require at least a basic knowledge of regulatory issues. Ofcom has been criticized for the length and complex language of its consultation documents (for example The Panel, 2006), but has made an effort to adjust them to different audiences and produce a summary that bears a Crystal Mark by the Plain English Campaign, an intention Ofcom has had since its establishment (Ofcom, 2004: 5). Graham Howell (private interview, 2014) [6], who among other roles is the consultation champion at Ofcom, has pointed out that there are not many complaints about the consultation

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[6] Graham Howell, Director England and Secretary to the Corporation, Ofcom

process at Ofcom, but an issue that does come up from time to time is that the documents are too complicated although Ofcom strives to find ways to make them easier to understand, especially the technical ones and those that might interest individual citizens as opposed to businesses mostly.

In addition, the documents provided are accessible and can be found with relative ease. As the previous section of the chapter has shown, the websites of these regulatory bodies are well organized and structured, with the information and documents clearly labelled. Being accessible is one precondition for these reports to be considered visible, the other is its publicity, and it is here that improvements can be made, although not necessarily by the regulatory bodies themselves, which will be discusses later in the chapter.

No issues have been identified when it comes to timeliness of the release, and documents are in a format that is non-discriminatory, apart from two latest annual reports by ASA that are in a format that cannot be downloaded from their website.

However, there are two issues with the quality of the information released proactively in terms of it being reasonably complete and reliable, and we will look at the different sets of documents separately.

4.2.1.2.1. Annual Reports

The main sources of information for accountability are annual reports. It is set in the statute that through these reports Ofcom will be accountable (Communications Act 2002, section 11), and MoUs with ASA and ATVOD prescribe that these bodies are to provide Ofcom with information through annual reports as well.

When it comes to annual reports and the extent to which they can be evaluated as reasonably complete, the analysis has revealed that they are lacking in certain important aspects and are of limited use when it comes to holding the regulators accountable. What is lacking is why and how certain decisions have been made, what the justifications for particular choices are, what different choices have been available initially, the evidence and information on which they have been based, and the consequences of those decisions. The lack of these classes of information is particularly striking bearing in mind that annual reports are the main means of information provision for the purposes of accountability. Annual reports are revealing when it comes to actions and final decisions that have been reached by the regulators, and, on some occasions, although this can be described as rare, of the decision-making processes. There is a focus on reporting decisions and actions when it comes to all three bodies being in the focus of this research.

This has been seen as one of the consequences of NPM reforms. From the point of view of the private sector where there are clearly defined bottom-line objectives, the public sector organisations are not sufficiently accountable since their goals are often imprecise and unarticulated, thus officials are unconcerned with reporting about efficiency and effectiveness in term of measurable results. Therefore, as an integral part of NPM reforms, the conceptualisation and practice of accountability has changed when it comes to a few aspects. One of them refers to '*for what*' dimension of accountability that has shifted its focus from input and processes to clear and measurable results (Mulgan, 2003: 156; Thomas, 1998: 379). One of the goals of NPM reforms has been to make governments more accountable for results and increase bottom line accountability in terms of specific and measurable objectives (Mulgan, 2003: 159), which is evident from the content of the annual reports published by Ofcom, ASA and ATVOD. The examples are many, but we will focus on illustrative few that are relevant for our case studies: delegation of regulatory powers to ASA and ATVOD, and regulation of alcohol ads and product placement.

Ofcom's Annual reports are structured in such a way that key people, departments and structures have their reporting sections over a few pages, and there are sections devoted to illustrating to what extent Ofcom has met its main objectives, such as reducing

regulatory burdens. What all these sections have in common is that they tend to be very descriptive, short and reveal very little in terms of why Ofcom has made certain decisions. The examples that are being looked at are the decisions to contract out regulation of broadcast advertising to ASA(B) in 2004, and the delegation of regulation of advertising in VoD to ASA in 2010. The aim of the analysis is to establish to what extent annual reports published by Ofcom from 2004 to 2014 reveal sufficient level of information regarding these decisions.

Ofcom's Content and Standards Department, which has been in charge of delegation to co-regulatory bodies among many other things, outlines its report on two pages only and dedicates a paragraph for selected decisions they have made. Thus, for example, in the 2003/04 Annual Report, they stated in two sentences that they had consulted on the proposal to establish a new co-regulatory system with ASA for the regulation of broadcast advertising, and they stated that the proposal intended to establish a one-stop shop that was 'easy for audiences to access, is effective in preventing or addressing problems and is a cost-effective means of regulating' (page 36). There are no details as to what the proposals were in details although the second sentence can be taken as the justification for the decision.

In the next year's Annual Report, the level of details increased regarding the same topic, and Ofcom stated in what way some consultation responses had been adopted, such as the following:

- the decision was made to establish the Advertising Advisory Committee in order to bring lay and expert input to the codemaking;
- it was decided to keep Ofcom's right, as a last resort, to insist on changes to the broadcast advertising codes; and
- it was stated more clearly which advertising regulation functions would be contracted out and which would remain within Ofcom (Ofcom, 2005).

In addition, Ofcom stated it was satisfied that the new system would be effective, adequately funded and would have a sufficiently independent co-regulator and that it would be launched in November 2004 following Parliamentary approval (Ofcom, 2005: 48). Although this example represents the one where there is the highest level of details,

it still does not show the depth of the debate regarding this issue and does not provide us with sufficient level of information.

Every other structure within Ofcom reports much less on this issue. Thus, Chief Executive's reports over the years only mention the matter and there is a sentence in the 2004/05 Annual Report: 'In broadcasting, we delegated regulation of broadcast advertisements to the industry self-regulator, the Advertising Standards Authority (ASA)' (page 8).

Content Board reports are also very ungenerous when it comes to details since they only list in bullet-point format what they achieved over the course of the year. Thus, they mention in the Annual Report 2004/05, page 17, that they 'provided input to the contracting out of the regulation of broadcast advertising content to a new co-regulatory system under the auspices of the Advertising Standards Authority (ASA)' without mentioning what that input contained. The only other time the issue of co-regulation is mentioned is in the Annual Report 2010/11, page 11, where they are stating that the Content Board

> 'have worked with a range of co-and self-regulators in the sector and we continue to look at the wider role and benefit of content co-regulation. For the first time this year BCAP, the Committee of Advertising Practice, issued a single consolidated Code, which the Content Board reviewed and approved, offering audiences important protections across radio and TV advertising'.

Thus, Content Board reports within Ofcom's Annual Reports are not particularly revealing in terms of how Independent Board Members have acted in the interest of citizens, what the discussions, arguments and disagreements occurred, and they are very limited in what they cover in comparison to the number of meetings where these issues had been discussed. As the analysis of the meeting minutes has shown, the issues of co-regulation have been discussed at forty-five meetings of the Content Board, and the above-discussed sentences are the only time some details, although evidently very scarce, are revealed.

Another section where information about the way Ofcom has dealt with the issue of co-regulation is given is the Stakeholder section. Ofcom considers ASA and ATVOD to be its stakeholders, but this section is extremely descriptive. In the Annual Report 2010/11, with which this section has commenced, Ofcom stated that they had designated ASA as the appropriate regulatory authority in respect of advertising in video-on-demand services (page 39). In the next Annual report, Ofcom outlined briefly what ASA is responsible for and that Ofcom acted as the backstop regulator. The exact same wording was repeated in the next two years' annual reports.

In the same stakeholder section of their annual reports, the way Ofcom involves other stakeholders is also outlined and this could be relevant for holding Ofcom to account for the way it engages with citizens and consumers if only it was not focused on numbers and brief references to research. It deals with the number of consultations, complaints, and lists topics of research being published. In the External relations section, the work of Ofcom's different advisory committees is mentioned as well as its regional teams, however, there are only details regarding the membership and very broad description of their roles.

Thus, if we use Annual Reports as a source of information on what Ofcom has achieved in terms of co-regulation, why, and through which processes, we do not discover a lot.

ASA's annual reports are structured in a similar way in comparison to Ofcom's with different structures within ASA presenting their respective reports. The reports of ASA, which is the executive part of the co-regulator, would usually contain a sentence or two related to alcohol ads, such as the mentions that there were public meetings where alcohol ad rules have been discussed between different stakeholders, ASA members of staff and the Chairman in Manchester (ASA, 2004: 11), in Bristol (ASA 2006: 5), and in Edinburgh (ASA, 2008: 2, 8). There is no reference as to the details of these debates or how the feedback has been used by ASA and BCAP.

In addition, if there was a significant event regarding alcohol ads, it would be noted, but similarly briefly. In the Annual Report 2003/04, they mention that Ofcom published new alcohol rules that are to be considered under ASA's expanded remit (page 11). There is a special section where ASA's Chairman would present his report and draw attention to developments regarding alcohol ads, if there were any. Thus, in AR 2004/05, page 3, it is stated that in the previous 12 months new rules and guidance for alcohol advertising have been introduced, and in AR 2006, the Chairman claims that 'public policy concerns have led to new restrictions on advertising for alcohol, food and gambling' (page 2).

CAP's reports are most revealing when it comes to alcohol ads, but they tend to be very descriptive, do not reveal many details and focus on what actions CAP and ASA took as a response to the concerns regarding alcohol ads. CAP reports have a section 'In focus' that deals with topical issues in advertising regulation and alcohol ads have featured for three times, which is a reflection of the salience of the issue in the UK over the past decade and the debate that has intensified over the years. This section is a good opportunity to deal with an issue in more depth, but is usually a missed opportunity since it remains as descriptive and focuses on promoting CAP's work. CAP's reports usually point out that there have been some changes when it comes to alcohol ads, describe what they are and what the role of ASA and CAP is. For example, it is pointed out that new rules were published by Ofcom in 2004 that represented a further restriction of alcohol ads in four different respects (appeal to children and teenagers, reduction of sexual content, and encouragement of anti-social or irresponsible behaviour and especially excessive or binge drinking) and that CAP would consult on and publish guidance to accompany these rules (ASA, 2004: 40). In the following report it is stated that these rules came as a result of Government's 2004 Alcohol Harm Reduction Strategy and one of its suggestions that Ofcom should review the rules (ASA, 2005: 25-8). In the Annual Report 2006, they inform us that CAP and BCAP introduced new rules on health, diet and nutritional claims in alcohol ads (page 24). Alcohol is in focus again in 2008 and 2009, and there is a very descriptive report regarding what BCAP and ASA have done in terms of monitoring compliance, commissioning research with Ofcom, upholding complaints, organizing a seminar in Edinburg, conducting industry training and providing guidance to help advertisers (ASA, 2009: 9; ASA, 2008: 6-8).

Once again, the focus is on actions and decisions, with almost no justifications. The debate about regulation of alcohol ads is quite complex and there has been a lot of activity, reports, research, and recommendations in the UK over the years. There are varied perspectives and evidence, and it is not clear from ASA's annual reports how they have dealt with these and why some evidence and suggestions have not been accepted as robust enough, for example, the introduction of a complete ban or the watershed.

When it comes to the ASA Council, annual reports only outline who the members are, and speaking of the section dealing with the work of the Independent Reviewer, it just discusses the number of cases he has dealt with. There is no reference to specific ads and his reasoning in relation to them. Furthermore, ASA's annual reports contain sections from AAC as well. However, they are very scarce in terms of details. The Chairman of the AAC would mention which issues they tackled, including alcohol advertising, but there is no details regarding what decisions they have made and whether these particular decisions have been accepted by BCAP. The usual sentence is that their advice has been valued or that BCAP accepted most of the changes they suggested but decided not to incorporate some. The only revealing detail was mentioned in the 2009 Annual report when AAC claims that they have considered the Sheffield University Review (ScHARR), which considers the relationship between the price and promotion of alcohol and alcohol-related harm. This study was refer to BCAP for consideration by the Department of Health and has also been widely used by public interest groups to argue for tighter restrictions on alcohol advertising. It is revealing to read in AAC's report that they have decided that ScHARR Review did not provide persuasive evidence that BCAP should consult further on changes to the then current broadcast rules for alcohol advertisements (ASA, 2009: 35). It is also interesting to note that this is the only time this study has been mentioned in ASA's Annual Reports and it has been otherwise considered to be extremely influential. This example is very symptomatic of the extent of details we get in ASA's annual reports when it comes to the level and substance of the debate regarding alcohol ads rules.

This is particularly important because none of the structures within ASA publish meeting minutes, thus Annual Reports are the main means of making this body transparent. Annual reports can serve as a good starting point, but unfortunately with ASA, there is no next step. ASA's annual reports are dominated by figures in terms of compliance surveys, complaint analysis, and customer satisfaction, which is a results of the MoU with Ofcom and focus on KPIs and performance, as will be shown later in this chapter. Thus, they are not a very good source of information on how and why certain decisions have been made, and what the consequences are.

When it comes to ATVOD, we are interested in the way it handled the regulation of product placement in VoD. Its annual reports resemble Ofcom's and ASA's both in terms of the structure and level of details. They are very descriptive and there is a focus on figures, actions and decisions. However, when its annual reports are analysed, there is no mention of product placement. From the private interview with Pete Johnson (2014), the Chief Executive of ATVOD, and Julie Hornle (2013), one of the Independent Board Members, it has been learnt that product placement has not been a significant issue when it comes to VoD since it has mostly appeared in programmes that have already been broadcast on linear television. Thus, ATVOD has not consulted on rules and guidance in relation to the regulation of product placement, has not adjudicated on any complaints regarding the issue and has not performed any proactive monitoring, which all falls under its remit. However, this has not been explained in annual reports. Thus, if we are to hold ATVOD accountable for its work on product placement according to the information published in its annual reports, it would appear that it did not fulfil its remit.

Therefore, it emerges that annual reports are beneficial for giving a useful overview of how Ofcom, ASA and ATVOD work in terms of their internal structure, role and remit, and what their most important achievements have been for the respective year. However, the lack of details and focus on performance and numbers makes them unsuitable as a source of information for the purposes of accountability.

Another problem with annual reports apart from the issue of completeness is the extent to which they can be considered reliable. The most important problem here is high level of mediation. Annual reports read more like promotional, PR pieces whose aim is the advertising of the achievements of the regulator. They cannot be described as raw or close to the source, and, apart from financial reports, they are not verified by a third party. The information also seems to be selectively presented. For example, it has been learnt in the private interview with Stewart Purvis (2013) [7] that creation of ATVOD has been government's idea and that Ofcom has been reluctant to delegate its powers in this case. However, information such as this is not presented in annual reports. All these factors have an influence on the extent to which we can consider annual reports reliable.

There appear to be two reasons as to why annual reports are scarce when it comes to information that does not relate to performance and actions. One is that regulators have many objectives to fulfil and there are problems in finding a structured and clear way to cover all the issues. For example, Ofcom had 263 statutory duties when it was established, the number of which has increased with the implementation of AVMS Directive and its extension of remit to regulate postal services for example. The solution to these problems is often the establishment of KPIs and increased focus on performance.

In addition, another reason is that the focus on performance and figures is a consequence of the thinking about accountability over the past decades and NPM reforms. There is a general focus on performance, measuring effectiveness, and the need to report on KPIs, which is reflected in the MoUs with ASA and ATVOD, and in the statute. There is the focus on final decisions and actions, but not how they have been achieved and what the consequences of specific decisions are.

Moving on to the next type of documents, the following section presents the discussion regarding the completeness and reliability of information provided in meeting minutes.

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[7] Stewart Purvis, currently a Professor at the City University London, previously Partner for Content and Standards, Ofcom

4.2.1.2.2. Meeting minutes

When it comes to meeting minutes and the types of problems the information they contain raise in terms of completeness, the document analysis revealed four distinct issues:

- inconsistent level of details when it comes to the discussions held at the meetings in terms of different arguments and perspectives, with the details ranging from summaries of different perspectives and arguments to just stating the topic of the discussion;

- there are most often no details as to what officials from other structures or regulators are saying when they attend the meetings and this is particularly important since they often initiate the discussion such as the executives from Ofcom's Content and Standards department attending Content Board meetings, members of the Content Board attending Main Board meetings, or executives from ASA and ATVOD attending Content Board meetings;

- a number of items are withheld from published minutes without an accompanying information as to the reasons why, thus leaving no clues as to the importance of the withheld information. For example, the complete contents of the 9th meeting of Ofcom's Content Board is completely withheld; and

- there is no supply of the papers, presentations and reports presented at meetings, which is of high relevance for determining whether the best decision has been made on the basis of available evidence.

These issues are usually combined and they are influencing the level of transparency when it comes to meeting minutes. This is consequently making it impossible to establish the contents of the discussions held, why certain decisions have been made, and how different perspectives have been balanced.

The fullest meeting minutes are published by Ofcom's Advisory Committee for Wales (ACW), which in most cases present a detailed summary of the discussions together with the conclusions reached, decisions made, and actions to be taken with the initials of the person responsible for them. However, as the decision-making power of the structure increases, the level of details decreases. In addition, the level of details has decreased over time. Thus, the meeting minutes of Ofcom's Main Board now mostly contain only topics of the discussions held. There is a bit more consistency when it comes to ATVOD but fewer details: it is stated a paper is NOTED, an issue is CONSIDERED, and AGREED, but there are no details as to the substance of these.

The following excerpts from meeting minutes attempt at illustrating the issues discussed:

- 5th meeting of Ofcom's Content Board, page 4: 'Publication of Consultation On A Proposal to Contract Out The Regulation of Broadcast Advertising: Paper CB17(03) 23. Kip Meek introduced the paper that sought the Content Board's approval for the publication of a consultation document by Ofcom on "The Future Regulation of Broadcast Advertising". 24. [Withheld from published minutes] The Content Board NOTED that these issues would be explored via the consultation. 25. The Content Board APPROVED the consultation document for publication.

- 10th meeting of Ofcom's Content Board: Update on Advertising Co-Regulation – Paper CB 24(04) [Withheld from published minutes - staff] introduced the paper, which updated the Content Board on progress on the project to contract out the regulation of broadcast advertising to a new co-regulatory system under the auspices of the Advertising Standards Authority (ASA). The Content Board NOTED progress and, particularly, the outstanding issues to be resolved with ASA to conclude the draft Memorandum of Understanding between Ofcom, the Advertising Standards Authority (Broadcast), the Broadcast Committee of Advertising Practice and the Broadcasting Standards Board of Finance.

- 108th meeting of Ofcom's Content Board: Item 7: ATVOD Presentation and discussion [Withheld from published minutes] CEO of the Authority for Television On Demand (ATVOD), joined the meeting. He spoke about ATVOD's current activities and strategic issues [withheld from published minutes] followed by discussion with members.

- 87th meeting of the Communications Consumer Panel: 5. Citizens and the Internet 5.1 Members had been provided with a paper and were joined by Ofcom colleagues for discussion of Ofcom's Internet citizens project. The project's aims included development of ways to incorporate the online citizen interest effectively in Ofcom's work and included interviews with colleagues in Ofcom about a range of projects and processes to understand where and how the citizen interest was incorporated within Ofcom.

- 39th meeting of Ofcom's Main Board: Ofcom's approach to information for citizen-consumers [Withheld from published minutes] introduced Annex 2 to Paper 137(04) which proposed a set of high-level principles describing Ofcom's approach to information for citizen-consumers across all its activities [withheld from published minutes]. Following discussion the proposed principles were APPROVED for publication [withheld from published minutes].

- 8th meeting of ATVOD's Board: Openness and Transparency Policy - The Board CONSIDERED the recommendations made in the paper and gave their APPROVAL subject to some further refinement. It was AGREED that the Policy would be updated as agreed at the meeting and prepared for publication.

Therefore, meeting minutes do not represent a complete picture of the discussions held at various meetings. However, this only forms a part of the problem when it comes to the contribution of meeting minutes towards transparency. Another issue is the extent of the decision-making that is happening outside of these meetings and is thus left unrecorded.

Across all the structures when it comes to ASA, ATVOD and Ofcom, discussions are conducted and decisions are taken via e-mails, informal meetings or by structures that do not record their discussions. For example, as Graham Howell[8] stated in the private interview (2013), Content Board meetings 'are really policy think-thanks, more than anything'. The decisions are made via e-mails or phone calls: 'only if there is a really, really serious case would they have a meeting about it, but that wouldn't be in the Board, it would be a separate meeting'.

Meeting minutes sometimes make transparent the extent of the decisions and discussions performed via e-mails or informal discussions, although the content of these discussions is not known:

- 29th meeting of the Advisory Committee for England (ACE) - Following discussion with the ACE Chairman it had been agreed that the Committee's purpose and objectives would be revisited at the next meeting. Prior to that the Committee's existing priorities could be circulated by email for online discussion.

- 46th meeting of the Panel: Discussion of the Panel's annual report would be by email. The Chairman, would draft a forward covering the big issues for the Panel, including 'citizens', and members would have an opportunity to comment

In addition, there is a large number of informal meetings held as a part of the work of different structures and between different structures. For instance, Content Board members often have a dinner the night before the recorded meeting where they would have guests present, exclusively from the industry. As Tony Close [9] (2013) explained in the private interview, this is to make them more knowledgeable about industry issues. The Panel also meets the night before the meeting, and this becomes obvious from the meeting minutes: 'The Chairman welcomed members to the meeting and thanked them for the time they had given the previous evening to allow informal discussion of the

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8 Graham Howell, Director England and Secretary to the Corporation, Ofcom
9 Tony Close, Director of Content Standards, Licensing and Enforcement, Ofcom

Panel's work plan (minutes of the 24th meeting). In the private interview, Colin Browne [10] (2014), a former member of the Panel, also confirmed that there were many private discussions.

Another issue is that different structures within regulatory bodies have various sub-groups and committee. For example, there are three different committees within ATVOD Board, Determinations, Audit and Finance Committee, and Ofcom's Content Board has a licensing and local radio committees among many others (Graham Howell, private interview). In addition, from the meeting minutes of the 56th meeting of the Content Board, it becomes apparent that there was a small group formed to work on ASA's new code approval in 2009: 'It was agreed that a small subgroup of the Content Board, [withheld from published minutes]. This group would then report to the Content Board setting out its views and comments on the Code for final approval by the Content Board'. However, all these different groups hold separate meetings that are not recorded, thus this part of the decision-making process is not transparent.

Finally, one of the crucial issues is that not all parts of the regulators have meetings minutes published. For example, Policy Executive at Ofcom is a structure that meets weekly and is responsible for certain decisions such as Ofcom's overall regulatory agenda. It reviews policies before they are submitted for final approval to either Content Board or the Main Board. As Anthony Szynkaruk [11] (2014), Ofcom's policy executive, stated in the private interview, many decisions do not reach the Main or Content Board but are made here. As Stewart Purvis [12] claimed in the interview with the researcher (2013), this is the most important structure at Ofcom. However, it does not publish meeting minutes. This is particularly important since it would enable transparency earlier on in the regulatory process at the agenda setting phase or the stage where issues and perspectives are defined since the discussions that are held at the Content or the Main Board usually involve final decisions.

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[10] Colin Browne, Chairman of the Voice of the Listener and Viewer, previously a member of the Consumer Panel, Ofcom

[11] Anthony Szynkaruk, Head of Commercial Policy and Enforcement, Ofcom
[12] Stewart Purvis, currently a Professor at the City University London, previously Partner for Content and Standards, Ofcom

Thus, to conclude, not only that meeting minutes do not make transparent the entirety of the discussions held at different meetings, they only present information from a limited number of decision-making arenas. Many decisions and discussions are happening via e-mails or at separate meetings.

Where meeting minutes increase transparency to a certain extent is when it comes to different meetings with outside stakeholders. For example, a few members of the Content Board had a series of meetings with Lord Putnam in the early days of Ofcom to discuss the ways Ofcom would work in the interest of citizens. These meetings were mentioned in Content Board discussions and were consequently recorded in the meeting minutes. Thus we know of their existence and sometimes the most important points made are mentioned. Another example is a summary of what Kip Meek, an Ofcom executive, stated at the meeting of Ofcom's Main Board on 23 September 2003 and that is that proposals for a system of broadcast advertising co-regulation had been developed over a period of time in discussions between the advertising industry and Ofcom. Some preliminary consultation had taken place with the Consumer Association, the Voice of the Listener and Viewer and the National Consumer Council. This is partially revealing of the process, but it is still lacking in terms of the details.

However, there is no consistency in reporting meetings with external stakeholders in this way, thus we only get a glimpse. The problem with this is that there is no formal obligation to report meetings, there is no consistency and thus we cannot rely on this to determine the extent and content of meetings with external stakeholders. This does however shed a bit of light on the network of meetings.

When it comes to the reliability of meeting minutes, there appears to be a few issues. Since there is inconsistency when it comes to the level of discussion presented, with it ranging from the summaries of all different arguments to just topics of the discussion, and the lack of the explanation of why it is so, it is very uncertain whether minutes

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contain the whole discussion and it remains unclear whether decisions have been made. The minutes should be written with more clarity and consistency in order for them to be more reliable. In addition, meeting minutes are not verified by a third party but are approved by the Chairmen. And speaking of the level of mediation, it is considered to be high since the discussions are not recorded verbatim.

There are a few reasons why meeting minutes are in the current shape and form, and they are linked with the FOIA 2000. The interview with Graham Howell [13] at Ofcom revealed the way FOIA requirements influenced recording and publication of meeting minutes. He claims that meeting minutes are not very detailed summaries precisely because of the FOIA. Since meeting minutes are subject to disclosure, everyone across the public sector no longer takes expansive meeting minutes as they once did. There is a tension between the wish to keep a record as a public body of the decisions made and actions performed and the need to disclose everything that is said and done, including private and confidential discussions. However, FOI 'blasted a hole through this' and as a result, less is written down. Another reason, according to Graham, is that requests are received from campaigners and people who are trying 'to find a story that does not necessarily exist'. Thus, he does not believe it is right that members must feel constrained because they know that everything they say will be written down and perhaps become public in the matter of days. The risk is that any e-mail written could be made public and people are under that slight pressure, which he does not think is right. As a consequence, things do not get put down, they do not send e-mails containing the details that they otherwise might, minutes of internal meetings are nor necessarily taken and the meeting minutes are not substantial.

In addition, ICO issues guidance as to what should be published when it comes to meeting minutes and they suggest that public authorities should publish on a routine basis, in addition to meeting minutes, 'any background documents which are referred to in the agenda or minutes, or were circulated in preparation for the meeting. These are considered part of the agenda' (ICO, 2012: 3). However, Ofcom, ASA and ATVOD do not publish these additional documents. As it has been stated before, ICO does not have

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[13] Graham Howell, Director England and Secretary to the Corporation, Ofcom

the powers to compel Ofcom to abide by its publications scheme, and ASA and ATVOD are not classified as public authorities. When it comes to the contents of the meeting minutes themselves, the guide does not contain strict prescriptions and it is stated that authorities should: 'publish the unedited agenda minutes where possible; publish as much as they can, even if it is not possible to publish the unedited documents and make it clear that certain documents are edited versions' (ICO, 2012: 4). Thus, Ofcom is at liberty not to publish a verbatim record of meeting minutes.

What sheds a bit more light on why certain decisions have been made, what the justifications for them are, on the basis of which evidence they have been made and through which processes are two types of released documents: consultation documents, and adjudications when it comes to ASA and ATVOD.

4.2.1.2.3. Consultations

Speaking of consultations, they are most often referred to as means through which regulators are made more transparent (Freedman and Schlosberg, 2011: 44), and they do in reality shed more light on the thinking behind certain decisions than annual reports and meeting minutes.

The structure of the consultation process is the same when it comes to Ofcom, ASA and ATVOD. Initially, a document is released that outlines the issue and states what the regulator proposes to do and for what reasons. There is also an outline of what has been done up to that moment when it comes to the development of proposals, such as research conducted, meetings with different stakeholders, etc. It is common practice that stakeholders have at least 10 weeks to respond to the consultation, and subsequently, the regulators publish their decisions. The decision statement is extremely valuable since the regulators deal with arguments presented in all consultation responses and justify their final decision.

Thus, for example, when it came to delegating regulation of broadcast ads to ASA (B) in 2004, Ofcom's initial consultation document outlined the proposed changes to the regulation, the rationale for them, the process via which they had been formulated, history of the system, and how they propose it will work in the future. In the document where the final decision was published, Ofcom dealt with the majority of the response they had received and justified why certain proposals had been accepted and why some had not been, and summarized all the issues raised through the consultation.

Therefore, when it comes to the documents released proactively, consultations do provide an insight into how certain issues have been conceptualized and what the debate has been. The problem is that these documents are intended for publication and this intention bears a mark on their contents. For example, through the interviews conducted with Ofcom executives, such as Stewart Purvis [14] and Adam Baxter [15], an interesting fact has been discovered regarding delegation of duty to regulate editorial content in VoD to ATVOD in 2010. It appears that Ofcom was reluctant to create the co-regulatory system with ATVOD but preferred to keep the responsibility. However, it was after the insistence of the Government that Ofcom delegated the functions.

4.2.1.2.4. Adjudications

Speaking of adjudications, they are particularly important when it comes to ASA since meeting minutes of the ASA Council are not published and they present the only insight into how rulings on complaints work. Adjudications published are very detailed and thorough, with a high level of information. The complaints are described as well as the ad itself, number of complaints, background information such as the relevant rules, what ASA Council decided and the justification for their decision, what arguments they have used to reach it, and the subsequent action. They also tell us what the advertisers said in response and if there was a comment from Clearcast, the pre-clearance organisation. All this information helps in determining how they are interpreting certain rules and why they are making certain rulings. What is missing however is what particular arguments

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[14] Stewart Purvis, – currently a Professor at the City University London, previously Partner for Content and Standards, Ofcom
[15] Adam Bexter, Standards Executive, Ofcom

existed and what the debate was within the Council. However, this information is not published when it comes to ATVOD as well, and as the executives from both bodies have explained (Shahriar Coupal, Pete Johnston, Miles Lockwood [16]) this is due to confidentiality and due to the decision that all the members take a collective ownership of the decisions, thus there is no need to reveal what the arguments of particular members were. Knowing what the discussion was would help in determining the role of Independent Members and to what extent they are satisfactorily performing their role. It would also help in determining how they are interpreting certain rules and enable outside stakeholders to hold them accountable.

To conclude, when it comes to proactive release of information and the extent to which different classes of documents provide the citizens with sufficient information to hold the regulators to account, the most important issue the analysis has revealed is that the data is incomplete in terms of four key questions for accountability:

- through which processes the decisions have been reached;
- what the justifications for the decisions are;
- what the information and evidence is on the basis of which the decisions have been based; and

- what the consequences of the decisions are for different stakeholders.

However, knowing this information is crucial for enabling citizens to hold the regulators to account.

The following section deals with the question of provision of information for the purposes of participation, which is another key extrinsic quality of transparency.

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16 Shahriar Coupal, Director of the Advertising Committees CAP and BCAP, ASA; Pete Johnston, Chief Executive Officer, ATVOD; Miles Lockwood, Director of Complaints and Investigations, ASA

4.2.2. Transparency and citizen participation

As it has been pointed out in the literature on transparency, there is interdependence between transparency and participation, but it is not compulsory that one increases the other. However, in the case of Ofcom, ASA and ATVOD, it has proved to be the case that participation does increase transparency and is heavily dependent upon it. The main question we are looking at is if there is sufficient transparency for citizens to participate meaningfully in the work of ASA, Ofcom and ATVOD. As it will be discussed in the next chapter, there are three different ways for citizens to participate in the work of Ofcom, ASA and ATVOD:

- indirect participation through public interest groups;
- indirect participation via independent Board members and different structures that are formed in order to protect the interest of citizens;
- and direct citizen participation.

If we look at indirect citizen participation through different public interest groups, it has become evident from the interviews conducted that transparency is not an issue for participation. When it comes to public interest groups, none of the interviewees had complaints regarding lack of information from the regulators both in terms it being provided proactively or if they needed to request it (Colin Browne, VLV; Laura Mathews, Action on Hearing Loss; Alcohol Concern; Claire Milne; Paddy Barwise, Which?; Mike Jempson, MediaWise). Through their interactions with Ofcom, ASA and ATVOD, public interest group representatives establish personal contacts and they are aware of the internal organization and the names and contact details of the people who are in charge of different projects, thus they can easily contact them. In turn, they are duly informed regarding regulators' actions and processes and are often invited to participate, even by personal phone calls (Colin Browne, VLV; Laura Mathews, Action on Hearing Loss). As Colin Browne remarked, they are a part of group of organizations Ofcom works with, they are a part of the so-called 'inner circle' and thus can find out easily whom they need to talk to regarding an issue and how to influence the process. However, Mike Jempson from MediaWise pointed out that maintaining contacts and 'monitoring

regulatory bodies is itself a full-time job. You need to keep close tabs if you are to be on top of issues'. Moreover, as interviews with key executives in these regulatory bodies have revealed (Tony Close and Graham Howell – Ofcom; Pete Johnston – ATVOD; and Shahriar Coupal – ASA), each department and key executives within it would have a list of all stakeholders interested in particular issues and would proactively seek to engage with them either by meeting with them, alerting them to the upcoming consultations, meetings or reviews. Thus, for different public interest groups, transparency is not an issue when it comes to participation; the problems are of different kind, as the next chapter will show.

However, when it comes to organizations and general public that are not a part of this 'inner circle' and need 'to start from scratch', as Colin Browne has put it, there have been a few suggestions for improvements in terms of ensuring there is sufficient transparency for participation. It has been pointed out by Claire Milne [17] (2013) in the private interview that she made repeated suggestions to Ofcom to publish details of Ofcom employees working on particular issues, projects or policy areas. Claire's suggestion has been for the regulators to create a type of a 'landing page' for long-standing themes and projects that would contain a summary of the current state of affairs, contact details for the managers in charge, links to relevant documents, and the next steps. It has been considered that this would greatly help stakeholders to participate and increase transparency. The same conclusion has been reached by Advisory Committee for England, as has been published in the minutes of their 32nd meeting (03/02/11). As the analysis of the websites has shown, there are almost no contact details publicly available. At the moment, one of the rare examples when contact details for specific managers are published is when it comes to consultations, but there is no continuous provision of these details.

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[17] Claire Milne, previously the Chairman of the Consumer Forum for Communications, Ofcom, currently Visiting Senior Fellow in the Department of Media and Communications, LSE, and independent telecommunications policy consultant

However, this is symptomatic of the way citizen engagement has been conceptualized and operationalized when it comes to regulatory bodies and this will be discussed in the next chapter in more details. The main way of individual and direct citizen participation is seen to be via complaints, thus those details are readily available and there is sufficient information about various ways to lodge a complaint, either via e-mails, online forms, or phone calls. However, it is not envisaged for citizens to be engaged on policy and regulatory issues, which might explain the lack of more contact details and policy information.

What is nevertheless helpful in terms of provision of information that is relevant for all different groups of stakeholders is that Ofcom, ASA and ATVOD publish annual plans that outline their operational objectives for the upcoming year, which is information that is essential for participation. In addition, all regulatory bodies provide regular newsletters and use social media to alert the interested public to topical issues and ways they can participate. Knowing the rules and procedures is also important, and, as one of the previous sections of this chapter has shown, it is satisfactory.

When it comes to different structures within these regulatory bodies that have been created to ensure respect for the interest of the citizens and consumers (The Panel, Content Board, and different Advisory Committees – Ofcom; AAC and Independent Board Members on the ASA Council – ASA; Independent Board Members - ATVOD), transparency once again has proved to be sufficient as it has been revealed by the interviews. These structures have clearly defined roles and remits, and they are either there to provide a citizen/consumer perspective on the issues or provide independent advice when it comes to decision-making powers. What is primarily important for both roles is knowing what the regulators are doing and having sufficient level of information about their activities so that they can perform their roles satisfactorily.

The issue of information provision has been resolved in many different ways: Ofcom executives would be present at the above named structures within Ofcom and would present their reports. They would also keep the members updated via e-mails and hold

meetings if necessary (revealed in private interviews with Graham Howell, Philip Graf, and Tony Close [18]). ASA Council has a special closed website where all the cases they need to look at are uploaded together with relevant legislation, rules, research and any other material deemed appropriate. In addition, Independent Board Members are allowed to seek information from ASA executives, which has been seen as without any problems (revealed in private interviews with Ruth Sawtell, Rachel Childs, Alan Bookbinder, and Shahriar Coupal [19]). The same is applied to AAC, which is regularly updated by ASA Executives (private interview with Stephen Locke [20]). The situation is even simpler with ATVOD since it is a very small body. Thus, individuals interviewed from these structures believe there is sufficient transparency for them to perform their respective roles.

However, the problem is that most of the information is coming from the executives of the respective regulators. Finding what the consumer perspective is independently of the information provided by the regulators and seeking any other information deemed necessary would depend on the members only. And, as the interviews have shown, they do not have special resources nor proactively seek for information independently. Thus recruitment is of crucial importance, not only for this reason, which would be discussed in the next chapter.

Thus, what can be concluded in relation to transparency and participation is that the situation is very different when it comes to direct participation by the citizens and indirect participation by those who appointed to represent citizens' interest. The latter believe they have sufficient information available for their effective participation, which they mostly obtain via engagement with the regulators. However, citizens are left out of this inner circle and are thus not in an enviable position when it comes to sufficiency of

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[18] Graham Howell, - Director England and Secretary to the Corporation, Ofcom; Graf, Philip – previously Chairman of the Content Board, Ofcom, currently Chairman of the Gambling Commission, and Tony Close, Director of Content Standards, Licensing and Enforcement, Ofcom

[19] Ruth Sawtell, Independent Board Member, ASA Council; Rachel Childs, Independent Board Member, ASA Council; Alan Bookbinder, Independent Board Member, ASA Council; Shahriar Coupal, Director of the Advertising Committees CAP and BCAP, ASA
20 Stephen Locke, Chairman of the Advertising Advisory Committee, ASA

information necessary for participation.

Therefore, it transpires that citizens do not have sufficient level of information neither when it comes to holding the regulators accountable not when it comes to participation. What the following section of the chapter aims to discover is whether these deficiencies in proactive dissemination of information could be compensated for by the opportunities offered by the FOIA 2000.

4.3. Freedom of Information Act 2000 and Ofcom, ASA and ATVOD

FOI laws in the UK have been introduced relatively late as a part of the so-called 'third wave' of countries that introduced FOI long after the first ones, Sweden (with some access laws dating as far back as 1766) and the USA (1966), and the second wave that included a few other European countries, Australia, Canada and New Zealand in 1982 (Roberts, 2006; McDonald, 2006: 129).

The UK government was notorious for its secrecy; it was the default attitude towards government information. 'A tiny breath of fresh air: the Freedom of Information Act, 2000' (Banisar and Fanucci, 2013: 184) has been introduced precisely with the aim to change that culture and predisposition of officials towards release of government information (Roberts, 2006: 107-8), which would in turn lead to further benefits. As Tony Blair (1996) has put it:

> *'I don't believe that its impact would simply be in the pure matter of legislation, in the detail of the legislation. It would also signal a culture change that would make a dramatic difference to the way that Britain is governed. The very fact of its introduction will signal a new relationship*

between government and people: a relationship which sees the public as legitimate stakeholders in the running of the country and sees election to serve the public as being given on trust'.

Thus, FOI policy was in line with the wider aims of the 'New Labour' project and its thinking about governance (Hayes, 2009: 4). Another aim, or perhaps a hope, was that FOI would increase trust in government (Roberts, 2006: 107-8).

FOI Act 2000 gives individuals the right to information in two ways. Firstly, it enables them to request information from public bodies, which are required to state whether they hold that information, and if they do, provide it within 20 days. However, FOIA does not provide an absolute right that enables unrestrained access to all information but is subject to 24 different exemptions and has to be balanced with privacy and state secrecy laws. In addition, the government has the right to veto the request and even not confirm whether the requested information is held (Hayes, 2009: 4; McDonald, 2006: 12-128l Birkinshaw, 2006: 47-50; Banisar and Fanucci, 2013: 185).

Secondly, freedom of information laws also refer to proactive measures to put information into the public domain unprompted by direct citizen action (McDonald, 2006: 12-128). Thus, FOIA 2000 contains provisions for proactive release of information under Part I, section 19 'Publication scheme'. This section obliges all public authorities 'to adopt and maintain a scheme which relates to the publication of information' and outlines the means of its publication and classes of documents to be published. The authorities have an option of either adopting one of the model schemes developed by the Information Commissioner, or creating their own and having it approved.

Whether FOIA in the UK enabled the aims it was introduced for to be achieved and how it works in practice has mostly been debated when it comes to central government departments. Roberts (2006) claims that the probability of these aims to be reached has been small due to institutional resilience to change and proactive efforts to curtail the law

and its requirements. In other words, the attitude towards transparency of information has not changed (pp. 107-8). The most comprehensive study of FOIA in the UK has been conducted by a team of researchers at UCL, and their findings are a bit more optimistic in terms of whether FOIA is making government more transparent and accountable. On the other hand, they claim it has not improved decision-making, enabled the public to better understand decision making processes, engaged public participation in politics, and increased public trust.

Their findings are also interesting since they show that there has been political will at the time FOIA was introduced, but as the time progressed, FOIA provisions came to be seen as being abused by the media and campaigners, and the interest in supporting them has declined. In addition, FOIA has had the 'chilling effect' and various methods to undermine the act emerged such as keeping less of records from meetings and the shift of discussions from official 'recorded' procedures (Hazell et al, 2010). However, these researchers have only studied the impact of FOIA 2000 on British central government, English local government and Parliament, while its effect on new forms of governance has remained out of the scope of their study.

However, when it comes to co-regulation in the UK and what effects and side-effects FOIA 2000 has brought, the biggest problem seems to be that both ASA and ATVOD fall outside its remit since they are not classified as public bodies for the purposes of this Act. This has proved to be a significant issue not only since it denies the public the right to request information and obliges these bodies to fulfil it, but because it does not compel these bodies to adopt a publication scheme, thus leaving them to decide which information they will provide proactively.

Whereas Ofcom is obliged to comply with these provisions and has adopted Commissioner's scheme related to non-departmental public bodies, ASA and ATVOD have not. The analysis of the requirements of this publication scheme and the documents released by ATVOD and ASA shows that greater transparency would be achieved if they have been classified as public bodies for the purposes of FOIA. Although a number of

categories of documents is proactively published by these bodies, such as their organizational structure, remit and processes, there is a significant number of categories of documents that are not released, which greatly reduces transparency of ASA and ATVOD. While it is undeniable that the lack of information such as senior staff and board members' allowances and expenses, pay and grading structures, financial statements for projects and events, procurement and tendering procedures and register of gifts and hospitality provided to Board members and senior staff are very important, what is striking and crucial for accountability is that ASA and ATVOD do not publish the following classes of information:

- Reports and papers provided for consideration at senior level meetings;
- Meetings of Chief Executive or Board members with Ministers and external organizations (including meetings with newspaper and other media proprietors, editors and senior executives); and
- Minutes of senior level meetings when it comes to ASA.

While ATVOD publishes Board meeting minutes, as well as the Industry Forum meeting minutes, not only that ASA does not publish meeting minutes for any of its structures, ASA Council, AAC, BCAP and CAP, they cannot be even obtained by request.

This brings us to the other important provision in the FOIA and that is the right to request information. While ATVOD does not offer the option to request information, at least not officially, ASA, in their commitment to transparency, provides an e-mail address on its website to which information requests can been sent. The researcher has used this address to require ASA Council and AAC meeting minutes, and subsequently found out that the address is not functional. After contacting the media team, the researcher had been supplied with another e-mail address, however, there was no response. After lodging an inquiry with Shahriar Coupal, the Director of CAP and BCAP, the researcher has been informed that AAC meeting minutes would not be released and that there is a section about their work in ASA's Annual reports, and that ASA Council meeting minutes cannot be released due to confidentiality. In the interview with Stephen Locke, the Chairman of AAC, the issue of transparency has been discussed and Stephen pointed out that BCAP and CAP do not publish their meeting minutes, thus it would be entirely inappropriate for their advisory body to do so. Therefore, ASA would greatly benefit

from being classified as a public body.

This illustrates a characteristic example of one of the issues with the effectiveness of FOIA and that is the changing structure of governing institutions (Roberts, 2006a: 21). With new modes of governance emerging that are not a part of the traditional government institutions, the scope of FOIA would need to expand in order for it to be effective.

However, it can be debated whether FOIA has enabled satisfactory access to information when it comes to Ofcom both when it comes to FOI requests and proactive release of information. When it comes to proactive dissemination of information, surprisingly, Ofcom does not provide all the information in the model scheme it has adopted. Similarly to ASA and ATVOD, it does not releases meetings of Chief Executive or Board members with Ministers and external organizations (including meetings with newspaper and other media proprietors, editors and senior executives), it does not provide meeting minutes of all senior level meetings since the Policy Executive meeting minutes are not published, and it does not make public reports and papers provided for consideration at senior level meetings, which is important as the previous section of the chapter has shown. In addition, Ofcom does not publish internal performance reviews, and reports to Parliament, if there are any.

It is interesting to note that ICO does not have powers of compulsory audit when assessing compliance with FOIA, but, with the consent of the authority, section 47 (3) of FOIA 2000 enables it to carry out an assessment whether good practice is followed. However, ICO has not up to this date performed this in relation to Ofcom and what classes of information it disseminates proactively, but only central government departments and police sector. In addition, there have been no complaints in relation to this matter when it comes to Ofcom.

Speaking of FOI request and Ofcom, as the analysis of the information released proactively has shown, there are some black boxes of policy making when it comes to

Ofcom: many decisions are reached via e-mails and at informal meetings, the reports that are considered at meetings are not made public, and the Policy Executive does not publish its meeting minutes. Thus, the aim has been to assess whether this information can be obtained via FOI requests. The analysis has been performed by submitting FOI requests, analysing FOI requests already submitted, and studying complaints dealt with by the Commissioner.

Speaking of obtaining information exchanged via e-mails and at meetings, the researcher has submitted a FOI request in relation to all available information regarding Content Board members recruitment and the way Ofcom dealt with this request was through a meeting where the recruitment procedure was explained and all the issues discussed. As the analysis of the available FOI requests has shown, there was a similar request in the past, and it was resolved by Graham Howell [21] sending a descriptive letter rather than with provision of all different e-mails and meeting notes, if they existed. The problems with obtaining information that has been exchanged in this way are two-fold. Firstly, as the analysis of previous FOI requests has shown, publishing of exchanged correspondence is subject to a number of exemptions:

- Section 12 – exemption where cost of compliance exceeds appropriate limit of £450;
- Section 36 – prejudice to effective conduct of public affairs;
- Section 40 - the exemption from disclosure of information that is personal data under the Data Protection Act 1998. It is an absolute exemption and does not require public interest test. Application of this exemption would result in redacting minutes and documents and removing individuals' names and details;
- Section 41 – information provided in confidence;
- Section 42 – legal professional privilege;
- Section 43 - the exemption of information that would prejudice the commercial interests of a person or company;

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[21] Graham Howell, Director England and Secretary to the Corporation, Ofcom

- Section 44 - the exemption of information whose disclosure is prohibited. Section 393(1) of the Communications Act 2003 prohibits Ofcom from disclosing information obtained in exercising their powers and which is information about an existing business.

In certain cases, when all the exemptions are applied, there is nothing left to disclose, such as when it comes to the request submitted to Ofcom on 25/02/11 for copies of the papers, meeting notes and internal correspondence in relation to the prohibition of product placement on radio services targeting children. In one case only, Ofcom responded that it can neither confirm nor deny that it holds information relating to the request from 18/05/11 for notes, memos, meeting minutes and any other documentation that refers to or is concerning News Corporation and/or British Sky Broadcasting since January 1st 2010. Ofcom applied the exemption under Section 12 of the FOIA and explained it would be too costly to provide the information requested.

Secondly, the problem is that records are not taken of meetings. In only one case, Ofcom supplied a note from a meeting that was taken by an Ofcom employee and it was in an illegible handwriting (08/02/11).

When it comes to reports and briefing papers that are considered at meetings, Ofcom would supply them if requested and if they hold them. The same applies to meeting minutes from the Policy Executive, although they are as incomplete as other minutes analysed and subject to even more reductions.

When it comes to the complaints ICO has considered in relation to the way Ofcom deals with FOI requests, only one of them was related to e-mails and was not upheld since the Commissioner ruled Ofcom applied the exemptions correctly. There were 12 other complaints, 9 were not upheld, 2 were upheld, and one was partially upheld. Thus, there is no evidence that Ofcom is not dealing with FOI requests in an inappropriate way. ICO

can also monitor compliance and the way FOI requests are dealt with. However, it has not considered how Ofcom performed so far in this area.

Thus, when it comes to FOIA 2000, where improvements can be made is with extending its scope to cover ATVOD and ASA. Although ATVOD does provide sufficient level of information, whether it will remain so in the future and especially so if its remit is extended would remain at their own will. There is some value in being obliged to respond to FOI requests and disseminate information proactively, as ASA's case study has shown. Voluntary publication of information has led to many areas of work being non-transparent when it comes to ASA.

When it comes to Ofcom, the conclusion emerges that there is no major issues in the way Ofcom is implementing FOIA, apart from the lack of proactive release of some classes of information. Some improvements are needed, but perhaps not in relation to how Ofcom implements FOIA but with the Act itself.

The exemptions are wide, both when it comes to proactive release of information and responding to requests, that transparency depends on political will, as there are strategies to circumvent FOIA provisions. As Roberts (2006) claims, 'FOI is principally a tool for regulating the struggle for control of government information. It does not eliminate this conflict, or reduce the political salience of complaints about governmental secrecy' (Roberts, 2006: 109).

In addition, using FOIA requires great skills in order to formulate useful requests in terms of what is likely to be released, what information is held and by whom, and an understanding of what is going to be useful (Hayes, 2009: 19).

Thus, to briefly but clearly answer the questions whether FOIA 2000 enables citizens to obtain information that is not released proactively, the answer is undoubtedly no.

The next section of the chapter deals with the final element of effective transparency, and that is the extent to which the information available is publicised.

4.4. Publicity

As the theoretical chapter has shown, one of the important parts of transparency is to what extent the information that is available is publicized. As it has been claimed, the availability of information is only the first step towards transparency: the information needs to be publicised and used. This section looks at the extent to which information about the work of Ofcom, ASA and ATVOD is publicised and we are looking at newspaper coverage, and they way regulators are using the opportunities provided by new media to make their work widely known.

When it comes to newspapers and to what extent Ofcom, ASA and ATVOD have generated coverage, the search on Factiva for relevant key words from 01 January 2003 to 20 July 2014 has generated 715 articles out of which 214 have been considered relevant. The following is the breakdown of the relevant articles according to the topics:

- 37 articles about ATVOD in total, with only one being of importance since the remainder are about the adult industry;
- 22 articles about Ofcom and co-regulation;
- 62 about Ofcom and alcohol advertising;
- 71 regarding alcohol advertising;
- 2 articles about ASA's Advertising Advisory Committee;
- 369 articles about product placement and Ofcom with the majority of the articles being about breaches of the rules;
- 26 articles about Consumer Panel with most of the articles about nuisance call and mobile phones users; and
- 126 articles about Ofcom's Content Board with the relevant ones being about appointments.

The only relevant article about ATVOD is a piece from 2010 debating the value of the new co-regulator since it has only dealt with four complaints and it costs around

£400,000 per year. ATVOD has generated newspaper attention only in relation to its work regarding adult industry.

When it comes to Ofcom and the type of publicity it has generated in relation to delegation of regulatory powers to ASA and ATVOD, and the regulation of alcohol ads, its decision to contract out to ATVOD and ASA in 2010 has generated no media attention, while the decision to delegate to ASA in 2004 generated 18 articles that scrutinised this move. In addition, these are almost no articles that scrutinize ASA in general, with only two articles over the past decade featuring interviews with its executives and only one arguing that ASA needs to regulate the Internet (2006). It is interesting to note that the majority of general articles about Ofcom and the way it operates are regarding appointments: 15 (2003), followed by general discussions about the way Ofcom will conduct its duties: 9 (2003/04), that it issued too many consultations: 2 (2004), and there were 2 articles related to the debate in what ways it will act in the interest of citizens (2003). In addition, the way Ofcom and ASA operate has in general attracted attention mostly in the days when they were established.

When it comes to alcohol advertising regulation, the analysis revealed that media attention is divided between different stakeholders: there were 15 articles in relation to Ofcom and ASA tightening the rules, 5 in relation to breaches of the rules, 5 about the calls by the Alcohol Concern to introduce a watershed ban on alcohol ads (5) or ban them completely, as called for by the British Medical Association (3). In addition, 12 articles dealt with the way Government and Ministers have handled this issue, and there have been 3 that discussed alcohol advertising in general.

Speaking of the debate in the media regarding product placement, it proved to be the most popular topic, presumably because of the importance of added revenue for media businesses themselves. However, the majority of the articles were not concerned with the way Ofcom or ATVOD handled the regulation of product placement: only 36 out of 369 (Ofcom discussing product placement and consulting on it: 10 (2005), 8 (2006); Ofcom allows product placement: 18 (2010)). Most of the articles discussed benefits and

disadvantages of product placement in general terms without the reference to how Ofcom and ATVOD handled the issue.

- Articles regarding advantages and disadvantages of product placement with no mention of the regulators: 14 (2005), 6 (2006), 9 (2008), 8 (2009);
- Articles with negative coverage of the introduction of product placement: 3 (2010);
- Articles regarding the announcement of the EU to relax the rules on product placement: 18 (2006);
- Articles about the appearance of the first product placement: 4 (2011);
- Articles regarding what product placement is and announcement that it has been introduced: 8 (2011); and
- Articles about Government's U-turn on allowing product placement: 1 (2009), 3 (2010).

When it comes to different structures we are interested in, such as Content Board, Consumer Panel, AAC and ASA Council, their work has also not be scrutinised, nor has the way Ofcom, ASA and ATVOD engage the citizens and consumers in their work.

What has been concluded is that what generates publicity in relation to Ofcom, ASA and ATVOD is related to new and crucial issues and there is a noticeable attention to personalities. In addition, product placement is much more of a topical issue than alcohol ads. It becomes apparent that the press follows their own logic and that the publicity has been relatively low, which, as Paddy Barwise [22] pointed out in the private interview, is not necessarily a bad thing due to their focus on sensationalism. In addition, as Graham Howell [23]stated in the interview, it is difficult for Ofcom to attract media attention when it comes to consultations for example. They would send a press release, but very few outlets would publish the news. The Panel also discussed the issue of drawing media attention, as it became apparent from their meting minutes. They came to the realization that it is difficult to get the attention of the media without a 'big story to

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[22] Paddy Barwise, London Business School, Chairman of Which?
23 Graham Howell, Director England and Secretary to the Corporation, Ofcom

tell' (7th meeting) and without a very strong brand (26th meeting).

When it comes to social media and the way regulators have used the opportunities offered, what has been analysed is the way they have used Twitter and Facebook.

When it comes to Twitter, while ATVOD does not have an account, ASA, CAP and Ofcom do and they have used them to alert the followers to various topics such as publication of news rules, new hot topics, documents they have published including annual reports, new vacancies, executives appearing in the media or at conferences, recent rulings and non-compliant advertisers. Twitter accounts have been searched for key words and the results are presented below.

When it comes to regulation of alcohol ads, there have been only eight tweets in total, one by Ofcom and seven by ASA regarding breached rules, alerts to new research, alcohol rules, and public speaking. Speaking of product placement, there have been four tweets by Ofcom in 2010 and 2011 regarding the introduction of new rules and the first campaign.

When it comes to the regulators and the way they have used Twitter to discuss their work, Ofcom did not tweet regarding ATVOD and ASA, and there have been no tweets discussing co-regulation. In addition, the work of the Content Board, CCP, Ofcom's advisory committees and AAC has not been publicised by the regulators through Twitter, while there are six tweets by ASA regarding ASA Council and they all relate to recruitment.

Facebook has only been used by Ofcom since ASA and ATVOD do not have Facebook profiles. Ofcom uses it for similar purposes to Twitter and alerts those who liked the page to anything from topical decisions and actions to published research.

However, not only that there are not many relevant tweets, the number of followers is very low. If the number of people all social media accounts are reaching is combined, we get the number of 31,816, which is 0.05 percent of the total UK population.[24] This is an extremely small percentage even if we assume that all the followers are from the UK.

When it comes to newsletters and bulletins, all three regulators have the practice of publishing them. The purposes are not dissimilar to those used for Facebook and Twitter, which is publicising recent decisions, rulings, consultations, research and similar issues. While ATVOD published only one newsletter for all of its audiences, Ofcom has thematic newsletters depending on whether you are interested in broadcasting or telecommunications for example, and ASA also has a few types of different newsletters, for example one relates to recent rulings while the other gives advice to the advertisers on how not to breach the code. ATVOD has an example of good practice and this is the only time it has been noted that Board meeting minutes are publicized – there is a link in its newsletter.

Thus, when all the evidence is considered, it cannot be claimed that certain issues receive sufficient levels of publicity. However, this is not necessarily to be blamed on the regulators. As the interviews have shown, they do make an effort to attract media attention and publicise through the social media, but they have no influence over how many people will be attracted. In addition, the nature of the regulation implies that there are rarely 'big stories to tell' in order to attract the attention of the press.

4.5. Conclusion

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[24] Ofcom on Facebook: 3,492 likes; Twitter: Ofcom (22.2k followers, 1,654 tweets, joined January 2009), ASA (4,777 followers, 1,769 tweets, joined January 2012), CAP (1,347 followers, 1,684 tweets, joined June 2012).

This chapter present an assessment of the extent to which Ofcom, ASA and ATVOD can be described as transparent. This assessment is based on the normative ideal of transparency that has been developed in Chapter 3, and it has revealed that the results are mixed when it comes to the way transparency operates in practice. There are some aspects that work particularly well, such as the accessibility of all the documents that are released, the publication of the rules guiding regulators' procedures and the extent to which they are fixed, as well as the importance of participation for transparency. However, there are several issues with the quality of the information provided, such as in terms of its completeness and reliability, and there are still a few so-called black boxes of decision-making, or arenas that are not transparent.

Co-regulation in the UK presents a typical case study of the problems associated with new modes of governance and transparency. The networks of actors and decision-making arenas are complex and involve a lot of negotiations, many of which happen at informal meetings. In addition, this complexity makes generating full transparency very difficult since it would require extensive research. Furthermore, these networks create a division between 'insiders' and 'outsiders', and the former are in a much better position in terms of transparency.

However, going back to the main purpose of this chapter, which has been to establish whether there is sufficient transparency for citizens to engage in deliberation, either directly or through representatives, and hold Ofcom, ASA and ATVOD to account, the conclusion that emerges is that the key information is not available when it comes to both of these purposes of transparency. But what is more important, and what the next two chapters aim to evaluate, is whether the citizens have the institutional structures to act on the information received. As we have pointed out, transparency does not have an intrinsic value; it is only the first step towards citizen empowerment.

5. Chapter 5: Institutional structures for democratic, deliberative participation

'Do we set the public opinion or are we led by it? A little bit of both.'

Graham Howell, Ofcom's Secretary to the Corporation (private interview, 2014)

This chapter presents an analysis of the different ways citizen can engage with and participate in Ofcom's, ASA's and ATVOD's decision-making processes. The definition of citizen engagement is taken to be very broad and encompass any either direct or indirect means of providing citizen input and getting their voices heard. It is taken that the normative ideal this engagement needs to reach is that of democracy and deliberation, as it has been defined in Chapter Three. In other words, engagement needs to be inclusive of all citizens that have equal opportunity of participation and influence, and the purpose of engagement needs to be deliberation upon common issues.

The foundation for the basic distinction between different ways of citizen engagement is taken to be the distinction between three spaces: *public space* removed from decision-making institutions, *empowered space* (deliberation fora that produce binding decisions), and what is called *minipublics* or *deliberative fora* that are sponsored by regulators but do not produce binding decisions. Or in words of different theorists such as Jürgen Habermas (1996), Nancy Fraser (1992), or John Dryzek (2010), public space is also termed opinion-

formation forum, weak publics, or periphery, while the empowered space is also referred to as will-formation forum, strong publics, mini-demoi, or the center. In between are minipublics sponsored by regulators that are a part of the institutions that make binding decisions but do not have the power themselves to make those decisions.

To illustrate in the order just presented, public space for the purposes of this research is composed of the media and public interest groups, where the deliberation can take place independently of the regulators with no power to make binding decisions.

The means of citizen engagement in the empowered space is through independent Board members that represent citizens' perspectives but have the power to make binding decisions. This is the only means through which citizens indirectly have the potential to deliberate regarding biding decisions.

And minipublics or spaces for citizen engagement sponsored by regulators are the Communications Consumer Panel and Advisory Committees when it comes to Ofcom, the Advertising Advisory Committee when it comes to ASA, and research, consultations, complaints, and public meetings when it comes to all regulatory bodies studied here. These are the fora organised or sponsored by the regulators but which do not produce themselves binding decisions.

The focus of analysis is to what extent these different fora can be seen as democratic and deliberative. In addition, in the case of public space and minipublics, the issue of influence is looked at as well, or in the Habermasian terms, the transmission to the empowered space.

In addition, a systemic approach is taken towards assessment. For example, if certain fora are seen as deliberative but not democratic, the whole system might be still assessed positively if other fora are democratic and there are means for different groups of

citizens to be heard and influence decision-making.

This chapter begins with the assessment of the qualities of the empowered space, followed by minipublics, and finally an analysis of the public space.

5.1. Empowered space

As stated in the introduction, the only means of citizen participation into the decision-making processes that lead to binding decisions when it comes to Ofcom, ASA and ATVOD is indirectly through independent Board members. Ofcom has been created by the Communications Act 2002 as a 'body corporate' and its main decision-making body is its Board. Following widely accepted principles of good governance, the statute also prescribes that the majority of Board members need to be independent, which means not industry members, executives or employees of Ofcom. These principles have been transferred to the co-regulators, ASA and ATVOD, whose main decision-making bodies are also Boards comprised of a majority of independent Members. Moreover, ASA's Board is also its Council that adjudicates on potential breaches of the codes whilst ATVOD's Board is involved in all decisions since it is a very small regulatory body.

A note needs to be made regarding Ofcom's Content Board. Although there were high expectations at the beginning that it would be a vehicle for citizens to hold Ofcom to account and make Ofcom consider citizenship issues with more seriousness, eventually its role settled to being simply a sub-committee of Ofcom's Main Board to which certain content decisions have been delegated, such as advertising codes (information gathered during private interviews with Philip Graf, Stewart Purvis, and Tony Close [25]). Thus, for the purposes of this research, it is not treated any differently from other Boards.

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[25] Philip Graf, previously Chairman of the Content Board, Ofcom, currently Chairman of the Gambling Commission; Stewart Purvis, currently a Professor at the City University London, previously Partner for Content and Standards, Ofcom; Tony Close, Director of Content Standards, Licensing and Enforcement, Ofcom

Overall, these are the means for citizen voices to be heard at the crucial decision-making structures within the regulators. The following sections will assess precisely the extent to which this indirect involvement of citizens can be described as democratic and deliberative.

5.1.1. Independent Board members and the question of democracy

Speaking of democratic qualities of minidemoi, we start with the question of inclusion: to what extent the citizens and various issues are represented and included, and in which stages of the decision-making process.

Ofcom's, ASA's and ATVOD's Boards offer an opportunity for citizens to have their voices heard at the decision-making level, but there is no *direct* involvement of citizens. Instead, independent Board members are relied upon to represent citizens and consumers. Immediately, the questions of authorization, representativeness, and accountability emerge.

Regarding authorization, there is no direct link between the citizens and independent Board members, who are recruited and appointed by the regulators themselves without any involvement from the citizens. In these appointment procedures, the main criterion is not representativeness of diverse groups of citizens, but rather expertise, independence, skills and knowledge. As Mike Jempson from MediaWise commented:

> 'Lay representatives tend to be 'the great and the good' drawn from the upper
> echelons of society. Ofcom's Content Board is a good example... not many
> regular TV viewers/radio listeners would view them as their peers, but the

industry would find them a very agreeable selection of luminaries.' (personal interview, 2013)

There are attempts to have a diverse group of members, but this has proven difficult to achieve and entails inevitable trade-offs. Ruth Sawtell, Independent Board member at ASA, has commented during the private interview (2014) that they recently wanted to recruit younger members to the ASA Board, which they did, but the appointment involved lesser level of expertise.

Ofcom has had similar intentions to recruit younger and ethnically diverse independent members, but they were left with middle-class white men and women (Graham Howell, personal interview, 2014). On the other hand, getting experienced and expert people has not been an issue, as senior executives from all regulators claim (Shahriar Coupal, ASA; Pete Johnson, ATVOD; Graham Howard, Ofcom - personal interviews). There is an attempt to ensure national representativeness of Ofcom's Content Board by having members from national advisory committees (Tony Close, personal interview, 2013). However, as the next section discusses, there is no link with the citizens when it comes to these members either.

Since citizens do not authorize or choose them, independent Board members are not accountable to the citizens on whose behalf they act. For example, Content Board members are accountable to Ofcom's Main Board (Tony Close, private interview, 2013). The ASA Council is accountable to ASA's Chief Executive, and ATVOD's Board is accountable to ATVOD's Chief Executive, and both are accountable to Ofcom. Thus, all the accountability threads ultimately lead to Ofcom and focus on its Chief Executive. However, as the next chapter shows, Ofcom's accountability to the citizens is not substantial.

In short, there is no *direct* link with the citizens. Independent Board members are expected to protect the interest of citizens and consumers by relying on their expertise

and information received from the executives. There is the expectation that Independent Board members should be skilled and expert enough to judge appropriately where the interest of the citizens is in relation to particular decisions and, as far as those interviewed are concerned, there are no issues in recruiting individuals with such capabilities (Shahriar Coupal, ASA; Tony Close, Ofcom; Graham Howell, Ofcom; Pete Johnson, ATVOD – private interviews). The Content Board struggled at the beginning with these issues since its purpose was not entirely clear, but as time progressed, some 'heavy-weight' members in terms of expertise have been recruited, such as Tim Gardam, David Levy, and Adam Singer (Stewart Purvis and Philip Graf, private interviews).

Furthermore, as Tony Close explains, the executives perform the crucial function in bringing in the consumer voices by ensuring that there is wide spread public consultation and, where appropriate, specific consumer research that might focus on specific communities, in terms of faith, gender, and disability, or maybe based on regionality and geography. These data are used as a foundation of what people think and it is the role of independent members to make a judgement whether final decisions are in line with these data. The situation is the same when it comes to ASA and ATVOD where there is also great reliance on the executives to bring in the consumer perspective (private interviews with Pete Johnson, Chief Executive of ATVOD; Julie Hornle, Independent Board Member, ATVOD; Shahriar Coupal, Director of CAP and BCAP, ASA).

Thus, there is no separate engagement by the independents. They are not meeting with citizens or public interest groups (Allan Bookbinder, Tony Close, Philip Graf - private interviews [26]), but expect the executives to do so when necessary and rely on the knowledge of members who have had lengthy experience in working in either consumer advocate groups or were involved in some kind of citizen empowerment (Shahriar Coupal, private interview).

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[26] Allan Bookbinder, Independent Board Member, ASA Council; Tony Close, Director of Content Standards, Licensing and Enforcement, Ofcom; Philip Graf, previously Chairman of the Content Board, Ofcom, currently Chairman of the Gambling Commission

Content Board members, as became evident from the analysis of their meeting minutes, had meetings with many industry representatives, with the purpose of being well-informed: 'there is a desire that non-executive members keep apace with what is happening in the industry, so when they do make decisions, they have a good understanding and grounding of what is going on in the industry' (Tony Close, Head of Content, Ofcom, private interview, 2013).

Regarding the issues dealt with and the stages of decision-making, these are determined by the fact that Independent Board members are a part of the main decision-making structures within the regulators, and this has both positive and negative effects. Speaking of the former, it gives independent Board Members power when it comes to major and important decisions. On the other hand, there is a selection of issues at the executive level. As Anthony Szynkaruk, an executive at Ofcom, claims, 'the decisions we would take to the Boards would depend on their significance, but it is the role of the people in any organization on a day to day basis to make a judgement as to what the senior people up the chain need to know and make a decision about it. Otherwise I am not doing my job because they cannot decide on everything'. And Tony Close states, as a part of effective administrative function, Boards delegate many decisions to other individuals or bodies within the organisation. Thus, they are consequently not involved in all the decisions. It is the same when it comes to the ASA, where the executives invite the Boards to take the big decisions and consider the options put forward to them. Shahriar Coupal and Anthony Szynkaruk make the important point that independent Board members are part-timers, meet once a month and have other aspects of their working lives, which needs to be considered when it comes to their workload and the number of issues that can be brought to them is quite small. Another interesting point is that there is no independent representation on BCAP, the body that makes the advertising rules, thus independent Board members are not involved in this important aspect of advertising regulation.

This all has consequences on the stages of the decision-making independent Board members are involved in. As just presented, their involvement is mostly in the final stages. Many decisions are made at the executive level, but on the other hand, the Boards

set the strategy for the regulators, and thus set the 'direction of travel' and the overall agenda. This is all a bit different when it comes to ATVOD since it is a much smaller body and its Board is involved in all the decisions.

Another crucial aspect for the democratic quality is the question of equality in terms of the opportunity, the right and the capacity to participate at the Board level and influence decisions. There seem to be two distinct perspectives in relation to this issue: the equality of the entirety of the citizens to be independent Board members, and the equality of influence of different members once on the Board.

In terms of the first meaning, the entirety of the population has the formal right and opportunity to be an Independent Board member since the advertisements are public. However, because of the requirements to be on the Boards in terms of expertise, experience and the skills, the reality is that only a small percentage of the population has the capacity to use this opportunity. As Graham Howell, Ofcom's Secretary to the Corporation who is involved in appointments, claims, it is mostly middle-aged professionals. Not choosing ordinary citizens or those who are representative of the population is a compromise since very strong individuals in intellectual terms are needed in order to be influential and comfortable enough in comparison to the executives of the regulatory bodies (Philip Graf, Former Content Board Chair, private interview).

And this brings us to the second meaning of equality, and that is the equality of different Board members, and it is here that individual expertise and knowledge is crucial for the independent input to be influential. Although the democratic principle of one person-one vote is respected at regulators, there are rarely any votes (Graham Howell, Stewart Purvis, private interviews). The ASA Council sometimes has a vote if there is no consensus on adjudications (Allan Bookbinder, Independent Board Member, private interview), but this is not at their Board level. Thus, recruiting strong independent members that are at par with the executives and industry Board members is crucial in

order for the equality to be realized in practice (private interviews with Stewart Purvis, Philip Graf and Ruth Sawtell [27]).

When it comes to equality between independent Board members and the executives, an illustrative case is Ofcom's Content Board that has had issues at the beginning in recruiting independent members that would be strong enough in relation to the executives and provide a credible input that the Main Board and the executives would take seriously. As Stewart Purvis, who was a Senior Executive at Ofcom in charge of content matters and dealt directly with the Content Board explained, the first two partners, Tim Suter and himself had successful careers in broadcasting at a very senior level, were trusted to 'make the right call', and had high reputation and credibility. This was coupled with weak membership of the Content Board, and consequently, they were 'very happy to go with our decisions'. However, the balance of power has since changed for a few reasons. Due to cost reductions at Ofcom, the preference has been to employ at senior levels professional regulators with no experience in the industry. But on the other hand, the membership of the Content Board grew stronger and consequently more powerful, and thus became able to challenge the executives on the decisions and change power relations (Graham Howell, Stewart Purvis, Philip Graf, private interviews).

As Philip Graf states, Ofcom is a place where intellectual arguments are important: 'The values were absolutely clear and you had to have an intellectual base to your argument. There was no hierarchy of status; there was hierarchy of intellect, which was great'. Thus if Content Board members would be ordinary citizens, even if they are intelligent, if their strength is not policy making, they would struggle, which happened at the beginning. The situation is similar in ASA. As Stephen Locke [28] claims, since advertising regulation is an interesting area to work in, it attracts good quality of people in terms of intellect and integrity and creates a strong executive that needs to be matched when it comes to independent members.

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[27] Stewart Purvis, currently a Professor at the City University London, previously Partner for Content and Standards, Ofcom; Philip Graf, previously Chairman of the Content Board, Ofcom, currently Chairman of the Gambling Commission; Ruth Sawtell, Independent Board Member, ASA Council

[28] Stephen Locke, Chairman of the Advertising Advisory Committee, ASA

In addition, the nature of regulation means that one needs to understand content and have experience of it in order to be able to deal with regulatory codes in a meaningful way (Stephen Locke, private interview). Philip Graf gives an example of a Content Board member, who, although extremely intelligent, could not deal with the codes. There were others in a similar position, and since they were not seen as being able to contribute credibly to the policy making by the executives, it became frustrating for them and their input was not influential. Not having an independent input that is influential defies the purpose of appointing independent Board members. Thus expertise is crucial.

In addition to the importance of the recruitment of experts for power relations, interviews conducted revealed that there are a few other determining factors, especially when it comes to the relations between independent and industry members on ATVOD's and ASA's Boards.

The nature of the advertising industry is helpful for the influence of independents, since many participants are concerned about their reputations and want the regulatory system to work (Stephen Locke, private interview). Thus, industry Board members are not there to represent their particular interest but to provide their expertise in the interest of the regulation working properly so that standards are maintained. There is a positive attitude from them towards the opinions coming form independent members, and quite often, they are the ones that are stricter (Ruth Sawtell, Rachel Child, private interviews[29]). At the beginning, there was an enormous amount of industry nervousness about consumer and independent involvement, but, as times have gone on, the industry's confidence in this sort of input has increased since it adds value and such input is helpful in building a reputable industry (Stephen Locke, private interview).

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[29] Ruth Sawtell, Independent Board Member, ASA Council; Rachel Child, Independent Board Member, ASA Council

The focus and attitude of the regulator in general is also crucial . An example is that the Content Board at Ofcom became increasingly more significant as there was a realization that content issues are important, complex and, more crucially, are not going away, which was the default attitude when Ofcom was established. When Philip Graf was asked to be the Chairman of the Content Board by the then CEO of Ofcom, Steven Carter, it was with the words: 'Philip, your job is to be the last governor of Hong Kong with regards to content' (Philip Graf, private interview).

In addition, there needs to be willingness by the executives and the particular individuals for independent Members to be seen as equal and influential. Collete Bowe, a former Chair of Ofcom, who came from the consumer perspective, enabled the Content Board to gain more importance, as well as Stewart Purvis, who tried to make the arrangement work. As Anthony Szynkaruk claims, ' a lot of it would come down to the strength of the Chairman, about the vision of what they want the Content Board to achieve, and to the extent to which that can be aligned with what the overall Ofcom Chairman's vision is. Some Chairmen are more interested in broadcasting issues than others.'

Thus, when it comes to the democratic qualities of the empowered space, there is no link between the citizens and independent Board members that are appointed to represent their perspective.

5.1.2. Deliberative qualities of the empowered space

When it comes to the quality of the debate, the characteristics of the meetings minutes make researching this issue difficult. However, there are a few conclusions that can be made based on the information available and interviews conducted. The debate is about issues of common concern, deliberation is consequential and the decisions are binding, and this is what makes these structures minidemoi.

According to those interviewed, this deliberation is based on reason. As Philip Graf noted, intellectual arguments are crucial at Ofcom. For Stewart Purvis: 'People at Ofcom were mostly absolutely focused on trying to get to the truth, trying to be fair, trying to understand commercial imperatives versus citizens, that sort of stuff, and the fact that this resulted in five-hour meetings or working until morning was hard but actually, at the end deeply impressive'. And as Stephen Locke remarked about the people at ASA: 'the staff feels acutely that they are working for the public and they try very hard to get the right answer'.

In addition, certain steps are taken to ensure to an extent that deliberation is key to making decisions. For example, there are rules regarding conflict of interest, and there are fair recruitment processes in place. However, there are some decisions taken by Ofcom and ASA where it is not certain whether deliberation in their Boards was crucial since there are no meeting minutes. For example, the decision to delegate to ATVOD came after insistence from the Government, as Stewart Purvis claims. There is no known coercion or tyranny, and there have been no reports regarding corruption. It seems that the participants are committed to deliberation and there seems to be mutual respect (Ruth Sawtell, Tony Close, private interviews).

What might be a problem for the quality of the debate is that most of the data is coming from the regulators. The executives are responsible for making the Boards informed, as well as their Chairs, and as discussed above, independent Board members are not proactively searching for information. For example, there is a complex structure at Ofcom and ASA that aims at ensuring Board members are timely and continuously informed and great attention and care is devoted to this (Tony Close, Shahriar Coupal, private interviews).

Although this complex structure constrains the framework of the deliberation, it is not unexpected since the ultimate aim of independent Board members is to provide an alternative and independent input into the decision-making. However, once again, the quality of independent Board members helps to expand this debate. Less strong

members would be highly dependent on and at the mercy of that information whereas heavyweight members would be able to challenge the executives and the information supplied and their assumptions (Philip Graf, private interview). In addition, the agenda is also set by the executives around the annual plan of the regulators.

Therefore, it seems that minidemoi are characterized by deliberation but not by democracy. Consequently, these institutional structures do not empower citizens.

5. 2. Minipublics

When it comes to minipublics, the analysis will deal separately with each distinct type: different advisory panels and committees established by ASA and Ofcom, consultations, research, complaints data and public meetings.

5.2.1. Ofcom's Panel and Advisory Committees

While the Communications Act 2002 Article 14 allows Ofcom to establish any advisory committees they think fit, the communications Act 2003 makes more specific provisions regarding Ofcom's obligations in this area and lays duties on Ofcom to establish the Communications Panel, and Advisory Committees (ACs) for different nations of the UK: Scotland, Wales, Northern Ireland and England. The Communications Act 2003 also made provisions for Ofcom to establish an Advisory Committee for Older and Disabled person (ACOD), which was merged with the Panel in 2011 following cuts in Ofcom funding. After the global financial crash in 2008 and consequent recession, Ofcom made a financial settlement with the Government as a part of its spending review. With its budget reduced, Ofcom embarked on the Expenditure Review Programme (ERP), which resulted in a few relevant changes in its governance, one of them being the cut in Panel's membership numbers and budget, and the other was the merger of ACOD and the Panel.

These structures have the same role and that is to provide advice to Ofcom from a consumer perspective and interest, with the ACs being focused on regional consumers.

Speaking of democratic qualities when it comes to the Panel and ACs, a number of questions are of relevance: how inclusive are these structures in terms of different groups of citizens/consumers, issues they give advice on and stages of decision-making they are involved in, as well as the question of equality of different members and reasons in terms of opportunity, right and capacity to engage or be considered.

Starting with inclusion, the Panel and ACs do not aim to include citizens/consumers directly in their decision-making processes and empower them in that manner, but there is a reliance on the Members to advocate for their interest. These representatives are neither directly authorized by citizens nor accountable to them. Instead, it is Ofcom's statutory duty to appoint these members with the approval of the Secretary of State. Sections 17 and 20 of the Communications Act 2003 set the details regarding membership. When it comes to the Panel, Ofcom is to secure there is a different member of the Panel that is capable of representing the interests and opinions of people living in different regions of the UK (17(3)), and that the Members are able to give *informed advice, as far as practicable* (emphasis added)*,* about matters relevant for people from urban and rural areas, small businesses, and the disadvantaged, such as those with low incomes, the disabled, and the elderly (17(4)). Similarly, when it comes to ACs, the Communications Act 2003 20(3) prescribes that Ofcom 'must have regard to the desirability of ensuring' that the members of different ACs are able to represent the interest and opinions of the people from different nations.

Although the Members are not in any way to be authorized by the people they are representing, the provisions in the statute aim to ensure there is representativeness of different groups in the society to a certain extent. This can be described as an attempt to ensure there is what Dryzek (2010) terms 'representation of discourses' with the

inclusion of perspective of many different groups. However, the attempt is lacking in certain respects. Representation of discourses needs to be based on extensive research so as to be as inclusive as possible and this is not the case here.

In addition, there is a focus on ensuring there are representatives from different regions, but this assumes that people from different regions have homogenous interests, which is arguably not the case. For example, it is especially difficult finding representatives for England with its nine different counties that have very little in common and perhaps do not have a collective interest (Graham Howell, Ofcom, private interview). Secondly, the number of groups referred to is limited and there is no mention of, for example, the young, children or the migrants, although they are consumers of communication services. The provisions for the Panel to have Members that can represent the interest of the elderly, disabled and those from urban/rural areas is watered down with the clause 'as far as practicable'. There are many dimensions of the consumers and citizens, and these provisions fail to recognize this.

Thirdly, it has proven to be very difficult to achieve the necessary diversity of members in practice. As Graham Howell, Ofcom's Secretary who is in charge of recruitment for different committees, claims, Ofcom needs to recruit a high number of members and a specific type of people needs to be targeted since the job is part-time and the salary is not particularly high: those who are either building their portfolio after taking a redundancy package, filling up their CV, or those being able for any reason to give up 3 or 4 days a month. He further claims it has been particularly difficult to recruit younger and older people, and those from ethnic minorities: the problem is not finding experienced and expert people, but having a diverse group. This issue therefore reflects, and in turn strengthens, broader divisions and inequalities within society. Consequently, the vast majority of members are white and middle-aged.

Fourthly, and perhaps most importantly, the provisions do not mention the citizens although, in practice, both the Panel and ACs try to represent the citizens' perspective as well, as has become evident from the analysis of their meeting minutes. However, as the

resources have been cut in 2011 and the membership numbers reduced, the focus on the priorities has become more pronounced and the citizenship perspective has been sidelined.

Thus, the focus is on ensuring that members who can represent certain perspectives are appointed. As Chris Taylor, Ofcom's Head of Consumer Policy claims in a private interview, a lot of effort has been made to increase representativeness through recruitment. The important question is, however, how Ofcom ensures that these members are able to represent the interest of these diverse groups and whether they are able to give 'informed advice'. In addition, how is this informed advice obtained? Is there a direct link with the people from these different groups? The statute gives no indications regarding this but there are a few ways this has been resolved in practice.

There is a great reliance on individual members in two respects: their knowledge of what would be in the interest of citizens/consumers based on their expertise and previous experience, and their personal proactive engagement and commitment. Firstly, the appointment procedures aim at ensuring that the members have sufficient level of expertise and knowledge to represent the interest of different regions and groups. Secondly, the members are committed to genuinely advocate for the consumer perspective and engage in the issues and with different stakeholders. As Tony Close has described the members of the ACs in the interview, 'in practice they are excellent champions of the relevant nations and they take it seriously. They are forensic in their approach in examining issues that have an impact on those nations and those regions and they are tireless in representing their interest and ensure those voices are heard'. Moreover, individual members are encouraged by the Chairmen to be proactive in engaging with different stakeholders, as the analysis of meeting minutes has shown.

This analysis has also shown that they do engage in practice as many of these meetings are mentioned in the minutes. In addition, Tony Close claims that 'they absolutely are engaged outside the meetings'. Thus, there is a reliance on members' expertise and engagement in order to obtain information about issues relevant for citizens/consumers.

The Panel in particular has been concerned with the issue of engagement and has continuously tried to improve it, especially since 2007 when they reached the conclusion that 'having persuaded Ofcom to make positive changes in the way that it approached its work with consumers, perhaps it was now time for a change of Panel emphasis on engagement'. It has also been recognized that the more knowledge the Panel has, its ability to influence the regulator would be enhanced (The Panel, 2007).

Over the years, there have been a number of ideas, one of which has been to raise the Panel's profile (55th meeting) in order to deal with the issue that not many people have been engaging with it. The possible reasons for this have been seen to be the perception that the Panel is a part of Ofcom, and that public awareness of it and its role has been low (CCP 35th meeting, 20/03/07; CCP 24th meeting, 11th meeting). Consequently, the Panel changed their name to Communications Consumer Panel. But this has not been seen as particularly effective and has been described by some commentators as absurd and 'just the silliness from the previous Chair' (private interview, anonymous interviewee). In addition, the Panel has worked on its media strategy and tried to make better use of its website and provide more in terms of regular content, as well as a periodic newsletter, and news releases to accompany advice given to Ofcom, and try to raise the attention of media outlets. However, they admit that, in terms of the use of media, the numbers remain low (CCP, 55th and 78th meeting).

Similarly, the ACs have tried using the media in order to enhance the engagement with stakeholders, but again with very limited success. The Advisory Committee for England devised what has been referred to as 'a web-based outreach project' in which social media would be used to engage with stakeholders. A blog 'Advice to Ofcom' has been created as a result, but it has had very little success (Graham Howell, Ofcom, private interview). More importantly, it is significant to note that even if it had more success, its aim has not been to engage with citizens and consumers. The idea was to develop a blog in order to allow ACs to complement other sources of evidence for its advice to Ofcom and encourage individuals with expertise to comment on Ofcom's work rather than to

generate mass participation in the site: 'it would attempt to draw on the wisdom of citizens with expertise for the benefit of Ofcom's national Advisory Committees and Ofcom itself' (30th meeting, ACE, 15/10/10; ACE, 03/02/11). However, the project has been a failure despite the efforts to encourage authorship by members and comments by readers, and to promote it among stakeholders (ACNI 29th meeting, 27 October 2010).

In terms of direct engagement with consumers and citizens, there seem to have been very few ideas. The Panel wished to engage more with the young people via schools or colleges, and, at the beginning, there was a suggestion to set up a group of sufficient size that would be representative of UK consumers where the Panel could test its ideas and provide more evidence base. This was guided by the fact that the Panel needed direct access to consumers and not just consumer bodies (The Panel, 2004).

However, these and other proposals have not been realized due to two major factors: the role and shape of the Panel, and limited resources (The Panel, 2007, 2008). Firstly, the role of the Panel has primarily been to influence the regulator thus it has been seen that 'a discreet 'insider' role based on a trusted and constructive relationship with Ofcom' could be more effective than a higher profile and wider external engagement.

Secondly, constrain on resources had an effect on modes of engagement when it comes to both the Panel and the ACs. Due to limited financial resources, especially after the cuts in 2011, costly proposals have not been implemented. In addition, the members have limited time available since they are part-timers, the number of members has been cut, and the support teams are small (Colin Browne, private interview [30]). Consequently, there is almost no engagement with the consumers, and both the Panel and the ACs engage primarily with organizations and businesses.

However, apart from stakeholder engagement and members' expertise, other means of

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[30] Colin Browne, Chairman of the Voice of the Listener and Viewer

obtaining information regarding consumer perspective are used. When it comes to the ACs, data are coming from Ofcom's regional offices in Scotland, England, Northern Ireland and Wales. In addition, one of the most important sources of information is Ofcom's executive, which is relied upon in order to bring in the 'consumer perspective' that they gain via research, consultations and the Call center (The Panel, 2007).

Moreover, the Panel also has its separate research budget. The problem with this is that, on the one hand, the budget is getting smaller, but on the other hand, 'if the Panel represented many millions of consumers, there were limits to how much the Panel could inform itself by consumer research' (The Panel, 2007). As Chris Taylor claims, the Panel has made the most of what they have and used their research budget quite creatively, but, still, the limits as to what they can achieve are very narrow.

Thus, when it comes to the question of inclusion, there is no direct inclusion of citizens and consumers but the inclusion of their perspective as understood and advocated for by the Members.

Another issue that is important from the perspective of democracy is the scope of topics the Panel and ACs deal with. The scope refers to both the issues advice is given on and the input into different stages of decision-making.

In terms of the Panel's and ACs' involvement in different stages of decision-making, it has been emphasised continuously as one of their most important advantages that they have privileged access to Ofcom's decision-making processes, sometimes on a confidential basis, before regulatory options are finalised. Since they are a part of Ofcom's governance structure, they have been able to engage in the early stages of decision-making and shape the proposals rather than just respond to finalised regulatory options, which is when their input would be most valuable (ACE, 2010; The Panel, 2010; ACS, 2009). Communication between different structures within Ofcom is well-organized and there is a good flow of information. At every meeting of the ACs there

would be an update from the Main Board and the executives, as well as the Content Board, the Panel, the Nations Committee and the Nations team. Similarly, the Panel's meetings are attended by Ofcom's executives and Ofcom has a statutory duty (Communications Act 2003, 16(8)) to provide the Panel with information in order to enable it to carry out its functions. Thus, the Panel and the ACs are able to get involved early in the process. For example, Ofcom published its consultation regarding an initial assessment when to adopt self- or co-regulation on 27/03/08, but the Panel was discussing it for the first time just over a year earlier at their 34th meeting on 27/02/07.

When it comes to the scope of the issues the Panel and the ACs are involved in, there are a few determining factors: the constraint resources impose, the nature of the ACs, and the distinction between citizens and consumers.

One of the biggest challenges are resources (Chris Taylor, Ofcom, private interview). Due to resource constraints in terms of finances and staff commitment, the ACs and the Panel have had to prioritise their work over the years, especially after the ERP in 2011, when for example the Panel decided to proactively engage with a small number of issues, only monitor a few others, and look for the areas where others were doing some work so they could contribute rather than lead (70th, 72nd and 76th meeting). The Panel is supported by only two members of staff (Colin Browne, private interview) so they can only focus on a limited number of issues.

Although the ACs' work covers a wide range of topics - from 4G auctions to media plurality, mobile coverage, TV licensing, PSB update and mobile roaming - they focus on issues relevant for their region. For Graham Howell, 'the advisory committees in each nation would push around specific issues they think have an impact on a nation and that is almost entirely access to service such as broadband, post, or Welsh or Scottish language television programming, and inclusion'. The analysis of the meeting minutes and the ACs' priorities has confirmed this and although the Content Board for example is reporting at the ACs meetings and makes reference to their work on, for instance, the future of advertising and sponsorship, exposure of children to alcohol advertising,

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product placement and VoD (ACS, 2013), the ACs have not engaged in these issues up to this date.

When it comes to the Panel, the work they have done in relation to the regulation of advertising concerns only that of broadband speeds. They have very proactively engaged with BCAP and ASA on this issue, invited them to the meetings several times, and publicly announced that they are dissatisfied with the way speeds are advertised. However, the Panel decided at their 55th and 56th meetings that they will not engage with the big code review, and they have not been concerned with any other aspect of ad regulation. When it comes to self- and co-regulation in general, they have engaged with Ofcom's project in 2007 and 2008, but have not been involved in other issues, not even delegation to ASA and ATVOD.

Another problem with the scope of issues the Panel and the ACs are involved in is the distinction between citizens and consumers. The Panel struggled with the definition since their establishment, as it became evident with the analysis of their meeting minutes. They claimed that the expression citizen-consumer has not been designed to represent a hierarchy but was employed for convenience and their intention has never been to represent only the consumers but 'the people', and not to be confined to economic issues (2nd, 7th, 11th, 20th, 35th meetings). However, eventually a hierarchy became evident, and as the resources have been cut, the Panel focused more on consumer issues.

Another issue is the fact that the Panel is not allowed to interfere in the area of content, thus Ofcom does not have a 'critical friend' in this area (The Panel, 2008): the work the Panel is performing in terms of consumers (giving independent advice) does not exist in terms of content. The Content Board is a sub-committee of the Main Board and is not there to provide independent advice to Ofcom regarding content issues.

Consequently, the ACs have not dealt with important regulatory issues notably alcohol advertising, product placement, nor the delegation to ASA and ATVOD, whilst the

Panel has only advised Ofcom in relation to a limited number of issues related to these areas. So the people in those regions are affected with the way broadcast ads are regulated, but these voices would not be heard via the ACs, although the possibility has existed to influence Ofcom at early stages of the decision-making.

In terms of deliberation, although it is difficult to establish the quality of deliberation since the detailed meeting minutes are not available, a number of arguments can be made based on the information available and obtained through semi-structured interviews.

Clearly, the issues of common concern are debated and the decisions are not binding, which classifies the Panel and ACs as minipublics for the purposes of this research. These structures also seem able to induce deliberation, members are seen as committed (Tony Close, private interview), and there seem to be no obvious constraints, apart in terms of resources and time.

When it comes to the information and data available for deliberation, there is the danger of 'Ofcom capture' (CCP, 2004). This is due to the fact that most data is coming from Ofcom executives and the agenda is mostly based on Ofcom's annual plan, although there is some independent thinking on what would concern the consumers the most (Colin Browne, private interview). The ultimate purpose of these structures is to give advice to Ofcom, thus the work they perform would be futile if it was not relevant for Ofcom's plans. In addition, there is a reliance on Ofcom's data obtained through research, consultations and the Call Centre regarding the consumer perspective. Although there are great benefits from being a part of Ofcom's governance and having an input from different structures within it, the Panel and the ACs' debate might be dominated by information from Ofcom. Thus, although there is no obvious coercion, the ultimate goal of giving advice to Ofcom is dominant.

Speaking of the influence, when it comes to the Panel, there are certain statutory provisions that ensure its advice is influential. Section 16 (7) of the Communications Act

2003 sets as one of Ofcom's duty in relation to the Panel to have regard to the advice it gives and the results of the research it undertakes, and, in the case Ofcom does not accept that advice, it has the duty under 16 (10) to inform the Panel of its reasons for doing so and to publish those reasons.

The Panel's influence is enhanced by the fact that the Panel publishes its advice, making it difficult for Ofcom to disregard it in entirety, and, even if they did, the Panel would point it out and would certainly criticise Ofcom (Colin Browne, private interview).

Another reason why the Panel and the ACs are influential is due to Ofcom's internal organisation and the way these structures are incorporated into the wider Ofcom governance. As discussed, there is a flow of communication between different structures. In addition, in 2010, the Nations Committee has been created, which is valuable since the Chairmen from different Nations Advisory Committees are members as well as two Main Board members. Thus, the work of the ACs feeds directly into the Main Board, which also considers papers from different nations at every meeting. In addition, Ofcom's Chairman is attending the Panel's meetings, as the analysis of the meeting minutes has shown.

In addition, the input from the Panel and the ACs is influential since it is considered credible and legitimate due to the fact that it is coming from independent experts and their engagement. Chris Taylor has stated that they have been very influential in Ofcom's work, a view that has also been held by Colin Browne, a former Member of the Panel. It is seen that the members of these structures represent and engage with the 'silent majority' that is unlikely to complain or otherwise make their views known, and also gain knowledge through their engagement in their regions and with different stakeholders that would not perhaps be available to Ofcom otherwise (Chris Taylor, private interview). Genuine attention is paid to their advice and some of the examples include the work they have done on the quality of customer service and mobile services in terms of rural not-spots, which pushed Ofcom's engagement with these issues. As Chris Taylor claims, even senior level executives are worried about these issues, and it is to a large extent due

to the continuous insistence from the Panel and the ACs.

However, since the duty of the Panel and the ACs is to give advice to Ofcom from the consumer perspective, another crucial reason why they have been influential is because the focus at Ofcom has changed and there is more attention to consumer issues. In the early days, as Chris Taylor claims, Ofcom would simply say 'we cannot tell companies where to invest', but this has changed. Over the years, Ofcom's consumer team has grown from one person that was in charge of helping the Panel to a whole Consumer Group. In addition, the previous Chairman, Collette Bowe, came from the Panel and had significant expertise when it came to consumer issues, whilst the new Chairman, Patricia Hodgson, is expected to drive the agenda even more in the direction of citizens and consumers.

Thus, to summarize, the distinction between citizens and consumers and the focus on priorities due to constraints has led to the advertising issues falling through the cracks when it comes to the work of the Panel and ACs. Not only there is no critical friend when it comes to content issues, but there is not one when it comes to citizenship issues. When it comes to specific issues of democracy and deliberation, the Panel and ACs are not empowering citizens directly, thus the democratic perspective suffers, but what is gained is perhaps in terms of the deliberative side and their influence.

5.2.2. **The Advertising Advisory Committee (AAC)**

The Advertising Advisory Committee (AAC) is the independent consumer panel established by BCAP to provide a consumer perspective to its code policy work. Although its existence was not envisaged in Ofcom's original plans to contract out regulation of broadcast ads to ASA in 2004, following consultation and expressed dissatisfaction among the respondents such as the National Consumer Council and the Consumer Association that there was no lay input into the code-setting to be performed by BCAP, Ofcom decided and agreed with the Task Force for the AAC to be set up to

provide lay and expert input into the code making (Ofcom, 2004a: 6). Thus, the AAC have operated since 2004 under an Independent Chair and its members are 6 independents and the BCAP Chairman.

When it comes to the analysis of its contribution as a minipublics sponsored by the regulator, in terms of inclusion, Stephen Locke, its Chairman made a valuable comment regarding its representativeness:

> 'I wouldn't pretend for a minute that we are able to pick up the broad mass of public opinion but that is not really our job. Our job is to identify the consumer interest in the specific issues that are on the table and to tease through those in detail and make sure that the proposals are as defensive as they can be from a consumer point of view' (personal interview, 2014).

This is illustrative of the way not just representativeness is conceptualised at the ACC but also at other structures, such as Ofcom's Panel and the ACs. The purpose is to represent the consumer perspective but not to have members that are representatives of consumers. And when asked about accountability, Stephen Locke explained that they are accountable to BCAP, and there is a dotted line accountability to Ofcom since they send an observer to their meetings.

Additionally, the emphasis is on the expertise of the members and Stephen pointed out that they have a number of experts on the AAC: one health expert, two with legal background, one broadcaster, and a former ASA Board Member. He described them as 'a reasonable spread of people', but this applies only to their expertise and not their diversity. There is no direct work with consumers, and there is no work with consumer organizations. Individual members have or have had links with some consumer organisations, for example, Stephen Locke was for a long time Vice Chair of Consumer Focus, but there are no requirements regarding this. If a need arises to consult with consumer organisations, the AAC would assume that ASA executives have done so. In

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addition, the AAC would also rely on the Secretariat to conduct research and consult if necessary, as they do not have a separate budget for stakeholder engagement or consumer insight of any sort. Thus the only source of consumer knowledge is expertise of different members and the information supplied by the ASA executives.

Consequently, the focus of the recruitment of different members is not placed on representativeness but on their ability to engage in details in the issue of drafting regulatory codes, and capability to balance between the needs of the regulator and the development of an honest and critical consumer perspective. Thus, the demands are high and as Stephen Locke claims, 'we got some very good people, but it always takes a bit of recruitment to get there'.

When it comes to the scope of issues the AAC is involved in, 'the agenda is set by the Secretariat or at least is proposed by the Secretariat, because they are the ones who know what decisions are coming up in what space and time. We don't know, we are obviously part timers and we do several other jobs and we need to be advised by them on. However, we do have the opportunity to request agenda items, and we do but only from time to time.'

Thus, the democratic quality of the AAC in terms of inclusion is dominated by its purpose: to give advice to BCAP. The agenda is set by BCAP's work and members are recruited on the basis of being able to provide expert advice.

This issue is closely linked to the quality of the debate and to the extent it can be seen as free and unconstrained. Although there are no formal constraints, the fact that the members are chosen by the BCAP, there is accountability to the BCAP and the agenda is set by the ASA, the framework of the debate is set. Additionally, the AAC relies to a large extent on the data received from the ASA, as mentioned. In addition, there is no publicity of the meetings, since the minutes are not published, and publicity to a large extent influences the quality of the debate in terms of it being other-regarding.

However, the input from the AAC seems to be influential, as Stephen Locke claims, and it has had an impact on what the BCAP has decided on many occasions. Shahriar Coupal also claims that the AAC is absolutely influential and that 9 out of 10 pieces of advice the AAC gives is accepted by BCAP. As Shahriar Coupal claims, 'this is because ASA is not a body that wishes to work in isolation and consequently provide policy that is estranged from the society. Thus, the AAC is an excellent advisory sounding board to ensure that the industry has not obviously overlooked citizen, viewers and listeners concern'. Anthony Szynkaruk, who is Ofcom's observer on the AAC, agrees with the claim that the AAC is influential, but he adds another reason and that is the fact that, even if the BCAP discards AAC's advice, the final approvals of the Code lie with Ofcom, which would expect the BCAP to take account of what the AAC says and would eventually be mindful of the fact that the AAC has taken a very strong stance either against or pro a decision.

In addition, the influence of the AAC can also be contributed to the positive attitude of the industry members who sit on the BCAP. As Stephen Locke claims, the advertising industry wants to run a responsible business and thus takes their advice seriously.

Thus, the qualities of the AAC are similar in comparison to the Panel and the ACs. There is no direct link with the citizens, but experts are relied upon to bring in the consumer perspective. The deliberation is constrained by the ultimate purpose of the AAC, which is giving advice to the BCAP. However, this structure is of significant influence.

5.2.3. Consultations

When it comes to consultations, Ofcom has a statutory duty under Section 16 of the Communications Act 2003 to 'establish and maintain effective arrangements for consultation' and under Section 324, Ofcom is, among other things, obliged to consult before it imposes any content standards and codes. This duty to consult has been

transferred to the co-regulatory bodies, ASA and ATVOD, through their Memorandums of Understanding with Ofcom.

Looking at the democratic qualities of the consultations these bodies are organising, the first aspect to be assessed is to what extent these consultations are inclusive in terms of citizens and consumers. Whereas there are no formal restrictions as to who can engage in this manner, the numbers in practice remain quite low. For example, the following are the relevant consultations for this thesis and the number of stakeholders that responded:

- Ofcom (2003/04) 'The Future Regulation of Broadcast Advertising' – 76 responses, 9 public interest organizations, 5 individuals;
- Ofcom (2004) 'Criteria for Transferring Functions to Co-regulatory Bodies' – 15 responses, no public interest groups, 1 individual;
- Ofcom (2004) 'Alcohol Advertising on Television' – 48 responses, 10 public interest groups;
- Ofcom (2008) 'Initial assessment of when to adopt self- or co-regulation' – 24 responses, 3 public interest groups, 1 individual;
- Ofcom (2009) 'Proposals for the Regulation of VoD Services' – 25 responses, 3 public interest groups;
- Ofcom (2012) 'Review of Ofcom's Designation of the Authority for Television on Demand - 9 responses, 2 public interest groups;
- Ofcom (2014) ' – Proposal to renew the co-regulatory arrangements for broadcast advertising' - 8 responses, 1 non-industry response;
- ASA (2005) 'Broadcast Advertising of Alcohol' – 36 responses, 4 public interest groups; and
- ASA (2009) 'Code Review' – 30,000 submissions, 32 related to alcohol ads, 5 public interest groups.

In the space for deliberation created by consultations, the majority of the voices heard are those from the industry (total number of responses 273 - 13.55% public interest

organizations (37 responses), 2.56% individuals (7 responses)). And the number of responses decreases with time. For example, the first consultation on the topic whether to delegate regulatory powers to the ASA attracted 76 responses, while in 2010 when Ofcom consulted whether to contract out to ATVOD and the ASA for VoD services, there were only 25 responses. The numbers are even lower when it comes to renewals of these designations, 9 for ATVOD and 8 for ASA.

Evidently, the number is the lowest when we speak about individuals, and it is important to add that 7 individual responses received are either coming from academics or people with significant experience in the consumer landscape, such as Claire Milne. It has proven to be especially difficult, almost impossible, for regulators to engage with the ordinary citizens via consultations regardless of the amount of publicity (Colin Browne, Graham Howell, private interviews). Although the following example is not relevant for this research, it is very illustrative. Ofcom consulted on 'deliver to your neighbour' scheme proposed by Royal Mail, which gave the option for people's post to be delivered to their neighbours. Ofcom's consultation received only around 300 responses, which is a very tiny proportion of the UK population despite the fact that it was widely publicised, a leaflet was delivered to every household in the country, it was directly relevant for all the citizens, and not in any way complex and technical (Graham Howell, private interview). Thus, although the opportunity exists for citizens to engage with the regulators via consultations, they rarely do so.

Moreover, due to limited resources, it is also hard to get commitment from small organizations to submit responses (Colin Browne, private interview), and it has also been recognised that even the large ones, such as RNIB, have only one person working on communications issues (The Panel, 2008). Responding to consultations requires resources, and it has been recognised that 'the current system appeared to favour industry stakeholders with the staff and resources to respond to consultations' (The Panel, 2008).

Ofcom has been particularly concerned with the issue of improving consultations. A few

problems have been identified over the years and there have been some proposals how to engage more organisations, such as the use of podcasts or other broadcast material to increase engagement especially with the younger people, follow up activity to see why certain stakeholders did not respond, aid engagement, set up a pool of stakeholders to consult, and promote consultations in supermarkets and GPs (The Panel, 2009), but they have not been implemented due to limited resources. The high number of consultations seems to be a part of the problem. As Mike Jempson from MediaWise claims: 'One of the best ways of 'managing' consultation is to have so much of it that people give up. In its early days, Ofcom certainly overdid the process, consulting about every jot and tittle'. But, that might be misleading since the number of distinct issues consulted on is smaller, such as universal service (Claire Milne, private interview). And as we can see from above, there are three consultations regarding the same issue, should Ofcom delegate to co-regulatory bodies and under which conditions.

As the analysis of the meeting minutes has shown and the interview with Graham Howell, the Panel has been heavily engaged over the years to deal with the issues as well as Ofcom, but getting people and public interest groups to engage still remains the problem, although consultations are publicised via the media and Ofcom's newsletter, and every manager would proactively contact relevant organisations and invite them to respond. But apart from this issue, Graham Howell, Ofcom's consultation champion, claims there are very few complaints regarding consultations, and Ofcom believes that the way they consult is transparent, publicised in the right way, they believe they consult for long enough, and that the entire process is robust and stands up to legal challenge. Laura Mathews from Action on Hearing Loss also has a good opinion regarding consultations and maintains that they are generally quite good considering some other consultations they respond to, and that they are well broken down so relevant questions can be chosen, which eases the entire process.

Although it can be argued that numbers are not crucial, as Claire Milne claims, 'numbers do matter, I am sorry to say'. She further says that the impact one good response has is still smaller than 6 responses with variations on the same topic would have. Claire

believes that it is quite powerful if a number of consumer groups submit responses that are all distinct and make different points but still push in the same direction.

However, there are those who think differently. As Shahriar Coupal from ASA claims, 'it is not about the percentage of people who are in favour of a certain option, we have to evaluate the arguments as well'. But even if we consider this, the industry still has an advantage because they have more resources to provide the regulators with the evidence they need, and this is also relevant for the equality of different responses. As Chris Taylor and Shahriar Coupal claim in the interviews, regulators need strong evidence that can stand up to legal scrutiny if they are to interfere with the freedom of speech. In addition, there is a large fear of market failure. And the industry has undoubtedly more resources. As Chris Taylor from Ofcom claims, if we want to impose a rule that would cost the industry £15m, they can afford to spend £4.5m stopping us from doing it.

Thus, for the question of inclusion and equality, there is certainly the opportunity and the right for everyone to participate, but the capacity to do so is limited by resources and capabilities [e.g. not having the expertise]. Consequently, the opportunity provided by consultations is largely used by companies and their associations.

When it comes to the quality of deliberation consultations are enabling, there are a few crucial issues. Deliberation is mediated and there is no face-to-face contact, which might have a lessened affect on the participants in terms of their commitment to true deliberation and shaping their preferences. The Panel had an idea in 2004 for Ofcom to publish their responses as soon as they are received, but this has not been materialized (4th meeting). On the other hand, there is a high level of justification for decisions, both when it comes to the responses submitted and the regulators' final decisions. As the analysis of Ofcom's and ASA's consultation documents has revealed, they deal with every response they have received and explain why they have either adopted it or not. As Shahriar Coupal said in the interview, they have received around 30,000 responses for the code review consultation they conducted in 2009. And publishing their views on every response they received almost 'killed the executives'.

However, deliberation via consultations is not key for the decisions regulators are consulting on, and this touches on the influence of consultations. There are a number of factors here. As Graham Howell pointed out, months of work on issues precede consultations, so if the reasons are not very strong why Ofcom should reach a certain decision, consultation responses would not be adopted (personal interview, 2014).

Regulators are aware of the unrepresentativeness of the responses. For example, the consultation regarding the 'deliver to your neighbour' scheme received 300 responses out of which 95% were not in favour of it. However, the consultation was preceded by research and focus groups and the results showed there was support for the scheme. There is a belief by the regulators that those who agree with certain issues usually do not respond, and that responses suffer from 'the angry men syndrome'. The problem for regulators is always whether they are obtaining a real, representative view (Graham Howell, private interview). In addition, regulators are weighing up potential risks, and consultations are only one means of information input (Shahriar Coupal, private interview).

The influence of the consultations seems to be very dependent on the attitude the regulator has in relation to the issue. For example, when it came to the BCAP's large Code renewal in 2009, the vast majority of the public interest groups who responded in relation to alcohol ads requested a 9pm watershed ban. However, as Shahriar Coupal and Stephen Locke claim, they do not believe nor any structures within ASA that there is a particular case for the watershed, thus these responses were not influential. Thus, consultations can be influential (Colin Browne, personal interview), but a lot of factors need to be present.

When it comes to the view of public interest groups regarding the influence of the consultations, the opinions are divided. Colin Browne from VLV thinks they can be influential, and Laura Mathews from AHL says they are definitely worthwhile and she

thinks they have made some achievements through consultations, such as getting Ofcom to monitor the quality of subtitles. She further claims that their responses are taken into account because Ofcom already knew who they are so they listen to them, but they do not stop listening to other people as well.

However, there seems to be some frustration as well. Mike Jempson from MediaWise claims that:

> 'the vast range of Ofcom's work and consultative processes mean that you can get drawn into a vortex - supplying lots of information, comments, suggestions (much of which never gets used) so it feels like you are wasting your unpaid time, which well paid execs can claim to be consulting widely. This is slightly unfair since consultation by its very nature tends to be a time consuming and ponderous affair. It always felt as if the industry rather than citizens had the final say.'

Claire Milne is of similar opinion and says that 9 of 10 times her response would not be used.

Thus, consultations offer an opportunity for democratic deliberation to take place. However, this opportunity is not used and consequently, the influence of deliberations remains limited.

5.2.4. Research

When it comes to research, Ofcom has a statutory duty to conduct research under Communications Act 2003, section 14, in order to establish 'the state of the public

opinion' when it comes to the way communications services are provided, facilities made available, regarding their experience in the markets, complaints handling, resolution of disputes, and the experience of the consumers in relation to the provision and availability of communication services. In addition, Ofcom is to conduct market research related to the state of public opinion in relation to radio and TV programmes and the effect those programmes might have on attitudes and behaviour. Ofcom is also to publish this research and 'to consider and, to such extent as they think fit, to take account of the results of such research in the carrying out of their functions (Communications Act 2003, 15 (b)).

The ASA is also obliged by a number of provisions in its MoU with Ofcom to conduct both qualitative and quantitative research in order to monitor to what extent they are meeting KPIs, such as industry/customer satisfaction, compliance, attitudes, awareness, determine public opinion, investigate audiences who do not complain traditionally, and in order to ensure 'that decisions on Code reviews, rule change proposals and policy positions are evidence-based, robust and well-informed'. ATVOD is also required to carry our research, however its designation does not specify what type of research (section xiv).

Therefore, it becomes obvious from the statutory provisions that the research to be undertaken does not relate to deliberative research in order to determine what the citizens would like the regulators to do in certain circumstances and what decisions they would like them to make.

Moreover, there has been very little research done that is relevant for the decisions this thesis examines. There has been none conducted by ATVOD, while the ASA took into consideration a few pieces of research: a two-part research conducted jointly by Ofcom and ASA in 2005 and 2007 in order to establish the impact of revised alcohol ads rules on consumption, academic literature reviews of the research compiled by Universities of Exeter and Hertfordshire regarding the influence of alcohol ads, and a qualitative research commissioned by ITC on the effects of alcohol advertising on young people.

Thus, in addition to the numbers being low, there has been no deliberative research that would provide an input from the citizens.

The Panel did recommend to Ofcom to conduct wider research with citizens, potentially involving deliberative research regarding, among other things, how they would like content regulated in the future, but this did not materialize (The Panel, 2009). This type of research is resource demanding and it is also demanding on the citizens.

In addition, the research budget at Ofcom has been cut following the ERP by 28% (around £2million) (ACS, 2011). The effects of this cut meant moving research in–house, undertaking more data mining of information collected, reducing sample sizes and the frequency of surveys, using other available data sources, and allowing other people to access Ofcom data for analysis. ASA and ATVOD do not have many resources for research. Research is mainly used to establish the level of customer satisfaction and provide data relevant for KPIs.

Thus, the aim of the research is to provide information regarding changes in the markets and consumer consumption and experiences, which would help regulators make informed decisions but not involve the citizens into decision-making processes. Again, due to the potential for judicial review of regulatory decisions, the regulators are obliged to have strong evidence for their decisions, and research is mainly used to build a stronger evidence-base (Chris Taylor, Ofcom, private interview).

As Anthony Szynkaruk [31]claims, Ofcom conducts research in order to find out how the industry is changing and the what broader shifts they need to be mindful of so as not to become an obsolete regulator. In addition, research is expensive and thus judgments need to be made regarding priorities (Chris Taylor, Ofcom, private interview).

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[31] Anthony Szynkaruk, Head of Commercial Policy and Enforcement, Ofcom

Thus, although the quality of the research for example Ofcom conducts and publishes is world-leading and used heavily by different stakeholders, Ofcom, ASA and ATVOD do not use more deliberative types of research, such as citizen juries for example, that would be useful for the decisions that they are making and be an input from the citizens, which survey and consumer research cannot achieve (Paddy Barwise, private interview).

The use of research and complaints data resembles practices used in the corporate world: representative data on customer experience, dissatisfaction and satisfaction, which is supplemented with in-depth research (Paddy Barwise, private interview).

5.2.5. Public meetings

Public meetings offer a way to engage with the public and deliberate upon regulatory decisions. The meaning of public meetings is taken to be the meetings where attendance is not by invitation only, such as different round tables or stakeholder discussions, and with no formal barriers to attendance. However, various factors make public meetings not a viable opportunity for citizen empowerment.

To begin with, the primary purpose of public meetings is generating publicity and creating the perception of being open to the public. As Shahriar Coupal from the ASA claims, they are a way to 'take us to the public eye'. He further claims that the ASA is committed to openness to different stakeholders and the public; the marketing community is London-centric, but, increasingly as the national and regional agenda becomes much more important, we have to 'see and be seen' outside London. It is a way for the ASA to have a regional presence. Chris Taylor from Ofcom also claims that public meetings are useful for publicity. Up to this date, ATVOD has not organised any

public meetings, but its Chief Executive would attend conferences and seminars as one way of attempting to be open to engagement with the stakeholders.

In addition, there is the question of frequency. Public meetings are not organised often enough in order to be a powerful and legitimate input into decision-making. ATVOD has not held any up to this date. Ofcom organises them when it comes to the publication of their annual plan at their headquarters in Riverside House, London and in each of the Nations (Tony Close, private interview [32]), and the ASA has had the total number of five meetings up to this date (Manchester, 2011 on advertising and sexualisation of childhood; Edinburgh, 2008 on alcohol advertising; London, 2008, environmental claims in advertising; Manchester, 2004, alcohol ads; Bristol, 2006, alcohol ads).

However, the most significant issues are the extent to which these meetings can be described as democratic and deliberative, which in turn leads to them being not particularly influential.

There is an opportunity for these meetings to be inclusive since anyone is allowed to come and challenge the regulators on their programme of work and any issues they wish (Tony Close, Chris Taylor, Ofcom, private interviews). However, the numbers are, as a rule, very small. As Graham Howell from Ofcom said: 'if you decide to have an open meeting, nobody comes. Getting the opinion of an average person for us is almost impossible'. In addition, from the regulators point of view, those who attend are not representative: you get 'hugely unrepresentative people coming along expressing usually highly unrepresentative views' (Paddy Barwise, Which?, private interview). As Chris Taylor puts it, 'you are engaging with a self-selected groups of stakeholders'.

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[32] Tony Close, Director of Content Standards, Licensing and Enforcement, Ofcom

Moreover, the issues discussed do not include the entirety of the issues regulators deal with since Ofcom mostly organises them when it comes to the annual plans and the ASA when it comes to certain high profile issues, such as alcohol ads.

Speaking of deliberation at the public meetings, the problem for the researcher is that there is no register of the meetings organised and meeting minutes are not recorded. The Panel also noted that there are no meeting notes or evidence of whether views were considered or accepted (The Panel, 2008). However, the interviews were partly revealing on this matter. Since there is the perception that the meetings are mostly attended by 'angry, old men' (Graham Howell, Paddy Barwise), they are not seen as able to induce deliberation and reflection. There is also no provision of information from the regulators as a way of ensuring participants have all the relevant information at hand. In addition, as Chris Taylor pointed out: 'there is not much deliberation, they are an hour or hour and a half long and you engage across a broad range of topics. They are not an effective tool for understanding in detail points of concern'. Consequently, the meetings organised by regulators are not close to the ideal deliberation days described by Ackerman and Fishkin (2005) or deliberative opinion polls proposed originally by Fishkin in 1998 for the first time. The participants are not representative, there is very little deliberation, and there is no sufficient mediation by the regulators to bring them close to the ideal in terms of making sure the sample is representative or ensuring there is sufficient provision of information, and facilitated discussion for example. As Paddy Barwise from Which? claims, for public meetings to be a useful exercise, they need to be structured well, there needs to be facilitated group discussion in order for it to be more thoughtful where different trade-offs are understood.

Consequently, the influence of public meetings is very low despite the fact that, being organised by the regulators, there is a direct link to decision-makers and senior executives. As it is discussed throughout the thesis, there is a focus on regulatory decisions to be evidence based, and although public sentiment is important, preference is for reliance on latest research rather than public meetings. As Shahriar Coupal from ASA has put it:

'In terms of actually informing our regulation, we would be an odd regulator indeed if we went to for example a meeting in Nottingham to hear the views of the public and to change regulation purely on the back of that'.

Chris Taylor at Ofcom agrees, and claims that public meetings are not at the center of their strategy of consumer engagement and insight into markets and consumer experience.

Consequently, the opportunity created by public meetings does not offer a means of citizen empowerment.

5. 2.6. Complaints

Another means of getting citizens voices heard is through complaints systems Ofcom, ASA and ATVOD are obliged to establish. All of the regulators have a statutory duty to have complaints handling procedures, publish them, and, in the case of ASA and ATVOD, comply with KPIs regarding complaints in terms of speed of processing and customer perceptions.

However, democratic quality of the complaints is low since they are not representative and they are not inclusive of a large number of issues.

As Chris Taylor states, the biggest problems with complaints data are that they are not representative and they are small. The people who complain are a specific sub-section and they are likely to characterise themselves as savvy or would be 'angry old men'. In general, it is the experience of regulators that the vast majority of people do not

complain. As Graham Howell says, it is a national outrage if Ofcom receives one hundred complaints.

In addition, there is a limited number of issues consumers can complain about. For example, people can complain to the regulators in relation to the standards they are imposing, such as advertising rules, but not in relation to the way they have handled certain decisions or processes, for example Ofcom's decisions to delegate regulation of editorial content in VoD services to ATVOD. For these issues, there are other means of redress, such as judicial review. Therefore, complaints are not a means for citizens to get their voices heard regarding regulatory decisions.

In addition, the problem is what kind of voice complaints give to the citizens/consumers? Complaints do not give citizens an opportunity to discuss matters of common concern: there is no deliberation involved.

However, complaints are a way for citizens to have their voices heard on certain issues and they carry some weight. Across three regulatory bodies that are relevant for this research, only one complaint is sufficient for Ofcom, ASA and ATVOD to investigate an issue, and their complaints handling procedures are very efficient and effective (Claire Milne [33]).

In addition, executives at these bodies have found complaints to be a good indicator for consumer harm in some instances. As Chris Taylor claims, complaints data have proven to be more robust than Ofcom have expected and they found that they are a good proxy for an issue in the markets. As he says, a classic example is nuisance calls.

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[33] Claire Milne, previously the Chairman of the Consumer Forum for Communications, Ofcom, currently Visiting Senior Fellow in the Department of Media and Communications, LSE, and independent telecommunications policy consultant

Complaints data are also used across different structures: at Ofcom they are shared with the Panel, Main and Content Board, and the ACs. The ASA's AAC also receives regular updates as well as the Independent Board Members. Thus, it seems that complaints do have a certain level of influence although there are problems with their interpretation sometimes (Chris Taylor, Ofcom, private interview). They are considered important in highlighting consumer protection issues (The Panel, 2008).

Customer complaints are really important but they are an incentive that is coming from the business world and from the need for the companies to be customer focused, use the data they get from dissatisfied customers and improve services (Paddy Barwise, private interview). But, they are not a means of citizen empowerment since they are not democratic and there is no deliberation involved.

5. 3. Public space

This section of the chapter evaluates democratic and deliberative qualities of what is referred to as the public space. Public space, general publics, weak publics (Fraser, 1992), or informal citizen deliberation refers to a public sphere 'whose deliberative practice consists exclusively in opinion formation and does not also encompass decision making' (Fraser, 1992: 134). This space refers to the sphere of deliberation outside the political system where binding decisions are not made but issues of common concern are discussed (Eriksen and Fossum, 2002: 405). This is what Habermas has famously called the public sphere or later in his writings 'the periphery' or 'opinion-formation forum', which should ideally hosts free-ranging and wide-ranging deliberations among equal citizens.

For the purposes of this research, public space is composed of the media and public interest groups, where the deliberation can take place independently of the regulators and where binding decisions are not made.

When it comes to the public space, the importance of influence is also important in addition to democratic and deliberative qualities. As we have discussed in Chapter Three, a debate cannot be seen as deliberation if it does not contribute to the binding decisions. Thus, there needs to be a means of transmission between the public space and the empowered space; a way for the deliberation in the public space to influence the regulators (Habermas, 1998: 249).

5. 3. 1. Public interest groups

As explained in previous chapters, public interest groups have a dual role in governance arrangements: they are there to provide an alternative public sphere for, in Habermasian terms, opinion-formation, and they are there to act in the interest of citizens and consumers. This section aims at assessing to what extent the space they provide is democratic, deliberative and influential.

When it comes to the extent to which public interest groups are democratic in the sense of how inclusive they are, despite the fact that they see it as their mission to work in the interest of citizens/consumers, this does not entail engaging with them in their decision-making processes.

This is partly because of the fact that, similar to the regulators themselves, the public interest groups involved take an evidence-based approach to their work, which means, in the words of Paddy Barwise, 'no way would we see it as a useful exercise if we invited a lot of unrepresentative people to come and express their views'.

However, sometimes there is a conversation with the consumers in order for public interest groups to determine what their work should focus on. For example, Action on

Hearing Loss (AHL) is conducting a survey among its members regarding which VoD services would need to be more accessible for the hearing-impaired, and they have conducted surveys before, such as the one regarding quality of subtitling, which they have used to influence Ofcom to commit more to this area of work. They have established a research panel of 1,000 people and they also send all their surveys to those who contacted them in the past, and the rate of response tends to be high (Laura Mathews [34], private interview). But they do not consult their members on their views and opinions regarding general policy and regulation. This is partly due to the fact that they have limited resources so they have to make sure the research is useful and worthwhile. Which? also surveys their subscribers, but this is for purely commercial purposes. Since they are funded by the subscriptions to their magazine, they see this engagement useful for their editorial policy.

In addition, similarly to the way regulators use complaints data, public interest groups would use them as well: they help them be aware of certain issues, but it is not a determinate factor in their policy work (Laura Mathews, private interview). And it is interesting to note that, for example, MediaWise would act on behalf of the citizens who have a complaint but, when they work on policy projects, they would not consult the citizens but obtain input from other interest groups involved (Mike Jempson [35], private interview).

In case of charities that have members, such as the VLV, there is a conversation with the members through bulletins, conferences, members' forum, e-mails and newsletter. But Colin Browne says it is not scientific or representative: they hear the views of the relatively small number of committed people who are interested in the subject (private interview).

In general, these organisations do not give the citizens any votes or decision-making powers. Consequently, since there is no authorisation from the citizens/consumers, there is no accountability to them either. This is caused by the governance structure of public

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[34] Laura Mathews, Senior Research and Policy Officer, Action on Hearing Loss
35 Mike Jempson, Director of MediaWise, Senior Lecturer at UWE

interest groups. For example, all organisations that have responded to the consultations are charities and therefore accountable to their Boards of Trustees. Sometimes, there is added complexity as is the case with Which? that is also a company limited by guarantee and a trading organisation and they are wholly funded by selling products. Thus, Which? is also accountable to the subscribers who fund their work, which influences their work: although their mission is to represent all consumers, there are trade-offs (Paddy Barwise, private interview).

When it comes to the deliberative qualities of the space created by public interest organisations, the answer seems to be straightforward. Since there is very little work with the citizens, there is consequently very little deliberation. They do not provide the alternative public sphere imagined by Habermas.

Turning to their influence, to a certain extent, there is a willingness by the regulators to work with different public interest groups, which is a positive start. They proactively seek to meet with various groups (Pete Johnson, Shahriar Coupal, Tony Close, private interviews) and alert them to consultations or what regulatory decisions they are making. Laura Mathews and Colin Browne for example stated that they would get a phone call if there is a relevant event or consultation coming up, and Graham Howell from Ofcom confirmed that every manager has a list of relevant stakeholders for their department in addition to the general mailing lists and newsletters. As Shahriar Coupal has put it, since their decisions have an effect on the public, it is not in their interest to produce policy in isolation from other factors, estranged from the society and myopic.

However, the ultimate aim of this engagement determines whether public interest groups are influential. As Chris Taylor says, engagement with stakeholders is one of the primary sources of 'consumer insight'. It is a way for them to obtain information about consumers so they can inform their regulatory decisions. But it is not the only source of consumer insight and the regulators need to balance evidence and consider the effect on all the relevant stakeholders. And what 'sits at the heart' of this balancing is an evidence-based approach (Shahriar Coupal, private interview). This has a large effect on what type

of input from different stakeholders is expected and would be most influential. As Shahriar Coupal explains, there is evidence that alcohol advertising leads to some degree of harm, and there also is evidence that advertising helps fund the plurality of the media, and the regulator needs to balance these. Therefore, what is expected is some sort of primary evidence and they are making it known to the stakeholders what type of evidence they need.

Evidence is also required due to another important factor that is framing the work of the regulators: judicial appeal. As Shahriar Coupal claims, the starting point of any content regulation is freedom of expression and if that is to be infringed upon, strong evidence is needed that can stand up in the court of law. In addition, there is a big risk of market failure if the right areas to pursue policies are not established, and evidence is crucial for that.

And evidence does help. As Laura Mathews claims, for a long time they have tried to make Ofcom improve the quality of subtitles and one of the things that helped was sharing the research and surveys they had done.

However, resources are crucial here, which is something that is scarce in the consumer landscape and which makes their input less influential. This is recognised by the regulators, and Shahriar Coupal admits it is unfair, but 'where the stakes are highest there is a necessary and proportionate need to have proper evidence to support that'. Lack of resources for accumulating strong evidence-base is especially stark when compared to commercial players. For example, Paddy Barwise says that Which?, that is one of the best resources organisations, still has a total income of £90m per year, which is just a rounding error in big companies' revenues, and out of that £90m they can only invest around £10m into policy and campaigning work. Chris Taylor gave a crude but illustrative example: if Ofcom proposes the reforms the industry does not like, they would hire professional experts, law firms, expert witness economists. If we make a decision that would cost them £15m they can spend £4.5m stopping us doing it'.

But resources are also important for the regulators since they determine to which extent they can engage with different organisations. ATVOD is a very small organisation with limited resources and two full-time members of staff (Pete Johnson, private interview), and Shahriar Coupal claims that they are trying to do as much as they can, but 'there just isn't enough hours in the day'.

Moreover, resources are crucial for all other ways that public interest groups have found influential in getting their message across:

- Using all the possible channels of communication and being persistent and patient since certain things can take years;
- Keep and eye on things since they can lose sight;
- Establishing and maintaining personal contact;
- Having a strong brand;
- Lobbying and campaigning (Colin Browne, Paddy Barwise, Laura Mathews, Claire Milne, private interviews).

All this undoubtedly requires a lot of work – it is a full-time job (Claire Milne, Mike Jempson, private interviews). But most of the organisations are very small and even the big ones usually have only one person working on communications issues. For example, AHL is a mid-size charity and there are two people who are dealing with communications issues but those are not their only tasks.

Another way that the influence of public interest groups is significantly enhanced is if they are collaborating. But this is again affected by the decrease in the resources. The analysis of the consultations has shown that over 10 years (2004-14) the number of organisations involved in the issues of co-regulation, alcohol ads, and product placement has been 16 plus additional 6 action teams that have been created ad hoc for the purposes of influencing alcohol ads regulation. And only 6 have submitted responses to more than one consultation. These organisations have to prioritise so they would not be

involved in an issue for long (Laura Mathews, private interview) and a number of these have responded to consultations although it was not in their main focus, they engage on sporadic basis. Which? was only interested in food advertising for example, MediaWise was only interested in Ofcom's work at the beginning, and VLV is interested in Ofcom's but not ASA's and ATVOD's work. And Alcohol Focus Scotland refuses to work with ASA since they believe codes for alcohol ads should not be self-regulatory.

Due to fewer resources and the need to prioritise, a number of organisations involved in an issue is decreasing, and this is due to their strategy to be as effective as possible. For example, if there is already a charity working on an issue, AHL would not get involved, and if another organisation is taking the lead, they would just sign the documents, or attend meetings, but would not provide any substantial input.

Another issue is the distinction between citizens and consumers. Which? is one of the best-resourced organisations and yet they do not engage with citizenship issues, and since they are funded by subscribers, which are middle class consumers, they have to ensure there is no bias towards them, which is not always the case.

In addition to how individual organisations work, there has been significant concentration of voices in the consumer landscape that has weakened their impact. One of the most significant developments has been the Consumer Futures becoming a part of Citizens Advice, since the government wanted to make things simpler and more efficient. Thus, Citizens Advice became crucial now in the consumer landscape, but is under resourced, volunteers-based and has very limited sophistication in terms of policy analysis (Paddy Barwise, private interview). And it concentrates consumer voices, there are fewer distinct voices, and numbers do matter (Claire Milne, private interview). Across the board, consumer representation in the UK got smaller, weaker and has less money (Chris Taylor, private interview).

But on the other hand, the number of regulatory and government bodies these organisations have to work with, establish contacts and influence is growing. For example, Laura Mathews from AHL has to work with Ofcom, ATVOD, broadcasters and the DCMS in relation to a single issue: access services. In addition, as Paddy Barwise says, the governments are suffering from initiativitis – they are launching one initiative after another without following them through and with little substantial change to the policy partly driven by the PR people. And it is demanding for organisations to keep up with this.

Another point worth making when it comes to what makes public interest groups influential is, as Colin Browne says, being reasonable. Laura Mathews similarly noticed that ATVOD was very apprehensive of working with them at the beginning since they presumed they were a campaigning organisation that was there to attack them but once they realized they are there to achieve improvements, they managed to build a very good working relationship. Paddy Barwise also claims that it helps that they are not radical and not anti-business even though they are pro-consumer. As Chris Woolard [36]claims, it seems that regulators are very weary of organisations that are not reasonable and even dangerous.

However, one thing seems to be particularly important when it comes to the influence of public interest organisations: the internal focus and ideology of the regulator (Claire Milne, Colin Browne, private interview). There has been a wide perception that Ofcom is or has been focused more on the industry perspective and very aware of the economic theory and great believer in competition. Consequently, the belief that the consumers would not need additional protection has been dominant. This has partly been so because that has been the wider dominant belief (Colin Browne, private interview). An illustrative example is the belief of the ASA that there is no case for alcohol ads

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[36] Chris Woolard, previously Content Group Director and Content Board Member, Ofcom, currently Director of Strategy and Competition, Financial Conduct Authority

watershed ban and they are dismissive of all the evidence. Another example has been revealed during the interview with Adam Baxter from Ofcom who was in charge of the processes leading up to the delegation of regulatory responsibilities to ATVOD. He claims that they did not work with public interest groups during this process because it was seen that the crucial factor for success was acceptance from the industry.

The importance of the focus and ideology is not only relevant on the organisational level, but on the personal one as well. Laura Mathews claims that one of the people she deals with at Ofcom is from a charity background so is aware of the issues and has been more inclined to work with them and listen to them.

However, this seems to be changing. As it has been noted, there is a consumer group at Ofcom, and they started to believe more in regulation for consumer protection. Consequently, they are taking into account the consumer view a bit more (Laura Mathews, private interview). And in addition, they are willing to make up for the lack of resources in the consumer landscape and build up the evidence base needed (Chris Taylor, private interview). But what remains to be said is that it is very hard to influence the regulators on a macro level and the organisations are still reliant on what regulators' priorities are (Colin Browne, Laura Mathews, private interviews).

To conclude, public interest groups are not a democratic and deliberative sphere for citizens' engagement, but they seem to be a relatively influential advocate for consumer perspective.

5. 4. Conclusion

As the analysis in this chapter has shown, there are few opportunities for citizens to get involved directly in the work of Ofcom, ASA and ATVOD. Consultations offer an opportunity for deliberation, but this opportunity is not used and it is of relatively weak

influence. Complaints and research can also be a way of direct citizens involvement but they are not opportunities for deliberation regarding regulatory decisions. Thus, the institutional structures offered for direct citizen participation do not empower them.

Influential means for deliberation rely on experts with whom citizens do not have any direct links, such as Independent Board members, and different advisory structures, such as the Panel or ACs. Public interest groups are also influential when it comes to the work of the regulators, but they are neither democratic not deliberative spaces.

Thus, the consequence is that the citizens are neither involved in deciding who will represent them and advocate for their interest, not do they get to decide what their interest will be, let alone what the regulatory decisions will be.

The power they have to influence regulatory decisions is the power of consumers of communications services: their experiences and dissatisfaction expressed via research and complaints can exert small influences on regulators.

6. Chapter Six: Democratic accountability – opportunities for citizens to hold ASA, ATVOD and Ofcom to account

> *'Effective accountability should involve a dialogue'*
>
> (Mulgan, 2004: 12-13).

Accountability has been high on the agenda of successive UK governments and regulators and has been widely perceived as one of the vital ingredients of democratic governance. It is one of the key principles of good regulation as promoted by the UK's highly influential Better Regulation Task Force, and it has also been prescribed as one of the most important principles to guide Ofcom's work. As Communications Act 2003 prescribes, the regulator must have regard in performing its duties to 'the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed' (Article 3 of Section 3, General duties of Ofcom). The eminence of this principle of accountability is transferred to co-regulatory bodies, ASA and ATVOD, through their contracts with Ofcom.

This chapter assesses how accountability has been conceptualised by the regulators and subsequently put into practice, and to what extent the existing structural arrangements are providing opportunities for the citizens to hold Ofcom, ASA and ATVOD to account.

As discussed in the normative chapter, accountability, in its most vague definition, refers to mechanisms that make those in power responsive to their particular publics. More specifically, this responsiveness is induced through an accountability mechanism, which is seen as a relationship between an actor and a forum, in which the actor has an

obligation to explain and to justify his or her conduct with respect to the principals, the forum can pose questions and pass judgement, and the actor may face consequences (Bovens, 2007: 447; Philp, 2009: 32). It is seen that a relationship consisting of these elements would make actors responsible and responsive to those affected by the actors' actions and decisions. The actors are seen as those who exercise political power, in this case Ofcom, ASA and ATVOD; the forum is the structure to which the actor is accountable, for example the Parliament, tribunals, or the judiciary; and the principals are the citizens, those on behalf of whom the actors are operating and those who should be the ultimate authority.

Accountability is important for democratic governance since it provides the citizens with a degree of control over regulatory institutions. It is taken that actors would only act according to the preferences of the citizens if they are held accountable by them (Take, 2012: 3; Mansell, 2012). In the normative framework developed for this thesis, it is one of the three basic ingredients for regulatory governance to be considered democratic in addition to transparency and deliberative participation by the citizens.

Thus, accountability is analysed as a part of a citizen-centric framework and we are ultimately interested in the extent to which citizens can hold ASA, ATVOD and Ofcom to account. Although they are the ultimate principals, the citizens are not always the forums regulatory bodies are obliged to be accountable to. There are different types of accountability based on who or what the forum is. Thus, we have political accountability where the forum is a political entity, such as the Parliament or politicians; administrative accountability if regulatory bodies are to be held accountable to administrative entities such as the National Audit Office (NAO) in the UK, and judicial accountability if the forum is the court. It is only when we are talking about social or public accountability that the citizens are the forum as well as the principals: they are holding the regulators directly accountable.

This chapter examines how these different types of accountabilities function in practice. However, since we are ultimately interested in the power of the citizens to hold regulators accountable, we are also interested in the extent to which there is a link between judicial and administrative accountability and the citizens. In other words, are courts and administrative tribunals accountable to the citizens? Are they legitimate to be

the forums on behalf of the citizens? This has been referred to in the literature as compounded accountability: the extent to which those holding governance bodies accountable are themselves accountable more widely for their performance as account-holders or forums (Mulgan, 2004: 66-7). What this chapter does not deal with is political accountability. As discussed in the normative chapter, this research is concerned with the regulatory process itself and the extent to which its structures provide the citizens with opportunities to engage in the decision-making processes and hold the regulators to account. The role of the politicians is referred to as meta-governance and is not the subject of this thesis. One of the purposes of the new modes of governance has been to provide the citizens with means to engage *directly*, thus, the indirect role of politicians is not considered relevant for the purposes of this research.

Thus, this chapter evaluates these diverse types of accountabilities, and the compounded accountability of administrative and judicial accountability. The basis for the evaluation of accountability mechanisms is the way different stages are found to be well functioning. As stated in the normative chapter, the relationship between the actor and the forum in an accountability mechanism consists of the following stages:
- standard setting stage;
- account giving stage or information provision where the actor has an obligation to explain and justify her/his conduct in relation to the principal;
- account holding or discussion stage where the forum can pose questions and pass judgement; and
- rectification stage where the forum can impose sanctions or influence the work of the actor in any manner.

We start with what is called public or social accountability, which is accountability directly to the citizens or different CSOs. Then we deal with judicial and administrative accountability, how well they function, and to what extent they empower the citizens to hold Ofcom, ASA and ATOD to account. While these assessments are performed, there is also an attempt to explain different structural solutions by reference to the wider institutional context.

6. 1. Public accountability

Public or social accountability is accountability to the general public or interested sections of the public, such as public interest groups or NGOs. As the chapter on citizen engagement showed, there is very little connection between citizens and different public interest groups. Although they are advocating for the citizen or consumer interest, CSOs are neither authorised by the citizens nor accountable to them. Thus, accountability of Ofcom, ASA and ATVOD to the citizens directly and to different CSOs will be assessed separately although they are both grouped in the literature under the common title of pubic accountability. This is because it has implications for democratic accountability: even though CSOs can hold public bodies to account, this does not contribute to democratic accountability since they are themselves not accountable to citizens; the compounded accountability link does not exist.

6.1.1. Ofcom, ASA and ATVOD: direct accountability to the citizens

When it comes to accountability *directly* to the citizens, the assessment follows different stages of accountability mechanisms and evaluates each of them:
- standard setting stage;
- account giving stage;
- account holding stage; and
- rectification stage .

The standards against which Ofcom, ASA and ATVOD are to be held accountable for are set in the statute when it comes to Ofcom, the Memorandum of Understanding between ASA and Ofcom, and ATVOD's Designation. These documents also prescribe that the main means of information provision for the purposes of accountability are to be annual reports where these bodies are to make public to which extent they have met

the standards set. Content analysis of these documents has revealed to what extraordinary degree these standards have been influenced by New Public Management (NPM) reforms and associated emphasis on performance, economic values, and consumer satisfaction.

When it comes to Ofcom, the standards it is to be held accountable for are not in any way atypical of the way accountability has been conceptualised over the past few decades: Ofcom is to account for regularity, propriety, value for money and good financial management, and to what extent it meets it statutory obligations. If we look at Ofcom's Annual Reports from 2004 to 2014, more than 50% is devoted to financial accounts.

The focus on performance is even more emphasised when it comes to co-regulatory bodies, which are accountable to Ofcom for a number of Key Performance Indicators (KPIs) that are set in their MoUs. Thus, ASA's KPIs, which executives at Ofcom are to monitor (paragraph 53 of the MoU), all relate to performance and outcomes, despite the distinction between quantitative and qualitative ones:
- quantitative: complaint response times, trend data on complaints received and handled, trend data on upheld complaints and complaints leading to sanctions (paragraphs 57-61); and
- qualitative: policy initiatives and activity, assessment of compliance in particularly contentious areas, research undertaken, code changes and rule reviews, assessment of internal performance, and reports to Ofcom on significant external criticisms of the regulatory regime (paragraphs 62-8).

ATVOD's KPIs, although fewer in total, are similar in substance. ATVOD is to report to Ofcom on its fulfilment of designated functions, its costs, income and expenditure, and on the data regarding number of complaints and programmes they relate to, the volume of complaints received, the number of complaints investigated and their status, the number of upheld complaints, and information regarding levying of fees (Schedule of the Designation, paragraph 5).

Thus, the standards according to which the regulators are to be held accountable relate to the extent they meet their regulatory objectives, exhibit sound financial management and satisfy a number of performance indicators. This is a classic example of how NPM

reforms changed the emphasis of accountability to performance auditing and focus on finances, value for money, efficiency and effectiveness (Scott, 2014: 362), which came as a part of the desire to make governments more businesslike in order to save money and increase efficiency (Pollitt 2006: 6, 9). This greater emphasis on performance, especially through the measurement of outputs, signifies a shift of attention from inputs to processes (Mulgan, 2004: 184), which is evident from KPIs: there is no mention of how certain objectives are to be reached or who is to be involved and through which means for example.

Another issue that becomes evident from KPIs and which came as a result of NPM reforms is the focus on measuring customer satisfaction. One of the aims of the NPM reform agenda has also been to change the focus of accountability directly to members of the public (Mulgan, 2004: 184). This came as an attempt to make government services more responsive towards citizens by offering quality and choice (Pollitt, 2006: 6,9). The intention has been to emulate the customer focus typically found in the private sector, and in the UK this has most notably been embodied in the Citizen's Charter launched in 1991 as initiated by then Prime Minister, John Major. Although 'the original charter idea has now become subsumed to a point of near-invisibility' it has still made a considerable impact. The Citizen's Charter aimed at improving the quality of government services, improving their accountability to society by making government publish and monitor standards of service to the public. It also aimed at making administration more consumer-friendly and empowering the public by, for example, giving them effective complaints procedures (Woodhouse, 1997, pp. 50–1; Mulgan, 2004: 173). The Charter has been widely criticised, as John Mullen illustrates:

> 'The position of the apostrophe (Citizen's Charter, not Citizens' Charter) is of no small importance. The Charter is intended to guarantee *individual* redress and quality of service, not the involvement of organized civil society in the conception and management of public services. The ideal is consumerism, not "participatory democracy", the citizen as individual consumer, not politicized and mobilized (Mullen, 2008: 15).

ASA's and ATVOD's KPIs similarly turn citizens into consumers of public services as they measure their satisfaction, as opposed to, for instance, measuring to what extent

they have been involved in the decision-making processes. This focus on customer satisfaction is perhaps not appropriate for accountability to the citizens since, as Pollitt noticed as early as 1988, 'the aim is not merely to please the recipients of public services (difficult and worthy though that may be) but to empower them' (p. 86). And empowering them would mean giving them decision-making powers rather than simply satisfaction that regulators have dealt with their complaints in a timely manner.

Thus, the standards setting stage is dominated by the language of private business of performance, finances and consumer satisfaction, which is a result of NPM reforms. This has as consequences not only what the citizens can hold the regulators to account for, but also what they will focus on in their activities and behavior, what they will report on, what kind of information will be publicised, and in what ways they will engage with the citizens. Therefore, this stage has far-reaching consequences for all other stages of accountability and citizen participation more widely.

An immediate example of this is, in Pollitt's words, 'what has been conspicuously absent from most of the performance measurement schemes thus far […] has been direct consumer-citizen participation in the design and operation of these schemes' (Pollitt, 1988: 84). One of the consequences of this is that citizens are not well equipped and suited to make conclusions regarding the behavior of the regulators based on performance data, in addition to not having the power to choose and decide what the regulators will be accountable for. Another consequence is what kind of information is available about the work of the regulators (which this research looks at) and with this we start the discussion regarding the account-giving stage of accountability.

Speaking of the next stage of accountability mechanism, provision of reliable information, it is crucial for any exercise of citizenship (Pollitt, 2003: 84). This is especially so when it comes to accountability where it is the essential requirement of any successful and well-functioning accountability mechanism: without necessary information it would not be possible to hold regulators to account (Schillemans, 2008: 176; Dawn, 1991: 25).

It has been taken that knowing the following information is essential in order for an effective accountability mechanism to exist:

- who makes the decisions;

- what the decisions are;

- through which processes (how) the decisions are made;

- what the justifications for the decisions are;

- what the information and evidence is on which the decisions have been based; and

- what the consequences of the decisions are for different stakeholders.

As the chapter on transparency has shown, considerable amount of information is available when it comes to the first two questions: who makes the decisions and what the decisions made by Ofcom, ASA and ATVOD are.

When it comes to the question of the decision-makers or who the responsible actors are for the purposes of accountability, the answer seems to be straightforward since Ofcom, ASA and ATVOD operate under a mixture of what is called hierarchical and corporate accountability. In terms of hierarchical accountability, calling to account starts at the top with the highest official who is to be held accountable externally, while the internal accountability takes place down the chain of command (Bovens, 2007: 458). In addition, Ofcom, ASA and ATVOD operate under corporate accountability and they, as corporate bodies, are accountable as unitary actors with independent legal status (Bovens, 2007: 458).

Thus, although it is one of the essential characteristics of regulatory governance that many hands are involved in the implementation of policy and decision-making, it is clear who is to be made accountable. As we have seen over the previous chapters, decisions at Ofcom, ASA and ATVOD are made with the involvement of different structures such as the Panel, ACs, AAC, independent Board Members, after consultations, research, informal meetings with external stakeholders, and with judgement calls from the executives. As with any other governance network, it tends to be very ambiguous who has contributed and in what way to the conduct of a whole institution or to the implementation of a policy. However, for the purposes of accountability it is clear who is to be held responsible and Ofcom's, ASA's and ATVOD's Chief Executives and their Main Boards are ultimately accountable.

When it comes to Ofcom, its Chief Executive is the accountable officer as appointed by the Secretary of State for regularity, propriety, value for money and good financial management. He/she is also held accountable by the Board for the day-to-day management of Ofcom. In addition, the Board is responsible and accountable for the discharge of Ofcom's statutory functions, its strategic leadership and overall control. And Ofcom's Board has a unitary structure, which means that it makes decisions as a unified group, as opposed to a two-tier board that would have two separate boards, one management board and the other supervisory. Thus, although there is delegation of decision-making powers as a part of effective administration of the corporation, as Tony Close, Ofcom's Head of Content Policy, has stated in a private interview, whoever makes the decisions, the Chief Executive and the Board are to be held ultimately accountable.

In addition, although Ofcom delegated functions in relation to advertising in broadcast media and in VoD to ASA, BCAP and CAP, and in relation to editorial content in VoD to ATVOD, it is still, under the provisions of DCOA 1994, ultimately accountable for the regulation of these areas, which is made clear in the MoUs it has with ASA and ATVOD (MoU with ASA, paragraphs 34-6).

Nevertheless, ASA's and ATVOD's Chief Executives and their Board Chairmen as well as BCAP's and CAP's Chairmen are accountable to Ofcom and could be called to Ofcom's Board at any time to justify and explain their decisions and discuss their annual reports, which are the main means of giving account (MoU with ASA, paragraph 78; ATVOD Designation, paragraph 3).

Therefore, although the decision-making process is complex and involves many different actors and fora, and the accountability chain is equally complex and protracted in these co-regulatory arrangements, it is clear who is to be held accountable for the decisions made.

In addition, it is clear what the decisions made are and the regulators have made great efforts to publicise their decisions via regular newsletters, bulletins, their social media accounts, websites, and by sending press releases.

However, when it comes to the other classes of information necessary for effective

accountability mechanisms in terms of decision-making processes and justifications and basis for decisions, there are a few issues. One of them is that the information available is incomplete and the other is that it requires great capacity, expertise and commitment to research in order to understand the data made public, which is arguably something that puts ordinary citizens at a disadvantage.

Speaking of the information necessary to establish through which processes the decisions have been made, there are certain benefits in the current system. For example, as the chapter on transparency has shown, the rules are relatively fixed and there is a clear division of responsibilities between Ofcom, ASA and ATVOD, thus it is to a certain extent clear what the processes are for making decisions. For instance, it is known that BCAP is to consult widely before making new advertising rules, and that these rules have to be pre-approved by Ofcom. However, there are a number of issues when it comes to transparency in relation to decision-making processes even when the totality of the channels for making information available is taken into account.

Annual reports, main means of providing information for accountability, are not very revealing of processes, as it has been discussed in the previous chapter, since their focus is on final decisions, outcomes, performance and finances. This is partly the result of the standards setting stage, as we discussed above in this Chapter.

Meeting minutes are equally unrevealing of processes and, in addition, a number of structures that are a part of the decision-making processes when it comes to ASA, ATVOD and Ofcom do not publish their meeting minutes, such as Ofcom's Policy Executive, BCAP, AAC and ASA's Board and Council, and thus these parts of the processes are not transparent although they are crucial in making decisions. Consultation documents are to a certain extent revealing of the processes since they all have a background section that describes the processes and thinking leading to the consultation. However, they are intended for publication and are not entirely informative.

Moreover and perhaps more importantly, decision-making is fraught with negotiations between different actors, informal meetings with external stakeholders, and discussion and decisions made via e-mails, as the chapter on transparency has shown. And these sections of the processes are not made proactively transparent by Ofcom, ASA and

ATVOD. For example, as it has been stated, although the ICO model publications scheme prescribes that meetings of Chief Executive or Board members with Ministers and external organisations (including meetings with newspaper and other media proprietors, editors and senior executives) are to be made public, neither Ofcom, ASA nor ATVOD are doing so. In addition, it is virtually impossible to obtain these types of information via FOI requests since there are many exemptions (in general, using FOIA requires great skills in order to formulate useful requests (Hayes, 2009: 19), meetings are not recorded, and there is the lack of will to reveal everything since it conflicts with the need to protect the employees (Graham Howell, private interview, 2014).

This is not atypical of new modes of governance, which are characterised by opaque and complex networks of decisions making in terms of venues and actors. This complexity makes it difficult to generate full transparency and the following few examples show that publicly available information is not entirely revealing of the processes.

As it has been discussed, in 2004 Ofcom delegated its responsibility to regulate broadcast advertising to ASA(B). As we have learned from the information published in the annual reports, meeting minutes, and the relevant consultation documents, Ofcom made this decision for a number of benefits, since it was its statutory duty and following public consultation. However, the entire process is not made public since the most important role in this process seems to have been played by the Advertising Association. An illuminating article from 2006 by Andrew Browne, then Director-General of the Advertising Association, Chairman of CAP and BCAP, and a director of ASBOF and BASBOF, illustrates to what extent the advertising industry had a role to play in enabling this co-regulatory system to be established, which has not been revealed in the vast number of documents published by Ofcom and ASA.

As the article reveals, the process started on 16th June 2000 when the AA's members met in order to 'agree its agenda for communications reform and to make an input into the forthcoming government White Paper'. Once they had agreed to pursue self-regulatory solutions, intensive lobbying started, which eventually, despite problems and opposition, resulted in the provisions in the Communications Act 2003 that allowed Ofcom to contract out functions, although the draft bill excluded them (page 33-4). As Browne further suggests, the AA immediately sought a meeting with the newly formed Ofcom, which realised on 27th November 2002 where they were given permission by Ofcom to

develop proposals for the new self-regulatory system for broadcast advertising: 'Ofcom welcomed the approach and gave us the green light. We were in business and now the work really started' (page 34). Subsequently, the AA put together a Task Force to develop the recommendations that contained representatives of all the broadcasters, the broadcast pre-clearance bodies, the advertisers, the advertising agencies, the Internet Advertising Bureau, and the Chairman of ASBOF. It is interesting to point out that Browne claims the Task Force met fortnightly in order to develop the proposals and had over 60 meetings with interested stakeholders (page 34). The proposals were approved by Ofcom in principle subject to public consultation, finalisation of the details and approval by government. The following 15 months were a period of intense work during the implementation phase and the creation of MoU, with the involvement of no less than five law firms: 'it became a labyrinthine process of considerable political and legal complexity which none of the stakeholders had expected' (page 35).

Thus, this article reveals more about the process than all Ofcom documents combined. There is only one mention of the Task Force in Ofcom's consultation document 'The Future Regulation of Broadcast Ads' (page 8) that says that a Task Force has been formed by the advertising and broadcast industry that has expressed commitment to self-regulation, which has been seen as necessary by them to maintain consumer and business confidence. These few sentences do not even remotely illustrate the extent to which the process was complex and dominated by the industry. The comparison of the proposals by the Task Force as published in Browne's article with the actual co-regulatory system established with Ofcom and ASA shows that the proposals by the Task Force have been implemented in their entirety, apart from the addition of the AAC, which came as the result of consumer groups' dissatisfaction as expressed during Ofcom's consultation.

In addition, what the documents publicly available do not reveal and what the researcher has discovered in private interviews with Stewart Purvis and Chris Woolard [37] is the extent to which the lengthy negotiations regarding remit were dominated by BASBOF, which was the main decision-maker as they claim.

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[37] Stewart Purvis, currently a Professor at the City University London, previously Partner for Content and Standards, Ofcom and Chris Woolard, previously   Content Group Director and Content Board Member, Ofcom, currently Director of Strategy and Competition, Financial Conduct Authority

The similar level of detail is available when it comes to delegation of regulation of editorial content in VoD to ATVOD in 2010. The interviews with Stewart Purvis and Adam Baxter [38] revealed that this process was dominated by the negotiations between the government and the industry, with no involvement of consumer groups, information that is not accessible in publicly available documents.

Moving forward to the discussion regarding the level of information available regarding what the justifications for the decisions are; what the information and evidence is on which the decisions have been based; and what the consequences of the decisions are for different stakeholders, the level of information available is similarly low. These questions refer generally to the debate regarding different regulatory options, how they are balanced and why certain decisions have been made, and none of the sets of documents available are sufficiently illuminating of the discussions the regulators have had, as has been shown in the chapter on transparency.

As discussed previously, annual reports are focused on decisions, meeting minutes do not give details regarding discussion and do not supply us with papers that have been considered, thus we do not learn what the debate has been.

Consultation documents are most useful when it comes to the content of debates since they give justifications for certain decisions, outline the process partially and the background, show how certain issues have been conceptualised, and debate the advantages and disadvantages of different arguments. However, the main problem with consultation documents as a source of information regarding the debate is that they are intended for publication, which bears a mark on their content.

Thus, we do not learn from the documents available what we have learned via private interviews. For example, Stewart Purvis claims that the reason why regulation of editorial content in VoD services was contracted out to ATVOD was because of government's insistence and their wish to experiment with new forms of regulation. In addition, as Chris Woolard claims, Ofcom was mostly interested in saving money when it came to delegation to ASA, which is something their consultation documents do not reveal.

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38 Adam Baxter, Standards Executive, Ofcom

Therefore, when it comes to provision of information or account giving, the information available is not particularly revealing when it comes to the decision-making processes and reasons as to why certain decisions have been made. The problem is that most of the released and published documents are intended for publication, which has an effect on how illuminating they are. However, this lack of information is even more worrying since, as the following paragraphs will show, the opportunities for citizens to engage in a debate with the regulators and compel them to further discuss their actions and decisions is extremely limited .

The next important step for accountability is the opportunity for debate. As Schillemans (2008) claims, information alone is not sufficient, but it also must be discussed and debated so that the behavior and decisions can be evaluated and judged. This presupposes a relationship between the regulators and citizens (p. 176). Accountability, the giving of an 'account', is grounded in language and communication, in information and argument (March and Olsen, 1995, Ch. 5); it involves not only reporting and informing but also explaining, justifying and responding to criticism. Effective accountability should involve a dialogue (Mulgan, 2004: 12-13).

However, when it comes to direct accountability to the citizens, this stage is not developed. There are no effective means for citizens to engage in a dialogue with the regulators, and this is largely influenced by the ways citizens participate in regulatory decision-making processes. As the previous chapter has shown, the main means of direct citizen engagement is mainly in terms of complaints, and this does not offer a space for debate regarding regulatory decisions. ASA, ATVOD and Ofcom offer the public an opportunity to complain about the content or availability of communications services they regulate, not complain in relation to the way they preform this regulation. This has also been influenced by NPM reforms that put an emphasis on treating citizens as consumers as a way to improve public services. In addition, there are public meetings, but they are not organised often and are very short in duration.

Moreover, as it has been noted, there is a lack of contact information for key personnel for all bodies, ASA, Ofcom and ATVOD, which is not enabling the members of the public to initiate the debate with relevant executives. As the analysis of the websites

demonstrated, there is no interactivity or immediate feedback and no means to engage with the people inside these organisations. As certain authors have noted regarding the way websites are used, responses made by individual citizens are not shown on the website, which means that there is no question of a public debate (Wong and Welch 2004). There are general contact details and explanations how to complain, which is symptomatic of the way engagement with the citizens is conceptualised: in terms of complaints and not engagement on policy and regulatory issues.

In addition, the regulators are not compelled to give information to citizens apart from what is prescribed by the FOIA 2000, and as we have discussed, there are significant limitations here. In an accountability relationship, the accountee has the right to demand information and the actor has an obligation to provide this information, and justify and explain their conduct. This formalised relationship distinguishes accountability from many other communicative relations of public agents with other parties (Schillemans, 2008: 177). However, these obligations are missing. ATVOD and ASA are for example compelled by the provisions in their MoU to share information with Ofcom, but not with the public since there are not under FOI laws. As Mulgan (2004) claims, becoming more 'transparent' by publishing more information does not mean becoming more accountable. 'Only if the people receiving the information have the right to demand it and to seek remedies, is the relationship one of accountability. Purely voluntary or grace-and-favour transparency does not amount to accountability' (Mulgan, 2004: 11).

In no way differently than other governance networks, co-regulatory systems studied create a division between 'insiders' and 'outsiders', and, as it becomes apparent, citizens are outsiders since they have no access to deliberation and decision-making arenas, and thus consequently have less information and opportunities for debate.

However, the most important issue might not be the provision of information and having space for debate, but whether the citizens are able to use the information made public. A difficulty arises since it might prove challenging to understand the basis of expert judgement that inhabits the regulatory space, and it might be impossible to assess if the decisions made have been effective (Baldwin and McCrudden, 1987: 49).

For example, on the basis of the information available, did Ofcom act sufficiently in the

interest of citizens and consumers in delegating regulatory powers to ATVOD? Section 3 of the Communications Act sets out provisions regarding Ofcom's general duties. As paragraph 1 says, 'It shall be the principal duty of OFCOM, in carrying out their functions—(a) to further the interests of citizens in relation to communications matters; and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition'. These are the main and overarching Ofcom duties that must be reflected in all different aspects of their work and decisions made.

Furthermore, the same Act prescribes under the same section 3, paragraph 4, that Ofcom 'must also have regard, in performing those duties, to the desirability of promoting and facilitating the development and use of effective forms of self-regulation'.

Therefore, it is the duty of Ofcom to further the interest of citizens and consumers, and, while performing that duty, it is to have regard to promoting effective self-regulation. The Communications Act does not make reference as to what 'effective self-regulation' should be apart from the need for it to be independent and properly financed. Ofcom developed its own criteria with institutional focus in 2004 and in 2008 with market focus, upon which it consulted. Once the European AVMS Directive was implemented in the UK, Audiovisual Media Services Regulations 2009 (Article 9) listed four criteria for delegation to co-regulatory bodies. Thus, through Ofcom's own work and statutory provisions, an elaborate set of 25 criteria for self- and co-regulation has been developed. They are the following:

- 2004 institutional criteria:
    - Beneficial to consumers
    - Clear division of responsibility between co-regulatory body and Ofcom
    - Accessible to members of the public
    - Independence from interference by interested parties
    - Adequate funding and staff
    - Achieve and maintain near universal participation
    - Effective and credible sanctions
    - Auditing and review by Ofcom (KPIs)
    - Transparency and accountability
    - Consistent, proportionate and targeted regulation

- Appropriate appeals mechanism

- 2008 market criteria:
  - Collective industry incentives to participate
  - Free rider issue
  - Clarity and simplicity
  - Public awareness and visibility of schemes
  - Proportionate cost
  - Audit of members and scheme
  - Involvement of independent members
  - Pro-active and planning in research and regulation
  - Non-collusive behaviour

- AVMS Regulations 2009 criteria:
  - the body is a fit and proper body
  - has consented to being designated
  - adequate financial resources for effective performance
  - sufficiently independent of VoD providers

Arguably, ATVOD meets eleven of these criteria. It is a very small organisation with a Chief Executive and two full-time members of staff. Their resources are limited and public awareness very low. They do not have effective sanctions and are still struggling with their remit and definitions of what TV-like is. The question has arisen among the stakeholders why Ofcom had not retained the functions delegated to ATVOD instead of further fragmenting the regulatory space (Laura Matthews [39]). There are many free rider issues since the big, responsible players are paying for the regulation of mostly adult industry and services that have already been broadcast in linear television. The VoD market is not developed and consists mainly of adult programmes and catch-up services of big broadcasters such as BBC and ITV, which are paying once more for the regulation of programmes that have already been regulated by Ofcom. The review of all the services regulated by ATVOD by the researcher in August 2014 revealed that there are only 11

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[39] Laura Matthews, Senior Research and Policy Officer, Action on Hearing Loss

VoD only, non-adult services. There is no collective industry incentive to participate, and, as Pete Johnson, ATVOD's Chief Executive remarked in the private interview, many adult service providers are relocating to Luxembourg, for example, to avoid being regulated.

Thus, Ofcom created a co-regulatory body that effectively mostly regulates the adult industry, and the majority of these services are based outside the UK and thus outside its remit leaving it unable to perform any actions. As Pete Johnson said, the other major area of their work is making VoD services accessible to those with disabilities, and here they have no powers, but are only 'to encourage' the providers. In addition, without much fuss, publicity, and public involvement, Ofcom renewed ATVOD's designation in 2012. The question is then, to what extent Ofcom acted in the interest of citizens and consumers in this particular case? The more significant question is whether ordinary citizens would have commitment and capabilities to conduct the necessary research and analysis of documents available to establish whether Ofcom is to be held accountable for these decisions. And most importantly, do citizens have any powerful fora to hold Ofcom accountable and impose any sanctions? This brings us to another essential ingredient of any accountability arrangement and that is the sanctions.

The final step in accountability mechanisms is the rectification stage, and the important issue to be discussed here is the possibility of citizens to impose sanctions or make a difference to the behaviour of the regulators should they find it unsatisfactory. It is an imperative that sanctioning powers are sufficiently powerful in order for accountability mechanism to exist (Schillemans, 2008: 177).

As Hood et al. (1999: 47) have noted, there is a hierarchy of sanctions, starting with the 'ability to shame', moving to formal disapprovals to the strong ability to 'liquidate'. However, it appears that the citizens only have the opportunity to shame, although whether it will be realised depends again on the resources and capabilities of citizens to draw the attention of the media. For this reason, some authors claim that direct accountability to the citizens cannot be considered full accountability (Bovens, 2007: 457; Dawn, 1991: 25).

But not only the ability of the citizens to hold regulatory bodies to account is limited, they also cannot hold to account those who represent their interest: independent Board members, and structures such as the Panel, Advisory Committees, and AAC.

As the chapter on citizen engagement has shown, there is an emphasis on experts to represent the citizen and consumer perspective and interest in the regulatory processes instead of direct citizen engagement. However, the ability of citizens to control and hold accountable those who represent them and advocate for their interest is very limited for a number of reasons.

To begin with, there is no sufficient information regarding the exact role of different representatives since meeting minutes are vague, if published at all. In addition, these structures abide by the rules of collective decision-making, thus the information regarding actions of different members is not available (Miles Lockwood, ASA, private correspondence with the author). Annual reports are also extremely vague on this topic, Ofcom's ACs just list the members, and there is a report by the AAC in ASA's annual reports but there is usually just one or two relevant sentences, which are by default extremely vague and only mention that some of AAC' advice was accepted by BCAP and some not without the details as to what this advice has been. In ten annual reports published by Ofcom from 2004 to 2014, the Content Board's work in relation to co-regulatory bodies is only mentioned twice, in Annual Reports 2004/05 and 2010/11. Not only these mentions do not tell us what different Independent Board members argued, they do not even refer to the decisions by the Content Board. For example, in Annual Report 2004/05, page 17, it is stated that the Content Board 'provided input to the contracting out of the regulation of broadcast advertising content to a new co-regulatory system under the auspices of the Advertising Standards Authority (ASA)' without mentioning what that input contained.

In addition, there is no information regarding the overall role of these structures and citizen representatives in the decision-making since their ultimate purpose is to provide advice to Ofcom, ASA and ATVOD and it is not always clear how influential this advice has been. There are claims that they are influential, but there is no conclusive evidence to what extent and in relation to which decisions.

However, not only there is no sufficient provision of information regarding the role and actions of these different structures, there is no opportunity for debate, which is another

important stage in accountability relations. As the chapter on citizen engagement has shown, these structures do not engage directly with the citizens, thus there is no contact and conversation with them.

And finally, opportunities for citizens to sanction them are non-existent. But this is perhaps not surprising and to be expected since the ultimate purpose of these structures is to provide advice to regulatory bodies, thus there is no link with the citizens and accountability to them is not envisaged.

To summarise, direct accountability is seen as accountability of regulators directly to the citizens. The evaluation of different stages of this accountability has painted a gloomy picture of the opportunity of the citizens to hold Ofcom, ASA and ATVOD to account. To begin with, NPM reforms, which have been very influential in the way accountability has developed, have put an emphasis on evaluation of performance and consumer satisfaction. Consequently, the provision of information remains insufficient and unrevealing when it comes to processes and justifications for certain decisions, and since it has been envisaged that the main role for the citizens is to file complaints, they are left without a space for debate with the regulators. In addition, since the regulatory space is mainly reserved for experts, as the previous chapter has shown, ordinary citizens are perhaps not capable to understand the judgments and not in a position to commit to research and entangle the complex network of decision-making. Moreover, their power to sanction the regulators and make a noticeable difference to their behaviour is minimal and would largely depend on their ability to mobilise media attention. Similarly, they are in no position to hold those who represent their interest accountable.

Therefore, we are left with the conclusion that the way current co-regulatory arrangements are structured, there is not a workable mechanism for direct accountability to the citizens. However, something more worrying is revealed when a very broad definition of accountability is used and that is the one that sees it as any mechanism that makes those in the power responsive to the preferences of their publics. As the previous chapter on engagement has shown, citizens are not engaged in meaningful deliberation with Ofcom, ASA and ATVOD and consequently do not express their preferences. Thus, making regulators accountable and responsive to the preferences that are not even expressed is an absurdity in itself.

6.1.2. Public interest groups and accountability

It appears that CSOs are envisaged to play many roles when it comes to new modes of governance and one of them is to hold those in the power to account on behalf of citizens (Steffek and Nanz, 2008; Kochler-Koch, 2012). Over the following paragraphs, we will discuss their opportunity and the ability to do so, and to what extent that enhances democratic accountability.

CSOs are in a much better position to hold Ofcom, ASA and ATVOD to account in comparison to citizens when it comes to all three stages of accountability mechanisms: information, debate and sanctions.

Since they are actively engaged with these regulatory bodies, as the previous chapter has shown, they have access to a much larger pool of information than citizens. As those interviewed revealed (Colin Browne, Laura Mathews, Paddy Barwise [40]), they are 'insiders' when it comes to the co-regulatory network studied, which enables them not only to be better informed, but also to debate the issues with the regulators and seek clarifications. And this is an opportunity that is not available to the citizens.

In addition, although CSOs do not have any enforceable right to information (Mulgan, 2004: 65), regulators have powerful incentives to co-operate with them since their success and legitimacy depends on co-operation of relevant interest groups and thus refusal to answer reasonable requests for information or not to enter into discussion can damage their working relationships (Mulgan, 2004: 66-7). This has been confirmed in the interviews with Shahriar Coupal, ASA, and Pete Johnson, ATVOD, who do claim that it is not in their interest to produce regulatory decisions in isolation and are therefore forthcoming to engagement with different CSOs. What might be an issue here is that usually the main purpose of policy dialogue is forward-looking, concerned with the making of future government policy, and not discussing the past decisions (Mulgan, 2004: 63). In addition, as the interviewees revealed, CSOs need to be reasonable in order to develop and maintain a good relationship with the regulators, thus their willingness to call them to account and demand information is limited.

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[40] Colin Browne, Chairman of the Voice of the Listener and Viewer; Laura Mathews, Senior Research and Policy Officer, Action on Hearing Loss; Paddy Barwise, London Business School, Chairman of Which?

Another important issue is that these points do not apply to all CSOs since many are not 'insiders'. There are many outsider groups, such as Alcohol Focus Scotland, which refuse to work with ASA for example since they are not in favour of advertising rules being designed by the industry. As Mulgan (2004) claims, there are many of these interests that are 'excluded from normal channels of confidential consultation because they are too radical, too poor, too electorally insignificant or too recently formed', and they can only occasionally force those in the power to listen and respond and thus hold them accountable (Mulgan, 2004: 63).

Regardless of these trade-offs, CSOs are still in a better position in comparison to citizens to access relevant information for accountability purposes. This is also helped by the fact that they have more expertise to interpret and evaluate the data and information available.

When it comes to the final stage of accountability mechanisms, the ability to sanction, CSOs have at their disposal the so-called soft sanctions: ability to shame, draw media attention, and maybe exert the pressure on the governments (Mulgan, 2004: 65-6).

What Paddy Barwise, the Chairman of Which?, stated in the private interview with the researcher can be applied to the way CSOs can make a considerable difference to the work of the regulators:

> 'The main powers we have is our brand and our reputation and our credibility, but of course we are doing quite a lot of lobbying and campaigning. We talk to a lot to ministers and shadow ministers, so I think our access is very, very good. Considering we are not a huge organisation, we have enormous de facto power, but it is mostly the power of publicity and lobbying but increasingly we try to have informal conversations. We are visibly able to make a difference using multiple methods and that is not because we have a lot of formal power. I think that our muscle is mostly informal.'

Laura Mathews from Action on Hearing Loss has confirmed that they would talk to the Department of Culture, Media and Sport and BIS and try to make a difference to the way

regulators are working, if dealing with them directly does not yield any results. Thus, they have tried to influence DCMS to change the way ATVOD approaches regulation of access services and Ofcom's work on subtitling.

Colin Browne from VLV has also stated that the power of their brand and personal connections would help influencing the work of the regulator and change their approach to issues: 'Jocelyn's remarkable work made the organisation more important than the size of the organisation itself'.

However, the willingness of CSOs to employ the powers they have at their disposal is largely influenced by the realisation that they risk their privileged access to the inner circle of insiders if they object too strongly (Mulgan, 2004: 65). This has been confirmed in the interviews. Colin Browne claims that they must be reasonable and make considered judgments if they are to be listened by the regulators and make a considerable difference, an opinion shared by Laura Mathews as well.

However, although CSOs are in a better position than citizens when it comes to accountability, whether they are able to take advantage of that opportunity would once again depend on their resources. Being active in every stage of accountability requires resources: processing and seeking information, monitoring the regulators and penetrating into the issues, engaging in debate, and trying to make a discernable difference to the work of the regulators by either putting pressure on them, mobilising the attention of the media or lobbying the government. The biggest power of CSOs is their brand and the possibility to have an impact on public opinion, both of which require a considerable amount of resources and commitment. Resources in terms of money, staff, administrative capacities and organisational skills and expert knowledge but also the access to the public by attracting media attention and mobilising members and supporters will make all the difference (Kotzian and Kohler-Koch, 2012).

Therefore, the ability of CSOs to make regulators accountable would depend on their resources, power and above all willingness to do so.

However, the contribution of CSOs to democratic accountability is very small since the level of compounded accountability is very low: they are not accountable for their work

to the citizens. As debated in the previous chapter and recognised in the literature, CSOs face legitimacy problems themselves since there is no link with the citizens and they are not accountable to them (Schillemans, 2008: 190). Their discussions with the regulators take place behind closed doors without transparency, thus making citizens unable to engage (Mulgan, 2004: 63).

Consequently, since the citizens are not involved, the dialogue is not public, and not even all CSOs have the same opportunity to get involved, this type of accountability has been described as closed and elitist, with only a few people or organisations being included (Mulgan, 2004: 66-7).

When all considerations are taken into account, public accountability to CSOs is more effective when compared to accountability to ordinary citizens. CSOs have better access to information due to their insider role and engagement with the regulators, which also gives them an opportunity for debate. In addition, they have more expertise and resources, which not only helps them interpret the actions and decisions of the regulators, but also attempt to make a difference when it comes to their behavior through exhorting pressure and drawing media attention. However, the ability of CSOs to take advantage of the position they are in would depend on their resources, power and their willingness to do so since their insistence on holding the regulators to account might pose a risk for their privileged positions.

However, the most important issue for democratic accountability is the fact that CSOs are not accountable to the citizens. Since there is no compounded accountability, the power of the CSOs to hold regulators to account does not contribute substantially to democratic accountability.

The next section of the chapter deals with judicial accountability and how it operates in practice. It aims to assess its power to hold regulators accountable and the extent to which it contributes to democratic accountability.

6.2. Judicial accountability

Legal or judicial accountability is generally understood to be accountability of an actor to the courts and quasi-judicial bodies such as administrative tribunals (Bovens, 2007: 456; Mulgan, 2003: 33). The most significant aspect of legal accountability is that of judicial review, whether constitutional or administrative (Fisher, 2004: 504-505; Dawn, 1991: 111). As the UK's Ministry of Justice defines it, judicial review is 'the procedure by which you can seek to challenge the decision, action or failure to act of a public body such as a government department or a local authority or other body exercising a public law function'. This challenge can only be bases on the lawfulness of the procedures followed by that body, not on the content of the decision itself. In this way, judicial review is closely linked to the rule of law and to what extent public bodies are following due diligence. It has been seen as one of the strongest types of accountability, and we aim to assess how different stages of it operate and to what extent it contributes to democratic accountability. In addition to judicial review, the decisions of the regulators can be challenged in courts as well, such as Competition Appeals Tribunal (CAT) for economic regulation, and regulators, as public bodies, are obliged to abide by the Human Rights Act 1998.

Speaking of different stages of account giving, debate and sanctions, it appears that judicial accountability works well in a few respects.

Although remarks regarding insufficient provision of information about processes and content of debates made earlier can be applied here as well, when it comes to judicial accountability, there is the obligation to appear before the courts if summoned, provide them with necessary information, and engage in debate. Judicial hearings not only require public bodies to disclose publicly their actions, decisions, and justifications for them, but they also provide a space for the debate and scrutiny of those actions and decisions (Mulgan, 2004: 75). Thus, although the level of information publicly available might not be sufficient, if called to the court, Ofcom, ASA and ATVOD are compelled to provide the courts with the necessary information. This obligation does not exist when it comes to public accountability, and it makes this type of accountability more efficient since provision of information is the essential step.

In addition, the rectification stage is well developed since the courts are able to impose tangible sanctions that are legally coercive and public bodies must abide by them (Mulgan, 2003: 80; Dawn, 1991: 26-27; Bovens, 2007: 456; Scott, 2000: 230). In the case of administrative judicial review in the UK for example, the sanctions are the following: a mandatory order requiring the public body to do something, a prohibiting order preventing the public body from doing something, a quashing order nullifying a public body's decision, a declaration, or award of damages to the claimant.

However, not only sanctions, but the threat of sanctions and the cost of the legal proceedings have been extremely influential when it comes to the work of Ofcom, ASA and ATVOD, and has perhaps been one of the most important factors that influence their operations. As discussed previously, rules and procedures are followed by these regulatory bodies due to the threat of court action, which is extremely resource intensive and expensive for them. There is a strong legal culture at Ofcom, ASA and ATVOD, and this is precisely because of the possibility of court appeals of decisions and judicial review. Thus, as Graham Howell, Ofcom's Secretary to the Corporation state in the private interview, 'we try to make sure that if there is an appeal, we win it. So we have to ensure our internal processes are absolutely watertight […]. We have never yet lost a judicial review, but again what that means is we have to ensure our processes are absolutely, 100% right'. Thus, according to Graham, there is a team of people scattered across the organisation ensuring due processes are followed. Stewart Purvis [41] also claimed that they were very aware of their legal responsibilities because of the potential of being overturned in court: 'somebody is always watching you apart from the internal'.

The threat of the judicial review is also very impactful when it comes to ASA and ensures different structures within it are independent, as envisaged by the MoU. For example, as Shahriar Coupal says, BCAP and CAP have absolutely no say in ASA Council's adjudications: 'we would find ourselves in courts very, very soon if they involved themselves in that'.

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[41] Stewart Purvis, currently a Professor at the City University London, previously Partner for Content and Standards, Ofcom

Thus, judicial accountability, even the threat of it, appears to be a very powerful mechanism of control largely due to the fact that it provides all major stages of accountability, not only information and discussion but also, most importantly, rectification. In being able to overturn decisions and enforce sanctions, courts and tribunals are able to go beyond the mere exposure and scrutiny of government actions by imposing remedies in their own right, in some respects the most powerful form of external review of executive action (Mulgan, 2004: 75, 80).

However, although it is a very powerful form of accountability, this analysis is concerned with the question to what extent judicial accountability contributes to democratic accountability. In other words, does it enable citizens to hold Ofcom, ASA and ATVOD to account? A few issues became apparent as the analysis progressed.

To begin with, the search of all UK cases through the database LexisNexis by using key words Ofcom, ASA an ATVOD revealed there have been 77 cases in relation to Ofcom, 18 linked to ASA, and none when it comes to ATVOD. Only one case out of 77 against Ofcom has been instigated by an individual and it is related to employment law. When it comes to the remainder of the cases, the claimants are corporations. None of the cases against ASA involved individuals, only companies.

Thus, although there is an opportunity for citizens to use judicial review and appeals to courts as a form of accountability, they in practice do not do so. There might be a few possible reasons and practical obstacles.

Judicial reviews for administrative cases in the UK are heard at the first instance by tribunals, which makes matters simpler since they are a bit less formal than courts and individuals do not need to have legal representation. In addition, CAT is also a tribunal. However, to begin with, in order to be allowed to bring a case, a claimant must prove that a decision or action has or would potentially affect them directly in order to be accorded 'standing'. In general, it is considered that the rights of taxpayers or consumers objecting to decisions which affect large sections of the population are controversial and would highly unlikely be granted standing (Mulgan, 2004: 76-7). This would be particularly difficult when it comes to the decisions this research is looking at, such as

delegating responsibility for advertising to co-regulatory bodies.

In addition, although individuals can appear in front of a tribunal without legal representation and can expect to be guided and helped by the judges through the procedures, it is not advised for them to so. Due to complexity, it has been thought that legal help is necessary in order to receive fair treatment. However, it comes at high costs, which places legal proceedings and judicial review beyond the reach of ordinary individuals, especially bearing in mind it would be very difficult getting legal aid for administrative cases, although there are some possibilities (Mulgan, 2003: 81-82). In the UK, it is possible to obtain free legal advice from organisations such as Law Centres or from solicitors who offer a free initial first interview, usually lasting 30 minutes. Public funding is also available to financially eligible people with legal problems other than criminal matters in order for them to obtain advice from a solicitor, to have a solicitor write letters on their behalf, or represent them in court. Applications for public funding are tested according to income and the value of the applicant's home, and sometimes there is the merits test. However, in some cases, even if the applicant is financially eligible, the Legal Services Commission may decide that they should make a contribution (usually paid monthly) toward the costs of their case called the Statutory Charge. The citizens may be able to come to a No Win - No Fee agreement with solicitors. Thus, although there are options when it comes to financial help, the likelihood of their receipt for administrative cases is very small.

Another issue that serves as a deterrent is the fact that, if the case of judicial review is lost, the claimant is due to pay the defendant's fees, which are likely to be more than £30,000. Moreover, judicial processes are notoriously lengthy and subject to delays, which often means achieving accountability can take years (Mulgan, 2004: 82).

In addition, it is worth noting is that the system is highly complex and fragmented. In case of those who do not win the case of judicial review, there is the right of appeal in a higher court and, in case of inappropriate conduct of judicial staff, to the Judicial Conduct Investigations Office (JCIO), which is the associated office of the Ministry of Justice. However, the JCIO cannot deal with complaints about judicial decisions, and, furthermore, if there is a complaint about the JCIO, it should be taken to the Judicial Appointments and Conduct Ombudsman. Thus, familiarity with the system is necessary,

which further makes a case for the necessity of legal representation.

Furthermore, a judicial review can only be instigated for procedural issues and must be based on some rule of public law and administrative justice. It is usually for the matters of fairness, reasonableness, irrationality, and procedural impropriety (Mulgan, 2004: 33). In other words, judicial reviews are a challenge to the way in which a decision has been made, rather than the decision itself. It is solely concerned with the question whether right procedures have been followed. Thus, as long as Ofcom, ASA and ATVOD follow the correct procedures for decisions, they cannot be challenged via judicial review.

To conclude, the likelihood of citizens using a judicial review or appeals to the court to challenge the decisions of the regulators is very low due to the complexity of the system, its cost and required commitment. The process is very resource and time intensive, which makes it highly improbable to be used by citizens. Thus, the extent to which citizens are empowered by the existence of the opportunity to use judicial review is debatable since the practical obstacles are so many and so strong. Judicial review and court cases are tools used by companies, which are in a better position to take advantage of the system.

The biggest issue when it comes to judicial accountability is not perhaps to what extent it enables democratic accountability, but what its effects have been on democratic qualities of co-regulatory arrangements and what Ofcom, ASA and ATVOD consider to be credible and influential input into their decision-making processes.

Firstly, the threat of court appeal has put more focus on the evidence-based approach, which in turn makes the contribution of citizens and public interest groups less influential. As Chris Taylor [42] stated in the private interview, 'we have to have evidence that would stand up to scrutiny in an appeal, and rightly so, you can't just regulate based on theory, you have to be able to demonstrate harm.' He further adds, 'it is different with every regulated sector, which is odd, and there is a particularly high standard of evidence required for us to withstand appeal in the telecoms sector'.

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[42] Chris Taylor, Director of Consumer Policy, Ofcom

Shahriar Coupal from ASA similarly claims that evidence is crucial:

> 'When you look at it from the point of a regulator who starts from the essential
> freedom of expression, and of course we are subject to a court of law as well, we
> need to have good reason to say you can't actually do that any more cause
> advertising actually has this effect, which means you can't do it. And if we didn't
> have that evidence, if I was to stand up in the court of law and a food
> manufacturer said 'judge I have freedom of expression and I am expressing it in a
> responsible way, I have seen little or no evidence to show that food advertising is
> having a detrimental effect and here we have a regulator who wants me to stop
> doing that'. On what basis? I would find that difficult to answer'.

Thus, the fact that regulators' decisions can be subject to court appeal has made evidence
even more important, which, as we have discussed, has made the input from citizens and
public interest groups less influential unless it is based on primary research.

Secondly, judicial review in general is open to criticism for encouraging an excessively
legalistic approach to government decision-making that leads to emphasising formal rules
and procedures at the expense of more flexible judgment (Wilson, 2000, Ch. 15), and this
has certainly proved to be the case when it comes to Ofcom, ASA and ATVOD.
Wherever a decision has the potential to end up as the subject of a legal appeal, those
making the initial decision are under pressure to impose law-like standards on their own
processes and to act themselves in a legalistic manner (Mulgan, 2004: 82). As Stewart
Purvis [43]claimed in the interview,

> 'One thing that I wanted to stress to you if you needed stressing, in everything
> that we are talking about, there is a lawyer on your shoulder, the whole time, the
> whole time. I was, I probably shouldn't have been surprised by that because, you
> know coming from the world of journalism, there are lawyers around all the time,
> but of course, in the world of journalism, I worked with some big lawyers, it is
> my decision at the end of the day, they were there to advise you. It wasn't like

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[43] Stewart Purvis, currently a Professor at the City University London, previously Partner for Content and
Standards, Ofcom

that at Ofcom. They were there to tell you. They told me a number of times you can't do that. You can't do that. It is the most common threat'.

Philip Graf [44] confirmed that, on many occasions, lawyers at Ofcom decided what could be done. As Chris Taylor [45] claims, 'any regulator that is competent should have a strong legal team and should have lawyers ensuring what they do is right'.

However, this has consequences, and one of them is the slowness of the process, which even the National Audit Office criticised Ofcom in their 2010 report, which will be discussed in more detail in the next section, and claimed that 44% of those they surveyed felt Ofcom does not act in a timely manner on the relevant issues. Ofcom justified this by claiming there is the need to consider evidence and follow due processes since the failure to do so could present grounds for appeal (page 6). Ofcom has also been criticised since their establishment for the number of consultation documents issued and the way that hampered smaller public interest groups to respond, but consulting widely is again one of the procedural rules that it must follow (The Panel, 2009).

Ofcom has transferred this legalistic approach to co-regulatory bodies as well. An interesting example that has been mentioned by a number of interviewees is the consultation on what is called post-conception advice, or abortion clinics. ASA was not particularly clear in their consultation on whether they wanted to change the rules or not and the entire process was confusing (Stewart Purvis, private interview). The campaigns by different organisations followed the consultation and Ofcom staff even received death threats because they had the ultimate responsibility for regulation of broadcast ads (Chris Woolard, private interview). Eventually, Ofcom was forced to re-run the consultation with ASA in order to make it absolutely clear what was consulted on. Thus, regardless of whether ASA's procedures are different, since Ofcom is ultimately accountable, its approach is enforced.

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44 Philip Graf, previously Chairman of the Content Board, Ofcom, currently Chairman of the Gambling Commission
45 Chris Taylor, Director of Consumer Policy, Ofcom

This legalistic approach makes the processes rigid to a certain extent, but regulatory decisions often need to be based on complex judgement that cannot readily be reduced to general rules or procedures. Legalism can thus be the enemy of sensible government, and judicial accountability is the driving force behind this (Mulgan, 2004: 83).

Summing up the contribution of judicial accountability to democratic accountability, it appears that the conclusion is controversial. Although judicial accountability works well in different stages since it forces the regulators to provide information and enter into a debate during court hearings, whilst it also gives the opportunity of imposing tangible sanctions, for a number of reasons, it remains beyond the reach of ordinary citizens. Since it is costly, complex, timely and resource intensive in general, it is almost exclusively used by businesses. Thus, citizens are given a tool that they in essence cannot use in practice.

Therefore, the conclusion emerges that the extent to which citizens are empowered by the existence of judicial accountability is doubtful. The next section deals with yet another form of accountability that appears to be removed from the realm of citizens.

6.3. Administrative accountability

Administrative accountability is accountability to non-political bodies such as audit commissions and offices, inspectors and controllers, and other bodies concerned with efficiency, effectiveness, value for money, and fairness to consumer (Dawn, 1991: 27; Bovens, 2007: 456; Scott, 2000: 230; Mulgan, 2003: 91).

This type of accountability takes an important place in the regulatory systems researched and the rising significance of administrative accountability came as a result of NPM reforms. In most Western countries, the dominant accountability relationships have traditionally been vertical in nature, which is particularly true for the UK with its parliamentary system that operates on the basis of the doctrine of ministerial responsibility. However, NPM reforms have led to a number of important changes and one of them has been the increased importance of accountability to independent bodies

(Mulgan, 2003: 156; Thomas, 1998: 379). The "audit explosion" has been one of the key characteristics of public sector management reforms (Scott, 2014: 362). When it comes to the UK, this shift has been embodied in the establishment and prominence of the National Audit Office (NAO), the auditor of UK Government. The role of NAO is also symptomatic of another change brought about by one of the main rationales for NPM reforms and that is the focus on three Es: value for money (efficiency), the quality of outcomes (effectiveness), and economy (parsimony in the use of resources) (Mulgan, 2004: 85; Mulgan, 2003: 154).

The NAO is concerned precisely with these issues: it scrutinises public spending, and reports to the Parliament on the economy, efficiency and effectiveness with which public bodies have used their resources. Financial auditing is seen more broadly and it is concerned not only with technical accounting matters of accuracy and regularity but also with ethical issues of probity and propriety in the handling of government funds and consequently deals with the questions of efficiency in the use of resources (Mulgan, 2004: 85). The NAO is also concerned with whether government policies have achieved their goals, which is also linked with NPM reforms and focus on performance and reaching objectives.

When it comes to the way administrative accountability and the NAO work, it is important to notice that there have been only four reports in relation to Ofcom, and none that looked at the way ASA and ATVOD operate. Thus, the NAO's assessments are not comprehensive.

The four reports relevant for Ofcom are the following:

1. 'The creation of Ofcom: Wider lessons for public sector mergers of regulatory agencies' (2006)
2. 'Review of Economic Regulators' Impact Assessments for the House of Lords Select Committee on Regulation' (2007)
3. 'Protecting consumers? Removing retail price controls' (2008)
4. 'The effectiveness of converged regulation' (2010)

Evidently, only two are in depth assessments of the way Ofcom operates while the other two only look at some aspects of their work.

In 2006, the NAO looked at the costs and challenges of organisational change in the merger of five regulatory bodies to create Ofcom. The report is primarily interested in the costs and value for money, the way the merger has been carried out, and whether the merger has achieved its objectives in terms of benefits for business, consumers, and cost such as reducing regulatory burdens, improving regulatory outcomes in terms of being light-touch and flexible and achieving efficiency savings. Thus, they are interested in performance and how to measure it. The report points out that it is difficult to assess mergers since there is no share price or shareholder value, as with private sector mergers. Thus, they propose that each merger should identify a combination of objectives that can be used to measure what constitutes success and for the NAO strategic objectives are benefits for markets, consumers, business satisfaction and cost efficiency (page 17-18). It is also interesting to note that what they see as benefits for consumers is only the price (page 17).

In their 2010 report on the effectiveness of converged regulation, the NAO tried to assess Ofcom's overall performance. They develop a framework containing four sections: Ofcom's use of resources and cost savings; the outcomes for citizens and consumers; market indicators; and the views of stakeholders (page 4). In terms of citizens and consumers, they concluded that outcomes for consumers are adequate since the levels of consumer satisfaction with communications services appear high. There is no mention as to what the outcomes for citizens are, but they state the areas of improvement are switching, broadband speed, and silent calls (page 6). As their recommendations, they list three areas where they expect to see improvements: articulating success criteria, spectrum management accounting, and reporting of efficiencies (page 8).

When it comes to the report from 2007, NAO only looked at the way Ofcom conducts Impact Assessments as a part of their evaluation how this is performed by a range of bodies: Ofcom, Ofgem, Ofwat, Postcomm, and the Office of Rail Regulation (ORR). They are using four criteria: presentation, Cabinet Office consultation guidelines in terms of time scales and publication of responses, assessment of cost and benefits, and monitoring and evaluation (page 10). It was concluded that Ofcom could improve when it comes to presentation, and monitoring and evaluation (page 19). However, only two consultations were looked at.

And finally, in the 2008 report on the removal of price controls, Ofcom's work in relation to retail price controls in fixed line telephone provision was assessed in addition to Ofgem's and Postcomm's work in markets relevant for them. The report assesses whether these regulators removed the prices in a way that makes them meet their statutory objectives in terms of the effect on consumers and markets. The conclusions are ambivalent, since, although Ofcom tried to ensure the competition is well developed, the problems of vulnerable consumers still remains in addition to the incumbent suppliers still having a strong position in their markets (page 5-6).

Thus, the work of the NAO is typical for administrative accountability: it is interested in performance, reaching objectives, efficiency and value for money. The problem for its contribution to democratic accountability is that its work is not comprehensive in terms of regulatory bodies and issues, its effectiveness is relative, and, most importantly, there is no link with the citizens.

As with any administrative forum, the effectiveness of the NAO depends on the extent of their legal powers and resources (Mulgan, 2003: 98). With administrative accountability, there are no legally coercive sanctions but just the possibility of recommendations (Dawn, 1991: 27; Mulgan, 2003: 87), and the NAO is only in the position to give recommendations since it is not in a hierarchical relationship with Ofcom and does not have formal powers of coercion. This is what is called diagonal accountability where the forum is not superior to the actor. A good example is the case of nuisance calls and the fact that Ofcom is still dealing with the issue although the NAO recommended in 2010 that Ofcom's work in this area must be improved.

And when it comes to the NAO's accountability and its link to the citizens, it is accountable to the Parliament and it scrutinises public spending on behalf of the Parliament. Citizens do not have a role and say in its work, and they have no means of influencing it. Thus, there is no compounded accountability and consequently its contribution to democratic accountability is low. In this case, administrative accountability only confirms what has been found in the literature: 'third parties' forums are not principals and they may themselves be weakly accountable' (Papadopoulos, 2010: 1042). For these reasons, horizontal accountability must be considered as something that differs from the democratic control (Schillemans, 2008: 190).

Not only administrative accountability does not contribute to democratic accountability, but perhaps its purpose is not making the regulators responsive to the preferences of the principals, but, as Mulgan claims, 'although some weight has been given to accountability as a value on its own, it has mainly been perceived as a way to increase efficiency and effectiveness' (Mulgan, 2003: 154).

6.4. Conclusion

Although accountability is high on the agenda of both governments and regulators, democratic accountability is arguably not. As this chapter has shown, the citizens are not in a position powerful enough to hold regulators to account for their actions and decisions. Since the main means of their active engagement with Ofcom, ASA and ATVOD is through filing complaints, they are not a part of the inner circle, which means the information they have access to is limited and incomplete. Moreover, they do not have access to the fora where they can engage in deliberation and debate with the regulators, which are the two essential steps for any accountability mechanism: information and debate. However, citizens do not have at their disposal sanctions that are powerful and influential enough: their option seems to be mobilising the attention of the media. Moreover, those who act on their behalf and who are in a better position to hold the regulators accountable, CSOs, are not themselves accountable to the citizens.

Mainly due to NPM reforms, citizens are confined to the role of the consumers, where their active engagement is seen in terms of complaints and regulators are to be held accountable for the level of service they provide in handling these complaints. However, this does not empower the citizens. As Pollitt points out: 'better customer relations is one thing, but performance indicators are another and partnership or power-sharing something else again' (Pollitt, 1988: 78).

This focus on customers is coupled with a general attention to performance and economic values, which removes the emphasis from processes and input into decision-making. In addition, due to NPM reforms, other forms of accountability, such as administrative ones, have gained in prominence.

What is interesting to note is that the influential forms of accountability, such as judicial and administrative to a certain extent, are not democratic.

7. Chapter 7: Conclusion

'Governance with 'some of the people' cannot make up for 'the lack of government by and of the people.'

(Schmidt, 2006, 28-29).

The purpose of this chapter is to summarize and bring into a coherent argument the findings of previous chapters of this thesis. Its organization follows the organization of the entire thesis. To begin with, the reader is reminded of the subject matter and why it warrants research interest. This is followed by a review of the normative framework that has been used for the assessment and main arguments for its justifications. Then, we discuss the main findings of the analysis conducted for this thesis before we develop a concluding argument that links these findings.

The subject matter of this thesis has been a regulatory innovation that has been termed co-regulation. It is a mode of regulation that includes formal involvement of both state and non-state actors and whose emergence is the result of two broad and significant changes in the nature of the statehood: the emergence of the regulatory state and the shift from government to governance. In the regulatory state, the dominant mode of intervention in economy and society is regulation, thus forms such as co-regulation are used to 'govern' or 'steer' the society. In addition, with the shift to governance, there is a greater reliance on non-state actors to perform this 'steering'.

Thus, co-regulation is symptomatic of the changes in the nature of statehood over the past few decades. Since it is used to implement public policy objectives, which has traditionally been the role of government departments, but implies formalized and substantive role of non-state actors, it is a qualitatively new regulatory development that justifies research interest into its nature.

Co-regulation has been promoted for three different reasons, which as a consequence has what it will actually represent in practice. As Prosser (2007) claims, the term co-regulation does not respond to fixed reality, but is a political slogan that is used to justify any types of arrangements. There are three different strands to explain why co-regulation and other alternative modes of regulation more generally have developed or should be encouraged to develop: to achieve better regulation in terms of smarter and more efficient regulation and thus overcome the challenges traditional regulation is perceived to be facing; to hand back the responsibility to the society and achieve greater democratic legitimacy; and, finally due to the belief that the market provides better outcomes than regulation and intervention in general.

The aim of this thesis has been not only to evaluate why co-regulation developed in the media sector regulation in the UK, but also what it represents: is it just a way to enable the commercial interest to be in charge of the regulation of their activities with symbolic involvement from the state, or is it a form of governance that would enable wide participation and empower a number of stakeholders, including the citizens, civil society, the state and the industry. As defined above, co-regulation entails the involvement of 'non-state' actors, which is much wider than industry players and could include civic society organisations, general public and all interested stakeholders. New modes of governance have the potential to be an open and flexible type of governing based on the participation and interaction of a range of public and private actors in diverse institutional settings.

More importantly, it is taken that co-regulation, since it is used to implement public policy objectives, should be evaluated as any other form of governance: to what extent it can be described as democratic, and this is the basis for the normative framework developed for this thesis that has been used as a tool to evaluate the nature and quality of co-regulation.

One of the basic premises of this research is that any form of governance should have as its ultimate goal the achievement of public interest objectives. It has been further argued that public interest objectives can be achieved only if institutional structures of regulatory bodies enable transparency, deliberative participation by the citizens, and enable citizens to hold the regulators to account. Only by providing such structures, co-regulatory bodies would empower the citizens to be the ultimate authority and could thus be considered a democratic form of governance.

The case studies chosen to evaluate whether this normative ideal has been achieved in practice comprise three different bodies: Ofcom, ASA and ATVOD. What has in particular been looked at is the way Ofcom handled the delegation of regulatory functions to ASA and ATVOD, and the way these bodies dealt with the regulation of alcohol ads and product placement. These studies involve an element of controversy and conflicting interests and as such represent the most suitable test in order to determine whether the possibilities offered by co-regulation to be a truly democratic form of governance have been achieved.

What the research regarding transparency has focused on is the extent to which citizens are provided with sufficient level of information to participate in deliberation regarding regulatory decisions, and subsequently hold Ofcom, ASA and ATVOD to account. The analysis has covered three main elements of transparency: existence of fixed and published rules, availability of information regarding the conduct of the regulators, and publicity of this information. The first element has been evaluated as satisfactory since, not only the rules of procedures are published, but the threat of the judicial review has compelled Ofcom, ASA and ATVOD to abide by these rules and follow strict

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procedures.

However, when it comes to the second element, the quality of the information available, it has been assessed as not satisfactory after the analysis of proactive release of information as well as the functioning of the Freedom of Information Act has been conducted. What has been revealed is that, due to NPM reforms, there has been a focus on reporting and publishing performance figures and decisions taken rather than processes of decision-making and input into these. This has had as a consequence insufficient level of information necessary to hold regulators accountable for their actions and decisions.

In addition, there is no sufficient information for direct participation by the citizens. Citizens are 'outsiders' when it comes to Ofcom, ASA and ATVOD since they do not participate actively in their decision-making processes, which in turn effects the level of information that is available to them. Moreover, there is no substantial publicity when it comes to activities of Ofcom, ASA and ATVOD.

This bleak picture is further exacerbated by the findings of the evaluation of modes of citizen participation. As the analysis in Chapter Five has shown, there are few opportunities for citizens to get involved directly in the work of Ofcom, ASA and ATVOD. Consultations offer an opportunity for deliberation, but this opportunity is not used and it is of relatively weak influence. Complaints and research can also be a way of direct citizens involvement but they are not opportunities for deliberation regarding regulatory decisions. Thus, the institutional structures offered for direct citizen participation do not empower them.

Influential means for deliberation rely on experts with whom citizens do not have any direct links, such as Independent Board members, and different advisory structures, such as the Panel or ACs. Public interest groups are also influential when it comes to the work of the regulators, but they are neither democratic not deliberative spaces.

Thus, the consequence is that the citizens are neither involved in deciding who will represent them and advocate for their interest, not do they get to decide what their interest will be, let alone what the regulatory decisions will be. The power they have to influence regulatory decisions is the power of consumers of communications services: their experiences and dissatisfaction expressed via research and complaints can exert small influences on regulators.

Although accountability is high on the agenda of both governments and regulators, democratic accountability is arguably not. As Chapter Six has shown, the citizens are not in a position powerful enough to hold regulators to account for their actions and decisions. Since the main means of their active engagement with Ofcom, ASA and ATVOD is through filing complaints, they are not a part of the inner circle, which means the information they have access to is limited and incomplete. Moreover, they do not have access to the fora where they can engage in deliberation and debate with the regulators, which are the two essential steps for any accountability mechanism: information and debate. In addition, citizens do not have at their disposal sanctions that are powerful and influential enough: their option seems to be mobilising the attention of the media. Moreover, those who act on their behalf and who are in a better position to hold the regulators accountable, pubic interest groups, are not themselves accountable to the citizens.

Mainly due to NPM reforms, citizens are confined to the role of the consumers, where their active engagement is seen in terms of complaints and regulators are to be held accountable for the level of service they provide in handling these complaints. However, this does not empower the citizens. In addition, due to NPM reforms, other forms of accountability, such as administrative and judicial, have gained in prominence. What is interesting to note is that the influential forms of accountability, such as judicial and administrative to a certain extent, are not democratic.

Therefore, it appears that Ofcom, ASA and ATVOD are not characterized by institutional structures that would enable democratic governance: there are no

transparent institutional structures that would enable the public to perform the role of the citizens and deliberate regarding regulatory decisions and hold Ofcom, ASA and ATVOD to account.

Regulatory bodies studied seem to have been promoted with the aims of increasing the efficiency of regulation since all their key values and principles are closely aligned with the Better Regulation Agenda as promoted by the British Government. However, the dominance of corporate language, such as consumer insight that is used instead of citizen engagement, and corporate institutional structures, such as complaints and measurement of consumer satisfaction, cannot but lead to the conclusion that the move towards better regulation is in essence a move towards neoliberal beliefs, but not in a more common sense of trust in the markets and competition, but in the belief that they way companies are organized is the best when it comes to public services such as regulation. The institutional structures of corporations are not empowering citizens, but are instead turning them into consumers, and that is undoubtedly a part of a strictly neoliberal agenda.

Appendix A

<u>List of interviewees</u>

Professor Barwise, Paddy - London Business School, Chairman of Which?

Baxter, Adam – Standards Executive, Ofcom

Bookbinder, Alan – Independent Board Member, ASA Council

Browne, Colin – Chairman of the Voice of the Listener and Viewer

Childs, Rachel – Independent Board Member, ASA Council

Close, Tony - Director of Content Standards, Licensing and Enforcement, Ofcom

Coupal, Shahriar – Director of the Committees, CAP and BCAP

Professor Hornle, Julia – Queen Mary University of London, Independent Board Member, ATVOD

Howell, Graham - Secretary to the Corporation and the Director, England Team, Ofcom

Graf, Philip – previously Chairman of the Content Board, Ofcom, currently Chairman of the Gambling Commission

Jempson, Mike - Director of MediaWise, Senior Lecturer at UWE

Johnson, Pete – Chief Executive Officer, ATVOD

Kiedrowski, Tom – previously Director of Market Reform, Ofcom, currently Managing Director, Cedar Tree Advisory Service

Locke, Stephen – Chairman of the Advertising Advisory Committee, CAP

Mathews, Laura - Senior Research and Policy Officer, Action on Hearing Loss

Milne, Claire – previously the Chairman of the Consumer Forum for Communications, Ofcom, currently Visiting Senior Fellow in the Department of Media and Communications, LSE, and independent telecoms policy consultant

Professor Purvis, Stewart – City University London, previously Partner for Content and Standards, Ofcom

Szynkaruk, Anthony - Head of Commercial Policy and Enforcement, Ofcom

Sawtell, Ruth – Independent Board Member, ASA Council

Taylor, Chris – Director of Consumer Policy, Ofcom

Woolard, Chris – previously   Content Group Director and Content Board Member, Ofcom currently Director of Strategy and Competition, Financial Conduct Authority

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