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**Private Regulation Series-01**

PRIVATE REGULATION IN EUROPEAN PRIVATE LAW

Fabrizio Cafaggi



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES**  
**PRIVATE REGULATION SERIES-01**

*Private Regulation in European Private Law*

**FABRIZIO CAFAGGI**

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## **Abstract**

European private regulation pre-existed European Community law and co-exists with it today, giving rise to different forms of complementarity with European legislation. While in the initial stage of *jus commune*, a stronger role for co-regulation characterized private law, the formation of national legal systems, and in particular the era of codifications, changed the complementarity between public and private law-making. Codifications reduced cooperative law-making but increased the role of adjudication as the vehicle through which customs and practices accessed European continental legal systems. The rise of the regulatory State and the more recent transformations of regulatory strategies have brought up new forms of co-regulation with increasing trends of negotiated rule-making, affecting legal integration through different institutions.

In this article the place of private regulation in the evolution of EPL is explored. It affects, in different ways, the whole domain of private law, from contract to property, from civil liability to unfair competition. Often European harmonised private regulation has anticipated European legislation, for example in the areas of unfair commercial practices, internet, financial markets. In other cases, forms of mutual recognition of private regulations have occurred. While the modes through which private regulation has contributed to European legal integration differ, it is quite clear that it has played and will play a significant role.

## **Keywords**

Regulation, Self-regulation, European private law, Contract, Unfair commercial practices



## Introduction\*

The making of European private law is at a strategic juncture. Efforts towards complete legal harmonization seem to be consolidating. While the principle of institutional autonomy has, in the past, separated harmonisation of rules and institutions, recently greater focus on the institutional aspect of European private law is driving increasing coordination among judges and regulators. Both vertical and horizontal coordination is higher for regulators, whilst judicial cooperation in civil and commercial matters is still embryonic. In this essay, I focus on the role of private regulation in the making of European private law (hereinafter EPL) and contend that its influence is greater than hithertofore recognised and requires a reassessment of rule-making power, its constitutional design, and its institutional implications.

Regulation plays an ever more important role in private law at European level<sup>1</sup>. Public and private regulation differ quite significantly in both the modes of governance and the ways in which they affect the formation of property rights, rules of exchanges, and responses to externalities<sup>2</sup>. Nevertheless, even within private regulation, models of activity are not homogeneous, featuring different degrees of decentralisation and competition among private regulators<sup>3</sup>.

The particular features of the relationship between private regulation and private law have not yet been explored in order to design a framework for making EPL<sup>4</sup>. The supranational dimension of private law has recently gained prominence<sup>5</sup>. It forces a distinction between the development of private law concepts and domains within and without the boundaries of nation-states<sup>6</sup>. In the European context, the focus has been on the relationship between States' and European contract law<sup>7</sup>. Less attention has been devoted to the role of private rule-making as a factor contributing both to European private law-making and to the design of newly liberalised European markets<sup>8</sup>. The relationship between Jus Commune and the Common frame of reference (DCFR) is highly debated and the place of private regulation in the overall framework is unclear<sup>9</sup>.

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<sup>1</sup> See F. Cafaggi and H. Muir Watt, *Regulatory functions of European private law*, EE, 2009.

<sup>2</sup> See A. Ogus, *Regulation: Legal Form and Economic Theory*, OUP, 2004, part. Chapter 2. In this contribution, I focus on the role of private regulation, while in a companion piece I tackle the role of public regulation in EPL.

<sup>3</sup> See A. Ogus, 'Rethinking self-regulation', (1995) 15 *Oxford Journal of Legal Studies* 97.

<sup>4</sup> See F. Cafaggi and H. Muir Watt, *The making of European Private law. Governance design*. EE, 2008.

<sup>5</sup> N. Jansen and R. Michaels, 'Private Law Beyond the State? Europeanization, Globalization, Privatization' (2006) 54 *American Journal of Comparative Law* 843; D. Caruso, 'Private Law and State Making in the Age of Globalization' (2006) 39 *New York University Journal of International Law and Politics* 1, G.P. Callies, 'The Making of Transnational Contract Law' (2007) 14 *Indiana Journal of Global Legal Studies* 469.

<sup>6</sup> N. Jansen and R. Michaels, 'Private Law and the State: Comparative Perceptions and Historical Observations' (2007) 71 *Rechtszeitschrift für ausländisches und internationales Privatrecht* 345;

<sup>7</sup> See the path-breaking article by S. Grundmann, 'The Structure of European Contract Law' (2001) 9 *European Review of Private Law* 505; and following, Id., 'European Contract Law(s) – of What Colour?', (2005) 1 *European Review of Contract Law* 184; Id., 'Constitutional Values and European Contract Law – an Overview', in: Grundmann (ed.), *Constitutional Values and European Contract Law*, Kluwer Law International, 2008. R. Schulze (ed.), *Common frame of reference and existing EC contract law*, Sellier, 2008.

<sup>8</sup> See F. Cafaggi (ed.), *Reframing self-regulation in European private law*, Kluwer Law International, 2006.

<sup>9</sup> See H. Eidenmüller, F. Faust, H. Ch. Grigoleit, N. Jansen, G. Wagner and R. Zimmerman, 'The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems' (2008) 28 *Oxford Journal of Legal Studies* 659; and, from a different perspective, M.W. Hesselink, 'The Common Frame of Reference as a Source of

The role of private rule-making in the creation of EPL has been significant in the past. It contributed to the formation of *Ius Commune Europaeum*, a remarkable component of contemporary EPL<sup>10</sup>.

In the XVII century the first clear changes from fragmented to centralized law-making became apparent<sup>11</sup>. In the XVIII century and the early XIX century, the process of codification in continental Europe generated a significant redistribution of law-making power from the private to the public sphere<sup>12</sup>. The ‘publicization’ of the law merchant was however limited. The separation between code civil and code de commerce and the higher importance of trade customs in commercial law shows that merchants’ contractual practices occupied an important position in the hierarchy of sources of law even in the century of codifications<sup>13</sup>. In the XX century, some countries moved towards legislative integration by adopting a unified code of private law, thereby integrating civil and commercial law<sup>14</sup>. This evolution did not however represent the end of private regulation. On the contrary, it partially eliminated the specificity of the law merchant and gave rise to different forms of private law-making; in particular negotiated self-regulation and delegated private regulation<sup>15</sup>. Transnational contract law in the last century developed not against the will of States but with State support, especially in relation to enforcement<sup>16</sup>.

The regulatory State emerged as the key feature of regulatory capitalism and within the regulatory State different forms of private regulation persisted<sup>17</sup>. Post-regulatory States show that they are more often rule takers than rule-makers while private transnational organisations, including business and NGOs play an ever more important role in rule-making and monitoring<sup>18</sup>. At the global level,

(Contd.)

Private Law’ Centre for the Study of European Contract Law Working Paper Series No. 2008/10, available at <<http://ssrn.com/abstract=1270563>>, last visited 25 May 2009, forthcoming in (2009) 83 *Tulane Law Review*.

<sup>10</sup> See R. Zimmerman, ‘Roman law and the harmonisation of private law in Europe’, in Hartkamp et al. (eds.), *Towards a European Civil Code*, 3<sup>rd</sup> revised edn., Kluwer, 2004, p. 21 ff. R. Zimmermann, ‘The Law of Obligations – Character and Influence of the Civilian Tradition’ (1992) 3 *Stellenbosch Law Review* 6; D.J. Ibbetson, *A Historical Introduction to the Law of Obligations*, OUP, 1999; D.E.L. Johnston (tr.), R.C. van Caenegem, *An Historical Introduction to Private Law*, CUP, 1992; Id. *European Law in the Past and the Future: Unity and Diversity over Two Millennia*, CUP, 2002, p. 73 ff.

<sup>11</sup> In France, under Colbert the first important steps towards ‘statization’ of merchant law took place with the two *Ordonnances*: *Ordonnance sur le commerce de terre* (1673) and *Ordonnance de la marine* (1681). However this was only a limited process since many of the traditional private law domains remained untouched. In England, merchant law was incorporated into the common law. See Schmitthoff, *Commercial law in a changing economic climate*, 2nd ed, Sweet & Maxwell, 1981, p. 4-6.

<sup>12</sup> See R.C. van Caenegem, 1992, *supra* n. 11, p. 125-126; J. Basedow, ‘The State’s Private Law And The Economy’ (2008) 56 *American Journal of Comparative Law* 703, p. 703; N. Jansen and R. Michaels, 2007, *supra* n. 7, p. 345.

<sup>13</sup> In many legal systems, for instance in English, German and French, law usages have been incorporated into contracts as implied terms.

<sup>14</sup> For example, Italy with the Civil Code enacted in 1941 which came into force in 1942.

<sup>15</sup> See E. Durkheim, *The Division of Labor in Society*, Free Press, 1964; K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, Beacon Press 1944; L. Cohen-Tanugi, *Le droit sans l’Etat*, PUF, 1985, part. p. 5 ff.. D. Levi-Faur and J. Jordana, *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*, EE, 2004.

<sup>16</sup> See J Basedow, 2008, *supra* n. 13, part. p. 705; R. Michaels, ‘The True Lex Mercatoria: Law Beyond the State’ (2007) 14 *Indiana Journal of Global Legal Studies* 447.

<sup>17</sup> See D. Levi-Faur, ‘Regulatory capitalism: the dynamics of change beyond telecom and electricity’ (2006) 19 *Governance* 497 “While in the nineteenth century steering and rowing were dominated by business, in the twentieth century the crisis of the interwar period and the process of democratic enfranchisement led to the growth and expansion of the role of the state, which in many spheres took over both functions. The new order of regulatory capitalism represents a new division of labor between States and business. While the state retains responsibility for steering, business increasingly takes over the functions of service provision and technological innovation”.

See W. Streeck, ‘The study of organized interest: before the “Century” and after’, in C. Crouch and W. Streeck, *The diversity of democracy: Corporatism, social order and political conflict*, EE, 2006, p. 3 ff.

<sup>18</sup> See G. Teubner (ed.), *Global Law without a State*, Dartmouth, 1997; J. Braithwaite and P. Drahos, *Global Business Regulation*, CUP, 2000.

administrative and private law have been developing not without but rather beyond States<sup>19</sup>. Different forms of transnational regulation have developed; within them private regulatory regimes have complemented or substituted conventional State regulation. These phenomena have had a strong effect on the process of Europeanisation of private law<sup>20</sup>.

Varieties of regulatory capitalism correspond to different roles of private regulation<sup>21</sup>. In some circumstances private regulation operates mainly as an alternative to public regulation, in others co-regulatory arrangements, especially in the form of delegation of tasks to private bodies, constitute the principal model<sup>22</sup>. These models vary across sectors and confirm that both States and sectors contribute to defining differences in private regulatory regimes even in a globalized world<sup>23</sup>. Transnational private regulatory regimes (TPRER) are emerging within Europe but also on a larger scale. The 2007-2009 financial crisis seems to have reshaped the power between States and business communities, redefining the main institutional features of regulatory capitalism without weakening the role of private regulation<sup>24</sup>.

Within this framework, I am concerned with private regulation that becomes binding on parties other than those who formally adhere to the agreement, be it the regulatory contracts, the rulebook or the code of conduct. In other words, I focus on private regulation with general or ultra partes effects. As it will be shown, there are different ways in which this ‘spreading effect’ occurs but it is useful to distinguish between judicial and legislative recognition<sup>25</sup>. This general effect does not transform private regulation into public norms but it calls for procedural and substantive requirements to comply with rule of law and democratic principles<sup>26</sup>.

In the past, private regulation acquired binding effects mainly through judicial recognition<sup>27</sup>. Standards defined by codes or guidelines were referred to by judges when filling the meaning of general clauses, i.e. the duty of care in the tort of negligence, the standard of performance in

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<sup>19</sup> See B. Kingsbury, N. Krisch and R. Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15; S. Cassese, ‘Administrative law without the State? The challenge of global regulation’, (2005) 37 *NYU Journal of International Law and Politics* 663; G. de Burca, ‘Developing Democracy Beyond the State’ (2008) 46 *Columbia Journal of Transnational Law* 221.

<sup>20</sup> See O. Lando, ‘The Lex Mercatoria in International Commercial Arbitration’ (1985) 34 *International and Comparative Law Quarterly* 747; K.P. Berger, ‘European private law, lex mercatoria and globalisation’, in Hartkamp et al., 2004, *supra* n. 11, p. 43 ff.

<sup>21</sup> See D. Levi-Faur, ‘Varieties of regulatory capitalism: getting the most out of the comparative method’ (2006) 19 *Governance* 367; J. Braithwaite and D. Levi-Faur, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better*, EE, 2008.

<sup>22</sup> See C. Donnelly, *Delegation of governmental power to private parties: A comparative perspective*, OUP, 2007.

<sup>23</sup> See J.R. Hollingsworth, P.C. Schmitter and W. Streeck, ‘Capitalism, sectors, institutions and performance’, in: J.R. Hollingsworth, P.C. Schmitter and W. Streeck, (eds.) *Governing capitalist economies: Performance and Control of Economic Sectors*, OUP, 1994, p. 3-16; P.A. Hall and D.W. Soskice (eds.), *Varieties of capitalism: The institutional foundations of comparative advantages*, OUP, 2001; G.A. Bermann, M. Herdegen and P. Lindseth (eds.), *Transatlantic regulatory co-operation: Legal Problems and Political Prospects*, OUP, 2001; J. Jordana and D. Levi-Faur, 2004, *supra* n. 16.

<sup>24</sup> See Financial Stability Forum, ‘Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience’ (April 2008) available at <[www.fsforum.org/publications/r\\_0804.pdf](http://www.fsforum.org/publications/r_0804.pdf)> (last visited 18 February 2009); Communication from the Commission to the European Council, ‘A European Economic Recovery Plan’ COM (2008) 800 final (Brussels, 26 November 2008).

<sup>25</sup> See F. Cafaggi, ‘Rethinking Private Regulation in the European Regulatory Space’, in F. Cafaggi, 2006, *supra* n. 9 p. 3 ff.

<sup>26</sup> In relation to transnational regimes and democratic accountability see G. de Burca, 2008, *supra* n. 20, 221.

<sup>27</sup> In the UK, a “party to a contract is bound by usages applicable to it as certain, notorious and reasonable, although not known to him.” (*Cunliffe-owen v. Teather & Greenwood* [1967] 1 W.L.R. 1421 (CH.D.)). In *Bowerman v Association of British Travel Agents Ltd* [1996] C.L.C. 451 a code of conduct was held to constitute terms of contract with consumers. See also case law cited below in footnote 87.

contractual undertakings, fairness in unfair competition law<sup>28</sup>. The use of co-regulatory arrangements was mainly associated with professional statutes that, since the Middle Ages, had been part of co-regulatory procedures, based on cooperation between governments and guilds. More recently the co-regulatory model has expanded, partly as the result of transformation of self-regulation, partly as a new regulatory form of unregulated fields<sup>29</sup>.

The distinction between codes of conduct or agreements within a self-regulatory and co-regulatory framework affects or should affect the criteria employed by judges when they refer to them in order to define the content of legal standards<sup>30</sup>. While pure self-regulation leaves judges with wider discretion, regulatory contracts and codes of conduct, within a co-regulatory frame, should be considered in a similar fashion as administrative rules designed by public regulators deserving a higher degree of judicial deference.

In this essay, I will briefly explore the role of private regulation in European contract law, European tort law and unfair competition law. I will then draw some conclusions about the role of private regulation in European law-making and define the needs for a new legal framework that can support the use of private regulation.

### **Private regulation, internal market and legal integration**

In this contribution, I shall concentrate on the European dimension, focusing mainly on the ‘internal’ multilevel structure and distinguishing between vertical and horizontal private law-making. I shall explore not only the shifting boundaries between public and private law-making but also the significant changes within private law-making in Europe, partly attributable to the new strategies towards complete harmonisation, recently advocated by the European Commission and endorsed by the European legislators. The focus will be on the relationship between private regulation and European Community law but clearly the influence of private regulation on EPL goes far beyond the domain of EU competences. It contributes to the formation of European rules in areas where States are sovereign but private collective autonomy generates transnational private regimes.

First, (1), I define the institutional complementarity between private regulation and public law-making then (2) examine the effects of the choice between minimum and complete legislative harmonisation on the role of private regulation, (3) discuss the compatibility of private regulation with the four freedoms and competition law and (4) finally, consider the limitations on the use of private regulation as a means to implement EU legislation at MS level.

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<sup>28</sup> Cf. *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl* [2006] UKHL 44; *Shore v Sedgwick Financial Services Ltd* [2007] EWHC 2509 (Admin). See also G. Spindler, ‘Market Processes, Standardisation and Tort Law’ (1998) 4 *European Law Journal* 316; H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, Hart Publishing, 2005, p. 343-347; C. Glinsky, ‘Corporate Codes of conduct: moral or legal obligation?’ in: D. McBarnet, A. Voiculescu and T. Campbell, *The New Corporate Accountability: Corporate Social Responsibility and the Law*, CUP, 2007, p. 130. However, private regulation will not usually be conclusive for the specification of the content of general clauses. In particular, non-compliance with private regulation will usually trigger presumption of the violation of legal duties (cf. *Ward v. Ritz Hotel (London)* [1992] P.I.Q.R. P315; judgment of the BGH of 12 November 1996, NJW 1987, 582), but this presumption is rebuttable; see; judgment of the BGH of 14 April 1994, NJW-RR 1994, 1196. On the other hand, compliance with private regulation will not represent a ‘safe harbour’. See judgment of the BGH of 14 May 1998, NJW 1998, 2814; judgment of the Landgericht Berlin of 18 October 1996, NJW-VHR 1997,94; *Saab and another v Jones Day Reavis & Pogue (a firm) and another* [2002] EWHC 2616 (Ch). Cf also J. Falke and H. Schepel, ‘Legal aspects of standardisation in the Member States of the EC and EFTA’, Office for Official Publications of the European Communities, 2000.

<sup>29</sup> The reasons for such a shift are numerous and vary from sector to sector given the different types of institutional complementarity with public regulation.

<sup>30</sup> The distinction between self-regulation and co-regulation within judicial application of codes of conduct is rare and even mature jurisdictions rarely adopt clear principles.

Private law and Private rule-making are different yet related bodies of rules<sup>31</sup>. Private law is publicly (mainly State-) produced law, including mandatory and enabling provisions, which individual or collective private actors can specify and modify, when rules are enabling<sup>32</sup>. Private rule-making is production of rules by private actors both in areas where there is enabling legislation and in those where public law-making has not (yet) emerged or cannot operate due to constitutional limitations<sup>33</sup>. The constitutional foundations of private law-making differ across sectors; they vary in employment law, professional activity, consumer and environmental protection, financial markets, and so forth<sup>34</sup>. They differ in relation to legitimacy, accountability, and governance. Certainly, freedom of contract and freedom of association often constitute the main grounds, however I would rather identify the basis of private regulation in the principle of self-determination and self-governance<sup>35</sup>.

Private law-making has not been explicitly considered in the EC Treaty as a source of legal integration. De facto however it has played an important role to promoting integration, supplementing and complementing European legislation to different degrees depending on the legislative competence of EU institutions. Not only market integration but also social integration has been achieved by private regulation, given that is at the core of many employment policies and it affects many fundamental rights domains.

Private regulation can also have the opposite effects: partitioning. Business communities and civil society have used private regulation not only to create new ‘communities’ but also to fragment existing ones<sup>36</sup>. While the role of private regulation as a means for European legal integration cannot

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<sup>31</sup> J. Basedow, 2008, *supra* n. 13, p. 706.

<sup>32</sup> See N. Jansen and R. Michaels, 2006, *supra* n. 6, p. 843.

<sup>33</sup> See F. Cafaggi, ‘Private law making and European legal integration’, and Id., ‘Rethinking Private Regulation in the European Regulatory Space’, 2006, *supra* n. 26. .

<sup>34</sup> On the constitutional foundations of private regulation, see F. Cafaggi, 2010, *supra* n. 34; A. McHarg, ‘The Constitutional Dimension of Self-Regulation’ and J. Ziller, ‘Constitutional Boundaries to Self-Regulation: A Comparative Appraisal’ both in F. Cafaggi, 2006, *supra* n. 9, respectively p. 77 and p. 147.

<sup>35</sup> The focus has been on the contribution of private regulation to the creation of EPL. Private regulation implements normative pluralism and contributes to making constitutional pluralism effective. It affects in different ways the whole domain of private law, from contract to property, from civil liability to unfair competition.

<sup>36</sup> See, for instance, *Vimpoltu* (Case IV/30.174) [1983] OJ L 200/244; *Concordato Incendio* (Case IV/32.265) [1990] OJ L 15/25; *Trans-Atlantic Conference Agreement (Case No IV/35.134) (TACA)* [1999] OJ L 95/9; *Belgian Architects’ Association* (Case COMP/38.549) [2004] OJ L 4/10; Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577. Already the Spaak Report recognized that private ordering could have the effect of partitioning the market (“*Des règles de concurrence qui s'imposent aux entreprises sont donc nécessaires pour éviter que des doubles prix aient le même effet que des droits de douane, qu'un dumping mette en danger des productions économiquement saines, que la repartition des marchés se substitue à leur cloisonnement.*” Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères, Bruxelles, 1956, 16) and it was also referred to in the early European competition law case law; see, for example, Joined Cases 56 & 58-64 *Consten and Grundig v Commission* [1966] ECR 299 (“*Finally, an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between states, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article 85(1) is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process.*” Consten and Grundig, p. 340). Also recently in the joined cases C-468/06 to C-478/06 *GlaxoSmithKline*, the ECJ referred to its older case law promoting market integration within competition rules (“*In relation to the application of Article 85 of the EEC Treaty (Article 85 of the EC Treaty, now Article 81 EC), the Court has held that an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the objective of the Treaty to achieve the integration of national markets through the establishment of a single market. Thus on a number of occasions the Court has held agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports, to be agreements whose object is to restrict competition within the meaning of that Treaty article (see, for example, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others v Commission [1983] ECR 3369, paragraphs 23 to 27;*

be underestimated, the risk of using it to exclude other groups and externalise costs should be taken into careful account<sup>37</sup>. Depending on the institutional design it can also produce legal dis-integration if private rule-making monopolies arise in the absence of conflict of interest rules and without subjecting the private regulatory activity to effective judicial review<sup>38</sup>.

With the inter-institutional agreement of 2003 European institutions have created a binding framework for the use of self- and co-regulation<sup>39</sup>. The Agreement binds European institutions whilst it is unclear the extent to which MS are bound<sup>40</sup>. The use of private regulation as a means for European legal integration is also affected by competition law rules and the four freedoms which might bring about different results: the former driving towards decentralization and some degree of regulatory competition, the latter preventing excessive fragmentation and barriers to trade<sup>41</sup>. They often concern more precisely the different modes in which private regulation operates than the use of private regulation itself<sup>42</sup>.

(Contd.)

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*Case C-306/96 Javico [1998] ECR I-1983, paragraphs 13 and 14; and Case C-551/03 P General Motors v Commission [2006] ECR I-3173, paragraphs 67 to 69). In the light of the abovementioned Treaty objective as well as that of ensuring that competition in the internal market is not distorted, there can be no escape from the prohibition laid down in Article 82 EC for the practices of an undertaking in a dominant position which are aimed at avoiding all parallel exports from a Member State to other Member States, practices which, by partitioning the national markets, neutralise the benefits of effective competition in terms of the supply and the prices that those exports would obtain for final consumers in the other Member States.” (par.. 65 and 66).*

<sup>37</sup> A. Ogus, 1995, *supra* n. 4, p. 99.

<sup>38</sup> See F. Cafaggi, 2006, *supra* n. 26, part. p. 48 ff.

<sup>39</sup> Inter-institutional Agreement on Better Law-making between European Parliament, the Council of the European Union and the Commission of the European Communities [2003] OJ C 321/1.

<sup>40</sup> See I. Eiselt and P. Slominski, ‘Sub-Constitutional Engineering: Negotiation, Content, and Legal Value of Interinstitutional Agreements in the EU’ (2006) 12 European Law Journal 209; H.C.H. Hofmann, ‘Agreements in EU law’, (2006) 31 European Law Review 800, 813; and the issue of European Law Journal on institutional agreements: 2007, vol. 13, issue 1.

<sup>41</sup> In Joined cases 177/82 and 178/82 *Van de Haar & Kaveka de Meern BV* [1984] ECR 1797 the ECJ held “...Article 30 of the Treaty, which seeks to eliminate national measures capable of hindering trade between Member States, pursues an aim different from that of Article 85, which seeks to maintain effective competition between undertakings. A court called upon to consider whether national legislation is compatible with Article 30 of the Treaty must decide whether the measure in question is capable of hindering, directly or indirectly, actually or potentially, intra-community trade. That may be the case even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways” (par. 14). In the words of G. Marenco whereas the rules on free movement of goods and services protect competition between state economies, the competition rules protect competition between individual businesses; G. Marenco, ‘Competition between National Economies and Competition between Businesses – A Response to Judge Pescatore’ (1987) 10 Fordham International Law Journal 420. More on the divergences in the application of the free movement and competition rules can be found at P. Pescatore, ‘Public and Private Aspects of European Community Law’, (1987) 10 Fordham International Law Journal 373; M.P. Maduro, *We The Court, The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty*, Hart Publishing, 1998, part. pp. 64-65 and 74-75; K. Mortelmans, ‘Towards Convergence in the Application of the Rules on Free Movement and on Competition?’ (2001) 38 Common Market Law Review 613; A. Albers-Llorens, ‘Competition Policy and the Shaping of the Single Market’ in: C. Barnard and J. Scott (eds.), *The Law of the Single Market: Unpacking the Premises*, Hart Publishing, 2002; J.B. Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*, Hart Publishing, 2002; G. Monti, ‘Article 81 EC and Public Policy’ (2002) 39 Common Market Law Review 1057; P. Oliver (assisted by M. Jarvis) *Free Movement of Goods in the European Community: under Article 28 to 30 of the EC Treaty*, 4<sup>th</sup> edn, Sweet & Maxwell, 2003, pp. 110-111; G. Monti, *EC Competition Law*, CUP, 2007 p. 39 ff.

<sup>42</sup> On the application of the four freedoms to private regulation see J.B. Cruz, 2002, *supra* n. 42, p. 105 ff.; P. Oliver, 2003, *supra* n. 42, p. 73 ff.; N. Reich, ‘Free Movement v. Social Rights in an Enlarged Union – the *Laval* and *Viking* Cases before the ECJ’ (2008) 9 German Law Journal 125; D. Wyatt, ‘Horizontal Effect of Fundamental Freedoms and the Right to Equality after *Viking* and *Mangold*, And The Implications for Community Competence’ (2008) 4 Croatian Yearbook of European Law and Policy 1; see also case law of the ECJ cited below. Competition rules have been applied to private regulatory arrangements among others in C-415/1993 *Union Royale Belge des Sociétés de Football Association ASBL*

The current interpretation of the four freedoms, in particular the deployment of the principle of proportionality, often may reduce the space of state public law-making and enhance that of private law-making, subject to competition law scrutiny<sup>43</sup>. Private regulation comes into play both in relation to potential violations of the freedoms, when it hinders free trade, or because it can serve to protect public interests, as a mandatory requirement to enhance consumer or environmental protection<sup>44</sup>. While the competition law control affects consumer welfare only indirectly, the evaluation of private regulation under arts. 28, 43, 49, 56, EC Treaty, is made mindful of the limitations to the internal market and constraints on consumer choices<sup>45</sup>.

While co-regulatory arrangements are usually considered within the domain of the four freedoms, given the broad definition of State adopted by the ECJ in *Foster*, purely self-regulatory arrangements are treated differently under the free movement of goods and the other freedoms<sup>46</sup>. But the Court has

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*and Others v. Jean-Marc Bosman and Others* [1995] ECR I-4921; *Wouters*, *supra* n. 38; *Belgian Architects' Association*, *supra* n. 37.

<sup>43</sup> The scope of private regulation is defined by the interpretation of Treaty provisions when no secondary legislation has been enacted. Once secondary legislation is enacted the scope of private regulation has to be defined accordingly to European legislation and its implementation at State level. See Case C-5/77 *Tedeschi* [1977] ECR 1555; Joined cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb* [1996] ECR I-4357; Case C-445/06 *Danske Slagterier v Germany* (Reference for a preliminary ruling from the Bundesgerichtshof lodged on 6 November 2006) [2006] OJ C 326/36.

<sup>44</sup> *Wouters*, *supra* n. 38, par 97; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and others* [2007] ECR I-11767 par. 101; C-438/05 *International Transport Workers' Federation v. Viking* (nyr in ECR) par. 53

<sup>45</sup> On the relationship between competition law and four freedoms see K. Mortelmans, 2001, *supra* n. 42; J.B. Cruz, 2002, *supra* n. 42.

A particular conduct can be prohibited under both sets of rules or fall only under one of them (it goes without saying that it can also escape the application of both sets of rules). In *Wouters* a regulation issued by the Bar regulating the exercise of the legal profession was held to fall under both competition rules and free movement provisions (free movement of services and of establishment). However, within both regimes private regulation of the Dutch Bar was held to be justified by being reasonably "necessary for the proper practice of the legal profession, as organised in the Member State concerned" (*supra* n. 38, par. 110 and 123). Similarly in Case 13-77 GB INNO ([1977] ECR 2115) a national measure was caught by both Article 28 and Article 82 in relation to Articles 3(1)(g) and 10. In this judgment, the Court held: "*In any case, a national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between Member States will generally be incompatible with Articles 30 and 34, which prohibit quantitative restrictions on imports and exports and all measures having equivalent effect.*" (par. 35). In Case C-519/04 P *Meca-Medina* [2006] ECR I-6991, the Court held that the fact that sporting rules are held to have nothing to do with economic activity with the result that they do not fall within the scope of Articles 39 EC and 49 EC does not automatically mean that they have nothing to do with the economic relationships of competition, with the result that they also do not fall within the scope of Articles 81 EC and 82 EC (par 33: "*In holding that rules could thus be excluded straightaway from the scope of those articles solely on the ground that they were regarded as purely sporting with regard to the application of Articles 39 EC and 49 EC, without any need to determine first whether the rules fulfilled the specific requirements of Articles 81 EC and 82 EC, as set out in paragraph 30 of the present judgment, the Court of First Instance made an error of law.*" On the opposite side, in Case 311/85 *Vlaamse Reisbureaus* [1987] ECR 3801, the Court applied Article 81 (then 85) to the conduct of undertakings, but excluded application of Article 28 (then 30). Furthermore, in *Viking*, *supra* n. 45, the Court held that "*the fact that an agreement or an activity are excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions are to be applied in different circumstances*" (par. 53).

<sup>46</sup> See Case 43/75 *Defrenne v. Sabena* [1976] ECR 455; *Bosman*, *supra* n. 43; C-281/98 *Angonese* [2000] ECR I-4139 in relation to freedom of persons; C-36/74 *Walrave and Koch* [1974] ECR 1405 in relation to freedom of services; *Viking*, *cit.*, in relation to freedom of establishment. With reference to free movement of goods, the Court seems to have been rejecting its application to private actors (cf, for instance, *Vlaamse Reisbureaus*, *supra* n. 46, "*Since Articles 30 and 34 of the treaty concern only public measures and not the conduct of undertakings, it is only the compatibility with those articles of national provisions of the kind at issue in the main proceedings that need be examined.*" (par. 30); Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5 "*Finally, it must be observed that if the general obligation to identify the packaging laid down in the second paragraph of Article 4 of Decree No 92-377 has taken the form of an obligation on Sapod to mark the packaging by affixing the Green Dot logo, that latter obligation arises out of a private contract between the parties to the main proceedings. Such a contractual provision cannot be regarded as a barrier to trade for the purposes of Article 30 of the Treaty since it was not imposed by a Member State but agreed between*

clarified that private organisations, exercising regulatory powers, fall within the freedoms<sup>47</sup>. The perspective is often that of the horizontal direct effects of the four freedoms<sup>48</sup>. The conventional view according to which, competition law applies horizontally to private parties while the four freedoms only vertically has been long superseded<sup>49</sup>. The more recent ECJ case law shows that collective agreements are considered within the scope of the four freedoms, granting private rights to market participants<sup>50</sup>. No distinction, based on the public or private nature of the rules, is allowed<sup>51</sup>. If they

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*individuals...*” (para 74)). To be precise, in Case 58/80 *Dansk Supermarked A/S v A/S Imerco* [1981] ECR 181 the Court held: “... it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the Treaty on the free movement of goods. It follows that an agreement involving a prohibition on the importation into a Member State of goods lawfully marketed in another member state may not be relied upon or taken into consideration in order to classify the marketing of such goods as an improper or unfair commercial practice.” (par. 17). However, the case remains isolated and does not represent an established approach of the ECJ. On the other hand, AG Maduro in his opinion in the recent case *Viking* seems to support horizontal application of all freedoms guaranteed by the Treaty (“30. ...in order effectively to ensure the rights of market participants, the rules on competition have horizontal effect, while the rules on freedom of movement have vertical effect. 35. However, this does not validate the argument a contrario that the Treaty precludes horizontal effect of the provisions on freedom of movement. On the contrary, such horizontal effect would follow logically from the Treaty where it would be necessary in order to enable market participants throughout the Community to have equal opportunities to gain access to any part of the common market. 36. Thus, at the heart of the matter lies the following question: does the Treaty imply that, in order to ensure the proper functioning of the common market, the provisions on freedom of movement protect the rights of market participants, not just by limiting the powers of the authorities of the Member States, but also by limiting the autonomy of others? 37. Some commentators have proposed to answer that question firmly in the negative – their main argument being that the competition rules suffice to tackle interferences with the proper functioning of the common market by non-State actors. Others, however, have pointed out that private action – that is to say, action that does not ultimately emanate from the State and to which the competition rules do not apply – may very well obstruct the proper functioning of the common market, and that it would therefore be wrong to exclude such action categorically from the application of the rules on freedom of movement. 38. I believe the latter view to be more realistic. It is also endorsed by the case-law.”) In addition, there is a line of case holding MS liable for the acts of private actors which created barriers to the free movement of goods. The Court considered it the responsibility of MS to ensure that private actors do not impede free movement of goods (see Case C-265/95 *Commission v France* [1997] ECR I-6959 and Case C-112/00 *Schmidberger* [2003] ECR I-5659). See also P. Oliver, 2003, *supra* n. 42, p. 82-83; C. Barnard, *The Substantive Law of the EU: The Four Freedoms* 2<sup>nd</sup> edn, OUP, 2007, p. 94-96.

<sup>47</sup> Typically, this is the case of professional organizations using codes of conduct to regulate the relationships between members and third parties see *Wouters*, *supra* n. 38. But it is also the case of sport organisations defining rules about organization of sport as an economic activity; see *Bosman*, *supra* n. 43.

<sup>48</sup> See *Viking*, *supra* n. 45, and the opinion of AG Maduro [2007] ECR I-10779 par. 29 ff. On the unsuitability of the term to refer to the problem see J.B. Cruz, ‘Free Movement and Private Autonomy’ (1999) 24 *European Law Review* 603, 604-606 or J.B. Cruz, 2002, *supra* n. 42, p. 106-108. It follows that the issue is rather that of the personal scope of the free movement provisions, i.e. “whether private parties, in their realm of private autonomy, are included among the addressees of the free movement rules”.

<sup>49</sup> P. Pescatore, 1987, *supra* n. 42, 378-380; G.R. Milner-Moore, ‘The Accountability of Private Parties under the Free Movement of Goods Principle’ (Harvard Jean Monnet WP 9/95); J.B. Cruz, 1999, *supra* n. 49; J.B. Cruz, 2002, *supra* n. 42; P. Oliver, 2003, *supra* n. 43

<sup>50</sup> See *Viking*, *supra* n. 45, in relation to art. 43 at par. 57 “...it is clear from its case law that the abolition, as between member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise by associations or organisations not governed by public law, of their legal autonomy”, and par. 65 “there is no indication in that case law that could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi legislative powers”.

The Court concludes “Article 43 is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article”.

<sup>51</sup> See *Walrave and Koch*, *supra* n. 47, para 20 (“Although the third paragraph of article 60, and articles 62 and 64, specifically relate, as regards the provision of services, to the abolition of measures by the state, this fact does not defeat the general nature of the terms of article 59, which makes no distinction between the source of the restrictions to be abolished.”) and *Bosman*, *supra* n. 43, par. 86 (“There is nothing to preclude individuals from relying on justifications on

violate the freedoms they should be set aside<sup>52</sup>. However collective agreements or other forms of private regulatory arrangements aimed at protecting workers, consumers, the environment, can still be valid if required by overriding reasons of public interest<sup>53</sup>. Private regulation can thus conflict with the freedoms but still be held compatible with the Treaty if social or economic goals so require<sup>54</sup>. That said, other aspects of the influence of primary legislation on the use of private regulation should be scrutinized. A fully fledged analysis is beyond the scope of this essay, but, in my view, the principle of proportionality should also include private regulation since the latter might be not only anti-competitive but also disproportionate<sup>55</sup>. Thus, a different yet not necessarily less intensive scrutiny should be applied to private regulation by national courts when it concerns the implementation of primary and secondary European legislation to verify compliance with the principle of proportionality<sup>56</sup>.

Private regulation has more recently been considered in Europe within the frame of governance and 'better law-making'<sup>57</sup>. The focus on better regulation has been directed at improving quality and effectiveness of legislation and public regulation<sup>58</sup>. Several sectoral regimes have been designed. The most well known, associated to the new approach is technical standardization but in the field of consumer law references to private regulation are frequent<sup>59</sup>. Other fields using private regulation,

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*grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.”).*

<sup>52</sup> See *Viking*, *supra* n. 45, where the Court concludes: “Article 43 EC is to be interpreted to the effect that collective action .....which seeks to induce a private undertaking whose registered office is in a given member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another member state, constitutes a restriction within the meaning of that article.”

<sup>53</sup> See *Bosman*, *supra* n. 43, par. 86 (“There is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.”). *Viking*, *supra* n. 45, par. 90 (“That restriction may, in principle be justified by an overriding reason of public interest, such as the protection of workers, provided that it established and that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective”).

<sup>54</sup> Private regulation was held to be justified in *Wouters*, *supra* n. 38.

<sup>55</sup> See *Bosman*, *supra* n. 43, para 104 (“Consequently, the transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty. It could only be otherwise if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose (see, inter alia, the judgment in *Kraus*, cited above, paragraph 32, and Case C-55/94 *Gebhard* [1995] ECR I-0000, paragraph 37). ... Furthermore, as the Advocate General has pointed out in point 226 et seq. of his Opinion, the same aims [to maintain a financial and competitive balance between clubs and to support the search for talent and the training of young players] can be achieved at least as efficiently by other means which do not impede freedom of movement for workers.”, par. 110); *Schmidberger*, *supra* n. 47, par. 71, 72 and 76; *Viking*, *supra* n. 45, par. 87. Cf also R. Van den Bergh ‘Towards efficient self-regulation in markets for professional services’, in C.D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2004. The Relationship between Competition Law and (Liberal) Professions*, Hart Publishing, 2004, who claims that the principle of proportionality should be applied in order to assess whether self-regulation does not violate competition rules.

<sup>56</sup> See the Legislative and Regulatory Reform Act 2006 in the UK.

<sup>57</sup> See White Paper on Governance, COM(2001) 428 final (25 July 2001); Communication from the European Commission – Action Plan ‘Simplifying and improving the regulatory environment’ COM(2002) 278 final (5 June 2002); Inter-institutional Agreement on Better Law-making, *supra* n. 40; European Commission, ‘Instruments for a modernised single market policy’ (Commission staff working document: Accompanying document to the Communication ‘A single market for 21st century Europe’ COM(2007) 724 final) SEC/2007/1518 final.

<sup>58</sup> Crfr. Mandelkern Group on Better Regulation ‘Final Report’ (13 November 2001). The terms better regulation and better law-making are often used interchangeably. On these questions see S. Weatherill (ed.), *Better Regulation*, Hart Publishing, 2007.

<sup>59</sup> See European Commission, ‘Green Paper on European Union Consumer Protection’ COM (2001) 531 final (Brussels 2 October 2001).

with different intensity of European legislative intervention, range from environmental law to professional services, from company law to banking and financial regulation, from telecom to energy, from agriculture to employment<sup>60</sup>. These fields display specific features which often discourage the creation of a uniform regime concerning private regulation.

### **The complementarity between public and private regulation in the European multilevel system**

What combinations are possible between public and private regulation in a multilevel system? Public and private regulation complement rather than substitute one another, although in many contexts, private law-making has anticipated public regulation or, in de-regulatory ages, has substituted public legislation.

Several dimensions of institutional complementarity between private regulation and public law-making should be analyzed. In particular the interaction between **horizontal complementarity**, when public and private actors operate at EU level, and **vertical complementarity**, where the public operates at EU- and the private at MS level or vice versa<sup>61</sup>.

Clearly, the complementarity between public and private regulation cannot be solved by choosing one or the other, rather it needs to be articulated in different combinations between the two. Complementarity entails both competitive and cooperative relationships between public and private law-making. It may be justified by different rationales. Public law-making provides legitimacy to private law-making but it also imposes accountability requirements concerning both the regulatory activity and the governance of private regulators. Private regulation on the other hand can improve effectiveness and efficiency of public law-making<sup>62</sup>.

There is a strong correlation between legitimacy and governance in private regulation: requirements of the activity - such as transparency and non-discrimination - affect the governance of the private regulator, which, in turn, influences its regulatory output (the code of conduct, rulebook, ethical code, etc.). For example, the choice of the regulator's legal form, for profit or non-profit, is highly relevant to defining the incentives to regulate and to setting the balance between different

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<sup>60</sup> Voluntary environmental agreements are a regulatory instrument used in the European environmental policy. In 1996 the Commission adopted a recommendation which sets specific guidelines for the use of environmental agreements as an instrument of implementation of directives, Commission Recommendation 96/733 concerning environmental agreements implementing Community directives [1996] OJ L333/59. In 2002 the Commission published the Action Plan on Simplifying and Improving the Regulatory Environment (COM (2002) 278 final) and in 2006 it issued a staff working paper where it declares its intention to encourage environmental agreements at Community level. It lays down basic legal conditions for the use of such agreements; Communication of 17 July 2002 From The Commission To The European Parliament, The Council, The Economic And Social Committee And The Committee Of The Regions "Environmental Agreements at Community Level - Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment" COM(2002) 412 final, in the gas and electricity markets network operators at the same time perform some regulatory functions and bear the responsibility for ensuring a smooth and satisfactory working of the systems; Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37 and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L 176/57. Private credit assessment institutions are an important element of the regulatory system designed by the Basel II and Capital Adequacy Directive implementing it in the EU; Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions [2006] OJ L 177/201.

<sup>61</sup> Such complementarity can concern only rule-making or rule-making and enforcement. For example horizontal complementarity may occur if at the same level the private design rules and the public enforces them while vertical complementarity may occur if private codes of conduct are designed at EU level and enforced by national Courts in MS.

<sup>62</sup> See F. Cafaggi, 2006, *supra* n. 9.

stakeholders of the regulatory body and the conflicts of interest between regulators and regulated<sup>63</sup>. This correlation has played an important role when private regulation is enacted by private organisations while, mistakenly, it has not been sufficiently considered when it is adopted by market participants through agreements or contracts<sup>64</sup>.

The role of private regulation as a means of legal integration can be examined in light of the relationship between minimum or complete harmonisation and private regulation. Legislative harmonisation can perform a combined function: integration by de-regulating and re-regulating<sup>65</sup>.

When complete harmonisation is chosen, it not only pre-empts MSs from legislating in the same domain but it may also affect private regulation. Complete harmonisation does not however reduce the space of private regulation; rather, it changes its scope and (should) be combined with governance devices<sup>66</sup>. The European Commission seems to have changed perspective, moving away from the earlier position that held co-regulation incompatible with uniform legislation as in the case of complete harmonisation directives<sup>67</sup>. Now co-regulatory arrangements both at European and national level are accepted even when complete legislative harmonisation is in place<sup>68</sup>.

Clearly lower private regulatory standards would constitute violations of the law. Does complete harmonisation prevent private regulation from introducing higher standards? The scope and domain of private regulation should not be constrained by the choice of complete harmonisation. This is certainly true for pure self-regulation. However some additional limitations may concern co-regulation. MSs cannot use co-regulatory arrangements to violate complete harmonisation's constraints and increase standards by delegating law-making power to private actors. Thus if they delegate regulatory tasks to private bodies within the domain of a complete harmonisation directive, they are bound to the standards defined by the directive.

One important dimension of the multilevel system is associated with the possibility that private regulation and public law-making do not necessarily operate at the same level, giving rise to different forms of hybrid multilevel law-making. At times, private actors rule at the international level while

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<sup>63</sup> See F. Cafaggi, 'Self-regulation in European contract law' (2007) 1 *European Journal of Legal Studies*, available at <www.ejls.eu>. and now in H. Collins (ed.) *Standard contract terms in Europe: a basis for and a challenge to European contract law*, Kluwer Law International, 2008, p. 93 ff.

<sup>64</sup> This distinction is articulated in F. Cafaggi, 2008, *supra* n. 64.

<sup>65</sup> See U. Bernitz and S. Weatherill, 'Introduction' in S. Weatherill and U. Bernitz, *The Regulation of unfair Commercial practices under EC Directive 2005/29: New rules and new techniques*, Hart Publishing, 2007, p. 2, and before S. Weatherill, 'European Private Law and the Constitutional Dimension' in F. Cafaggi, (ed.), *The institutional framework of European private law*, OUP, 2006. On the question of legislative harmonisation in consumer law see N. Reich, 'Crisis or future of European consumer law', in (2009) *Yearbook of consumer law* 3, part. p.40 ff.; and H- Micklitz and N. Reich, 'Crónica de una muerte anunciada: The Commission proposal for a "Directive on consumer rights"' (2009) 46 *CMLR* 471.

<sup>66</sup> See art. 10 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22 (hereinafter UCPD). "This directive does not exclude the control which Member States may encourage, of unfair commercial practices by code owners and recourse to such bodies by the persons or organization referred to in art. 11 if proceedings before such bodies are in addition to the court or the administrative proceedings referred to in that Article." F. Cafaggi, 'Making European private law. Governance design', in F. Cafaggi and H. Muir Watt, 2008, *supra* n. 5.

<sup>67</sup> See White Paper on Governance, COM(2001) 428 final (25 July 2001) and then the Green Paper on European Union Consumer Protection, *supra* n. 60; Communication from the Commission 'Follow-up Communication to the Green Paper on EU Consumer Protection' COM(2002) 289 final (Brussels, 11 June 2002); Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions 'Consumer Policy Strategy 2002-2006' COM(2002) 208 final (Brussels, 7 May 2002).

<sup>68</sup> See for example unfair commercial practices described below text and footnotes.

public law-makers legislate at EU and State level<sup>69</sup>. At times European public law-making has been influenced by private law-making both at State and European level<sup>70</sup>. At times, private regulation may represent a means to implement EU legislation. Agreements between public and private actors, between EU and MS institutions or among MS institutions are common<sup>71</sup>. The applicable law to these agreements varies according to the nature of the agreements and so does the admissibility of judicial review by European or MS Courts<sup>72</sup>.

Implementation by private regulation of European legislation is however limited<sup>73</sup>. General rules about legislative implementation require specific features associated with legislation, unless expressly provided as the cases of employment, structural funds, agricultural and environmental policies show<sup>74</sup>. The principle of institutional autonomy, at least in its current interpretation, confers on MS the power to choose among different instruments but does not leave free choice between implementation through

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<sup>69</sup> This has frequently been the case in the area of financial markets where IOSCO [IOSCO is a body of public regulators, however it has recommended the use of standards made by a private body, IASB, and these standards have further been also incorporated into EU law] defined through codes rules to be implemented at regional level, i.e. Nafta, EU.

<sup>70</sup> The example is technical standardization and advertisements though in both cases strong coordination with international level has taken place, more in technical standardization for reasons concerning market integration. In advertising markets are still relatively fragmented also due to linguistic differences.

<sup>71</sup> See with reference to agreements H.C.H. Hofmann, 2006, *supra* n.41, 803, identifying four categories of agreements to implement EU and EC law. “*Agreements replacing administrative guidelines. Secondly agreements are used to establish rules and conditions for implementation of EU/EC law within administrative network. Thirdly IIAs are concluded to create meta-rules for legislative, budgetary or delegated rule-making procedures... Fourthly, agreements can be concluded as forms of act in delegated regulatory activity in the form of co-regulation... Finally agreements are used as tools for structuring international relations of the EU and EC as international agreements.*”

<sup>72</sup> See H.C.H. Hofmann, 2006, *supra* n. 41, p. 805 ff. suggesting that the form of the act can affect both the applicable law and the scope of judicial review, “*Depending on which form of act- decision or contract has been chosen by an institution thus defines the distinction between the (public) jurisdiction of the European Courts and the (public or private) jurisdiction of the Courts of the Member States.*”

<sup>73</sup> The Court repeatedly held that transposition of directives by means of administrative practice is insufficient since they do not meet the requirement of legal certainty, clarity and transparency. In particular, the Court indicated that administrative practices are not stable and could be easily changed, and are not publicized enough. It seems that similar objections could be raised against (pure) private regulation. See. Case 429/85 *Commission v Italy* [1988] ECR 843; Case C-339/87 *Commission v Netherlands* [1990] ECR I-851 (“*mere administrative practices, which by their nature may be changed at will by the authorities, cannot be regarded as constituting proper compliance with the obligation on Member States to which a directive is addressed, pursuant to Article 189 of the Treaty*” (par. 29)); Case 29/84 *Commission v Germany* [1985] ECR 1661 (“*In view of the terms of that provision, the legal analysis relied on by the German government is not such as to create a situation which is sufficiently precise, clear and transparent as to enable nationals of other member states to discover their rights and to rely on them . That situation is not altered by the mere fact that the bodies designated by the German authorities for the purpose of providing the persons concerned with information on the health and social security laws in accordance with article 15 of the directive are aware of the practice followed by the German administration. ... reference to principles of law which are as general as those relied on by the German government is not sufficient to establish that national law fully guarantees compliance with provisions of directives which are of such a precise and detailed nature.*” (par. 28 and 31)). See also footnotes below.

<sup>74</sup> In the employment area, Art. 139 EC permits implementation through ‘normative agreements’. “*They have been given the nature of sources of law by means of delegation of regulatory powers by the EC Treaty. Agreements under art. 139(1) EC are thus “normative agreements” binding the Community and the Member States. Member States and the Community will have to comply with the provisions established for the implementation of the agreements by the social partners – management and labour- directly or the decisions taken by the Council for their implementation. The ECJ controls this compliance and reviews the Member States’ discretion in implementation of the agreements against the standards of the framework agreements*”, see H.C.H. Hofmann, 2006, *supra* n. 41, p. 817.

In the field of agriculture the use of private regulation, especially in the form of co-regulation is common. See for example CMO Regulation 479/2008, arts. 64 and 65 concerning the role of producers associations and inter-branch organisations.

legislation and through private regulation<sup>75</sup>. There are limitations to institutional autonomy. Only when the European legislation, in particular a Directive, states the possibility of using private regulation, will MS will be able to use it as an exclusive instrument<sup>76</sup>. In order to implement European

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<sup>75</sup> In particular, the implementing measures should meet the following requirements: be of binding nature, be specific, clear, precise and transparent, create rights for individuals which can be enforced in courts and thus allow for effective judicial protection, create rights for individuals which can be enforced in courts; cf S. Prechal, *Directives in EC Law*, (2<sup>nd</sup> edn), OUP, 2005, p. 75 ff. See Case 240/78 *Atlanta Amsterdam BV v Produktschap voor Vee en Vlees* [1979] ECR 2137 (“the Community regulations in question did not determine which institutions in each Member State are competent to take the intervention measures envisaged and assigned to the Member States the task of designating the said institutions” (par. 4). “It is accordingly for each Member State to determine the institutions which are empowered within its domestic legal system to adopt measures in implementation of the above-mentioned Community regulations. ... it is however incumbent on the said national institutions to ensure by appropriate means that the measures which they adopt are co-ordinated in such a way that they do not jeopardize the proper functioning of the organization of the market.” (par. 5); Case C-8/88 *Germany v Commission* [1990] ECR 2321 (“it is not for the Commission to rule on the division of competences by the institutional rules proper to each Member State, or on the obligations which may be imposed on federal and Laender authorities respectively. It may only verify whether the supervisory and inspection procedures established according to the arrangements within the national legal system are in their entirety sufficiently effective to enable the Community requirements to be correctly applied.” (par. 13); Case 96-81 *Commission v Netherlands* [1982] ECR 1791 (“It is true that each member state is free to delegate powers to its domestic authorities as it considers fit and to implement the directive by means of measures adopted by regional or local authorities. That does not however release it from the obligation to give effect to the provisions of the directive by means of national provisions of a binding nature. ... Mere administrative practices, which by their nature may be altered at the whim of the administration, may not be considered as constituting the proper fulfilment of the obligation deriving from that directive.” (par. 12)); Case 29/84 *Commission v Germany* [1985] ECR 1661 (“It follows from that provision that the implementation of a directive does not necessarily require legislative action in each member state. In particular the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous, provided however that those principles guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the legal position arising from those principles is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts. That last condition is of particular importance where the directive in question is intended to accord rights to nationals of other member states because those nationals are not normally aware of such principles.” (par. 23)); Case 363/85 *Commission v Italy* [1987] ECR 1733 (“the transposition of a directive into internal law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.” (par. 7)); Case C-339/87 *Commission v Netherlands* [1990] ECR I-851 (“In order to secure the full implementation of directives in law and not only in fact, Member States must establish a specific legal framework in the area in question.” (par. 25)); Case C-361/88 *Commission v. Germany* [1991] ECR I-2567 (“It must first be pointed out that the fact that a practice is in conformity with the requirements of a directive in the matter of protection may not constitute a reason for not transposing that directive into national law by provisions capable of creating a situation which is sufficiently precise, clear and transparent to enable individuals to ascertain their rights and obligations.” (par. 24)); compliance with fundamental rights and primary Community law is also necessary, Case 5/88 *Wachauf* [1989] ECR 2609. See also S. Prechal and B. van Roermund, *The Coherence of EU Law: The Search for Unity in Divergent Concepts*, OUP, 2008.

<sup>76</sup> For instance, the Nitrates Directive (Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375/1)) states: “Article 4 (1). With the aim of providing for all waters a general level of protection against pollution, Member States shall, within a two-year period following the notification of this Directive:(a) **establish a code or codes of good agricultural practice, to be implemented by farmers on a voluntary basis, which should contain provisions covering at least the items mentioned in Annex II A;**

(2). Member States shall submit to the Commission details of their codes of good agricultural practice and the Commission shall include information on these codes in the report referred to in Article 11. In the light of the information received, the Commission may, if it considers it necessary, make appropriate proposals to the Council.”.

In the field of environmental law, certain directives explicitly provide that they can be transposed by environmental agreements between public institutions and private bodies. See, Commission Communication Environmental agreements

directives through private regulation all the conditions necessary to ensure correct implementation have to be met<sup>77</sup>. The binding requirement of implementing legislation prevents the use of pure self-regulation because it would lack ultra vires effects. In order to make the legislation binding at MS level co-regulation is needed, otherwise agreements or codes of conduct, based on voluntary adhesion, can only bind signatories. Different forms can serve the purpose: from ex ante delegation to ex post approval or recognition.

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at Community level within the framework of the action plan on the simplification and improvement of the regulatory environment” July 17, 2007 COM 2002 412 final.

For instance, Article 4(1) of the Council Directive 85/339/EEC of 27 June 1985 on containers of liquids for human consumption (OJ 1985 L 176/18, no longer in force) provided: “*Within the framework of the programmes referred to in Article 3 and with due regard for the provisions of the Treaty on the free movement of goods, Member States shall, either by legislative or administrative means or by voluntary agreements, take measures designed inter alia: to facilitate the refilling and/or recycling of containers of liquids for human consumption, develop consumer education in that area, promote the collection and processing of non-refillable containers, and also to maintain and, where possible, increase the proportion of refilled and/or recycled containers. In accordance with Article 5, the Member States are to take steps to inform consumers of the fact that the containers are refillable and of the amount of the deposit.*” (emphasis added). In 1996 the Commission issued Recommendation 96/733 concerning environmental agreements implementing Community directives ([1996] OJ L333/59) which sets specific guidelines for the use of environmental agreements as an instrument of implementation. The recommendation specifies that environmental agreements implementing certain provisions of directives “*need to take a binding form and should meet the requirements ensuring their transparency, credibility and reliability*”. The recommendation also specifies that directives should specifically list the provisions of a directive which may be implemented by an environmental agreement and that binding requirements for agreements implementing the stated provisions of a directive should be laid down in those directives.

On the other hand, when a directive was transposed into national law by means of voluntary agreements in the absence of express provisions in this respect in the directive, the Court held this to be insufficient, see Case C-255/93 *Commission v France* [1994] ECR I-4949. However, it seems that the Court objected to the particular formulations of the agreements and not such a possibility in itself (the French government transposed Article 3(1) of the abovementioned directive 85/339/EEC which stated: “*In pursuance of the objectives referred to in Article 1, Member States shall draw up programmes for reducing the tonnage and/or volume of containers of liquids for human consumption in household waste to be finally disposed of.*” Pursuant to Article 3(3) “*These programmes shall be revised and updated regularly, at least every four years, taking into account in particular technical progress and changing economic circumstances.*” The Commission claimed that France did not transpose the directive properly as the voluntary agreement did not amount to the programmes required under the directive because they did not contain an undertaking by the public authorities, or a quantified statement of the objectives pursued, or a time-table or a list of the steps proposed in order to attain them (case C-255/93 *COM v France* [1994] ECR I-4949). The ECJ considered whether the agreements could be regarded as programmes under Article 3 of the directive. It first stated that **the directive did not require the Member States to give unilateral undertakings** (par. 21). It then concluded that all the **voluntary agreements contained undertakings given by all the signatories and hence also by the French public authorities** (par. 22) and thus could not be regarded as not constituting reduction programmes for the purposes of the directive solely on the ground that they do not contain undertakings by the public authorities (par. 23) (AG Lenz argued even that: “*Since Article 4 authorizes them to implement the programmes by means of voluntary agreements, I do not consider that it is necessary for the Member States themselves to commit themselves in those agreements to playing an active role. If and as long as industry is in a position to comply with the obligations laid down in the agreements, and hence to further the aims of the directive, there is no need for the State to intervene*” par. 20). However, the ECJ held the agreements not to be sufficient implementation measures because (1) (but for one) they did not set out precise, quantified objectives as required by the directive; and (2) “*the application of at least five of the six agreements in question was limited to a period of 30 months with effect from 10 May 1988, the date on which they were signed, and that they are not automatically renewable, while the sixth, which relates to glass, may not be extended beyond 31 December 1992. There is nothing, consequently, to guarantee that the agreements will be regularly revised and updated regularly, at least every four years, in accordance with Article 3(3) of the directive.*” (AG Lenz had also some other concerns concerning the agreements: “*For instance, they almost all contain a clause according to which, in the event of unforeseen difficulties, some obligations may be declared by common accord to be no longer applicable. (6) Also, there is no doubt that it must be regarded as very unusual for an agreement to include a clause under which one of the contracting parties may “call on” the public authorities to carry out a particular measure. (7)*” (emphasis added).

<sup>77</sup> See P. Craig, *EU Administrative Law*, OUP, 2006; T. Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> ed., OUP, 2006; S. Prechal, 2005, *supra* n.76.

Hybrid law-making can entail some degree of competition. In the multilevel structure just described it often happens that cooperative law-making at European level, engaging the Commission and private bodies, reflects vertical competitive law-making between European and MS legislation. This is particularly true when EU does not have competence and tries to regulate matters by triggering private regulation at EU level then to be implemented at State level<sup>78</sup>. Formal delegation of European law-making power to private organizations is still problematic, given the Meroni doctrine<sup>79</sup>. Yet to the extent that such a power is original, i.e., constitutes the expression of freedom of contract and freedom of association, there is no need, let alone duty, to circumscribe the private law-making power of national organizations to the State territory.

## Private regulation and European contract law

In this section, the role of private regulation in European contract law and its function in the process of Europeanisation is analyzed. First, the difference between publicly and privately produced contract law is examined, then the different forms in which the latter take place with emphasis on the role of contract standardisation<sup>80</sup>. The final part is devoted to a few other examples concerning the impact of private regulation on Europeanisation of contract law.

In the initial stage, European contract law witnessed an increasing importance of mandatory provisions at EU level. More recently, legislative techniques have become more sophisticated and the dichotomy between mandatory and default rules has been redefined, encompassing rules functionally aimed at addressing asymmetries of contracting power between parties but structurally remaining default rules<sup>81</sup>.

Mandatory contract rules are generally described as prohibiting private rule-making. However in many cases even mandatory rules leave space for private rule-making, giving rise to typical co-regulatory arrangements: the public law-maker defines mandatory minimum standards or general principles, the private law-maker specifies them or raise the standards. Examples can be found in information regulation, termination, breach<sup>82</sup>.

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<sup>78</sup> In some instances, as the case of European payment system shows, the Commission has established an alliance with private organizations to create an integrated payment system before political consensus among MS was reached to enact the payment system directive which has defined a co-regulatory system.

<sup>79</sup> Case 9/56 Meroni v High Authority [1957-8] ECR 133.

K. Lenaerts, 'Regulating the regulatory process: "Delegation of powers" in the European Community' (1993) 18 ELR 23; C. Donnelly, 2007, *supra* n. 23, p. 69 ff.; M. Egan, 'Regulatory strategies, delegation and European market integration' (1998) 5 Journal of European Public Policy 485: "In its Meroni judgment of 1958, the Court recognized an implied power to delegate, although it reiterated certain principal-agent concerns of 'slippage' by noting that the replacement of choices of the delegator (principal) by choices of the delegate (agent) is not permissible. Delegation can only occur if it is subject to strict review, and the delegating authority may only grant the same powers that it has under the treaty. The autonomous nature of the agent is thus subject to review – whether it is political control by the Commission or Parliament or judicial review by the Court (Lenaerts 1993; Everson 1995). The Commission is thus in a position to monitor and review the regulatory output of an agency – in this case the regulatory 'output' of the private European standards bodies which set the standards that conform to the requirements of the New Approach directives (see also McMillan 1991)."

<sup>80</sup> H. Collins, 'The Freedom to Circulate Documents: Regulating Contracts in Europe' (2004) 10 European Law Journal 787; S. Whittaker, 'On the Development of European Standard Contract Terms' in: H. Collins, 2008, *supra* n. 64.

<sup>81</sup> See S. Grundmann, W. Kerber and S. Weatherill (eds.), *Party Autonomy and the Role of Information in the Internal Market*, Walter de Gruyter, 2001; M.W. Hesselink, 'Non-Mandatory Rules in European Contract Law' (2005) 1 European Review of Contract Law 44; M.E. Storme, 'Freedom of Contract: Mandatory and Non-Mandatory Rules in European Contract Law' (2007) 15 European Review of Private Law 233.

<sup>82</sup> E.g. The Banking Code published by the British Bankers' Association, the Building Societies Association and the APACS available at <[http://www.bba.org.uk/content/1/c6/01/30/85/Banking\\_Code\\_2008.pdf](http://www.bba.org.uk/content/1/c6/01/30/85/Banking_Code_2008.pdf)> (last visited 18 February

The boundaries between enabling State-produced contract law and private rule-making is less clear-cut than that between mandatory rules and private rule-making. Privately produced rules can either modify publicly made enabling rules or can regulate fields not yet covered by public law-making. Default rules can be designed to promote or to hinder private rule-making<sup>83</sup>. For example, where preferences of contracting parties are unclear, the default rules can provide parties with incentives to reveal their preferences and stimulate trade and consumer associations to design a majoritarian default rule<sup>84</sup>. Private regulation is limited by highly detailed default rules which define the narrow scope of deviation while it is enhanced by default standards.

Contract law includes different forms of collective private law-making<sup>85</sup>. Customs and trade usages are generally represented as ‘spontaneous and incremental’ modes of generating contractual practices that acquire legally binding force only when they become majoritarian within the business community<sup>86</sup>. Legislation incorporates them by making explicit references which bind parties and judges<sup>87</sup>.

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2009); the Good Banking Practice Principles published by Polish Bank Association available at <<http://www.zbp.pl/site.php?s=NGQ3ZTBkNzIxMDc4>> (last visited 18 February 2009); Code of conduct adopted by the Associazione Bancaria Italiana (Italian Banking Association) available at [http://www.abi.it/manager?action=show\\_document&portalId=1&documentId=375](http://www.abi.it/manager?action=show_document&portalId=1&documentId=375) (last visited 18 February 2009); Advertising Codes published by the Advertising Standards Authority in the UK available at <http://www.asa.org.uk/asa/codes/> (last visited 18 February 2009); Dutch Advertising Code published by the Dutch Advertising Code Authority available at <http://www.reclamecode.nl/bijlagen/NRC%20brochure%20Engels%202008.pdf> (last visited 18 February 2009); German Corporate Governance Code available at <http://www.corporate-governance-code.de/eng/kodex/1.html> (last visited 18 February 2009); Charter of core principles of the European legal profession and Code of Conduct for European lawyers issued by the Council of Bars and Law Societies of Europe available at <[http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_2008\\_Code\\_of\\_Cond1\\_1229585455.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_2008_Code_of_Cond1_1229585455.pdf)> (last visited 18 February 2009); Code towards consumers and Code towards direct sellers adopted by the Federation of European Direct Selling Associations available at <http://www.fedsa.be/ethicsCodeConsumers.html> (last visited 18 February 2009).

<sup>83</sup> See J. Scott Johnston, ‘Cooperative negotiations in the shadow of boilerplate’ in: O. Ben Shahr, *Boilerplate: The foundation of market contracts*, CUP, 2007, p. 12 ff. : “rather than precluding bargaining and negotiation standard form contracts in fact facilitate bargaining and are a crucial instrument in establishing and maintenance of cooperative relationships between firms and their customers.”

<sup>84</sup> I. Ayres and R. Gertner, ‘Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules (1989) 99 Yale Law Journal 87; and the Issue of the Florida State University Law Review dedicated to Default Rules in Private and Public Law (2006, vol. 33, no. 3).

<sup>85</sup> See J.P. Kostritsky, ‘Judicial Incorporation of Trade Usages: A Functional Solution to the Opportunism Problem’ (2006) 39 Connecticut Law Review 451; S. Macaulay, ‘Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein’, (2000) 94 Northwestern University Law Review 775; L.L. Jaffe, ‘Law Making by Private Groups’, (1937) Harvard Law Review 201, 213.

<sup>86</sup> E.g. in the UK, in order to be incorporated into contract as an implied term, a trade usage or practice must “be notorious, in the sense that it is so well known, in the market in which it is alleged to exist, that those who conduct business in that market contract with the usage as an implied term”, “‘Usage’ as a practice which the court will recognise is a mixed question of fact and law. For the practice to amount to such a recognised usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known in the market in which it is alleged to exist, that those who conduct business in that market contract with the usage as an implied term...” (Cunliffe-owen v. Teather & Greenwood, *supra* n. 28); “a custom of the kind here in question would have to be not only certain and also reasonable but notorious so as to be well known to all those who come into professional relations with firms of solicitors (see e.g. per Jessel, M.R., in the case of Nelson v. Dahl, 12 Ch. D. 568, at page 575) where the learned judge said in reference to alleged custom in the shipping trade that – ‘... like all other customs, it must be strictly proved. It must be so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable, and it must have quite as much certainty as the written contract itself’” (Brown v Inland Revenue Commissioners, [1965] A.C. 244).

*Goodwin v Robarts* (1874-75) L.R. 10 Ex. 337, Cockburn, C.J. p. 353: “The universality of a usage voluntarily adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience; and there can be no doubt that by holding this species of security to be incapable of being transferred by delivery, and as requiring some more cumbrous method of assignment, we should materially hamper the transactions of the money market with respect to it, and cause great public inconvenience.”

The more recent trends, both at national and supranational level, suggest that custom as a form of spontaneous market regulation has been partly substituted by more structured and organised forms of self-regulation<sup>88</sup>. They are often designed by associations whose members may be bound or simply be recommended to subscribe to the regulatory activity of the organisation. When codes are sector or industry wide, their legal nature and their application to third parties may imply direct or indirect liability of individual members depending on the configuration of the contract/agreement (code) towards non-signatories<sup>89</sup>. Compliance with the codes on behalf of the organisation and third parties that may rely upon those commitments is often imposed on code-owners who take the responsibility to monitor members who have adhered to the self-regulatory instrument<sup>90</sup>. The new forms increasingly, include, bilateral or trilateral agreements between traders, consumers and often public entities. These are regulatory agreements, taking place not only at national but also at European and international level, with a sophisticated structure, including framework and executory contracts<sup>91</sup>. The shift from unilateral to negotiated private regulation has not only socio-political but also legal implications<sup>92</sup>. The distinction between codes of conduct and trade practices is, today, formally legislated in the area of unfair trade practices and violations have different effects and are taken care with different remedies<sup>93</sup>. But similar distinctions exist in many other areas of private law including product liability, product safety and professional malpractice.

The rise of private regulation poses questions of legitimacy and accountability which were foreign to judicial references to trade-customs as standard-setting mechanisms. Often claims concerning their legitimacy and accountability are multiple and conflicting and can only be addressed by a proper

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In Germany see, for instance, the judgment of the BGH of 6 June .1991, NJW-RR 1991, 1445 or BGH, NJW 1987, 2222 stating that standards of the Deutsches Institut für Normung (DIN) for its qualification as a generally recognized technical rule needs to be used by the whole branch and applied within the business field.

<sup>87</sup> See on the incorporation strategy, J.S. Kraus and S.D. Walt, 'In Defense of the Incorporation Strategy' in: J.S. Kraus and S.D. Walt (eds.), *The Jurisprudential Foundations of Corporate and Commercial Law*, CUP, 2000. See also R. Craswell, 'Do trade customs exist?', *ibidem*, p. 119 ff; A. Katz, 'The relative costs of incorporating trade usages into domestic versus international sales contracts' (2004) 5 *Chicago Journal of International Law* 181; J.P. Kostritsky, 2006, *supra* n. 86, p. 451.

<sup>88</sup> See J. Basedow, 2008, *supra* n. 13, p. 709; For differentiation between custom and standard contract forms in the US context see R.A. Epstein, 'Confusion about custom: disentangling informal custom from standard contractual provisions' (1999) 66 *U. Chi L. R.* 821.

The change from custom to private regulation seems to be more qualitative than quantitative. Institutional support to customary practices existed also in the past, especially in the dispute resolution mechanisms. Special merchant courts have existed for a long time and composition of these Courts with judges coming from the business world is still quite common in many European countries. The changes concern rather the quality of the law-making process and the more active role of States and international organisation in policing self-regulatory phenomena.

<sup>89</sup> See F. Cafaggi, 2008, *supra* n. 64, p. 93 ff.

<sup>90</sup> This issue translates into the liabilities of code owners to monitor and ensure compliance by the signatories. A definition of code owner is provided in the area of unfair commercial practice by art. 2(g) UCPD:

"(g) "code owner" means any entity including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it".

<sup>91</sup> For example, environmental agreements at EU level.

<sup>92</sup> For a detailed taxonomy see F. Cafaggi, 2008, *supra* n. 64.

<sup>93</sup> Contrast the definition of code of conduct and that of professional diligence provided by UCPD art 2f and 2h:

"(f) "code of conduct" means an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behavior of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors"

(h) "professional diligence" means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity"

institutional design<sup>94</sup>. The broader point is that the techniques used by judges to legitimize customs as standards of conduct in contracts, property and torts cannot mechanically be transplanted to private regulation. On the one hand, the regulatory function requires a balance between intention of the drafters and the general scope of the private regulatory act, be it a code, a rulebook, or guidelines<sup>95</sup>. On the other hand, judges applying standards defined by private regulators, both national and transnational, need to inquire into the legitimacy and accountability of their activities to refer to codes as reference points for standard-settings.

Contract standardisation at EU level constitutes one of the most relevant forms of private regulation and contributes to European legal integration<sup>96</sup>. It occurs in different ways: it sometimes is promoted by European trade associations, and at other times by national ones, which then coordinate or adopt mutual recognition systems or by market players across MSs<sup>97</sup>.

Contract standardisation occurs in different ways: trade associations produce standard contract forms to be directly used, they produce a model to be adapted to national legal systems, framework contracts which have to be specified by individual parties<sup>98</sup>. But there are also rules produced by European market players concerning management of networks, monitored by national regulators in the field of banking, securities, telecom, and energy. A different mode of Europeanisation through standardisation occurs when private regulators operate at national level but they conclude mutual recognition agreements concerning contract forms.

The role of transnational law firms is very relevant both as a direct producer of standard contract forms and as a consultants of enterprises or trade associations<sup>99</sup>. Given the high level of competition in the market for legal services, law firms may have incentives to propertize standard contract forms thereby reducing the function of legal integration. The nature of the supply, whether for free or against remuneration, whether as a public or private good severely affects the ability of standard contract forms to become instruments of European legal integration.<sup>100</sup>

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<sup>94</sup> On decentring and polycentricity of regulation see J. Black, 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes' (2008) 2 Regulation and Governance 137, and before Id., 'Decentring regulation: Understanding the role of regulation and self-regulation in a post regulatory world', (2001) 54 Current Legal Problems 103; C. Scott, 'Self-Regulation and the Meta-Regulatory State' in: F. Cafaggi, 2006, *supra* n. 9, p. 131 ff.

<sup>95</sup> In the field of standard contract forms the use of a statutory interpretation technique instead of conventional interpretive technique used for bilateral contract has been proposed. See S. Choi and M. Gulati, 'Contract as a statute' in: O. Ben Shahr, 2007, *supra* n. 84, p. 157 "Taking a statutory approach to boilerplate enables Courts to turn to alternative, more expert source of interpretive authority, leading to a greater likelihood that the welfare of contracting parties will be maximized. Under such an interpretive approach industry standard setting entities are more likely to organize and clarify existing boilerplate terms as well as draft new boilerplate terms for unaddressed contingencies."

<sup>96</sup> See H. Collins, 2004, *supra* n. 81.

<sup>97</sup> Hugh Collins, distinguishes between corporatist co-regulation and autonomous agreements and suggest that the latter have advantages for market integration although he acknowledges that 'a rule of strict enforcement of the standard form would be required throughout Europe', p. 802. Furthermore he advocates for a procedural approach to increase legitimacy and improving fairness, participation and consent, p. 802. For a critique of Collins proposal see S. Whittaker, 2008, *supra* n. 81, p. 141 ff.

<sup>98</sup> See F. Cafaggi, 2008, *supra* n. 64, p. 98 where five functions of self-regulation are described: legislative, regulatory, interpretive, monitory and enforcement.

<sup>99</sup> See K. Davis, 'The role of non profit in the production of boilerplate', in O. Ben Shahr, 2007, *supra* n. 84, p. 120 ff.; see also G. Hadfield, 'Private Harmonization of Legal Regimes: The Role of Multi-Jurisdictional Law Firms and the Diffusion of Legal Human Capital' (January 2007) Working Paper, available at <<http://ssrn.com/abstract=959422>>, last visited 25 May 2009 (forthcoming in: A. Breton et al., (Eds.), *Multijuralism: Manifestations, Causes, and Consequences*, Ashgate Publishing).

<sup>100</sup> See in relation to North America K. Davis, 2007 *supra* n. 100, p.120 ff., contrasting trade associations and law firms.

Standardization concerns both BtoB and BtoC transactions. By defining common terms it performs a strong market regulatory function<sup>101</sup>. Often the former are regulated by agreements between trade associations subject to stricter scrutiny than the latter concluded between trade and consumer associations. Contract standardization performs common functions such as economizing in transaction costs, catalysing comparability of offers, and promoting network effects but there are specificities concerning BtoB and BtoC which also translate into different level of administrative and judicial control. It may be stimulated by the necessity to promote market interoperability and to integrate markets otherwise fragmented. Thus it plays a significant role in shaping the form and the structure of an integrated market.

The limits of contract standardization imposed by contract law differ in the two domains. Fairness constraints are generally higher in standard contract forms used for consumers than for businesses. National mandatory rules may impose further constraints and increase differentiation. In competition law, controls on contract standardization do not distinguish between the two types but clearly the protection of competitors has different meaning in the two contexts.

Clearly legal integration through contract standardisation is limited and sector specific<sup>102</sup>. European standard contract forms often do not include all possible rules regulating the contractual relationship and gap filling is made national legal systems when European legislation is missing. This may reduce harmonisation, especially considering the role played by factual circumstances and context specificity<sup>103</sup>. Furthermore, mandatory rules at State level both in BtoB and BtoC may impose differentiation, increasing transaction costs. Mutual recognition of standard contract forms is limited. European legislation is needed to complement the fairness control aspect with rules that allow, especially in BtoB to use standard contract forms across MS.

Standardisation is sector specific, thus, similar problems may be dealt with differently across industries. These are remarkable between regulated and unregulated markets and within regulated markets, also given the control exercised by national IRAs on the content of standard contract forms<sup>104</sup>.

These limitations should not hide the important role played by standardisation as a form of private regulation and the necessity to consider rules defined by standard contracts as part of European contract law. On the contrary, interpretive techniques of European standard contract forms should be adopted in order to foster legal integration. For example, the existing terms or the gap-filling should look for the 'regulatory' purpose and interpret the contract in the light of the whole industry and the related market. This would ensure more uniform interpretation by national judges and a functional oriented gap-filling function towards legal integration<sup>105</sup>. Increasing the role of mutual recognition along the lines employed for marketing practices and selling arrangements, within the differentiation made by ECJ, may contribute to foster integration through standardisation.

The debate over standardisation as a means of integration has crossed that of Codification and the Commission after envisaging an active role in promoting European standard contract forms has

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<sup>101</sup> See H. Collins, *Regulating contracts*, OUP, 1999.

<sup>102</sup> See on the issue S. Whittaker, 2008, *supra* n. 81, p. 141 ff. part. pp. 143 ff.

<sup>103</sup> Different rules concerning judicial interpretation in MS may reduce the level of integration. See on this issue, Whittaker, 2008, *supra* n. 81, p.154 ff.

<sup>104</sup> See G. Alpa, 'Standard contract terms: the role of the courts and moral persuasion by independent authorities', in: Collins, 2008, *supra* n. 64, p. 74 ff.

<sup>105</sup> This approach has been proposed by S. Choi and M. Gulati, 2007, *supra* n. 96, p. 158 "courts when faced with the interpretation of boilerplate, should attempt to construct how an industry-wide legislative body would have interpreted the boilerplate term, an approach distinct from constructing what the specific contracting parties would have done". Unlike them I propose that the interpretation should look at the regulatory functions incorporating the interests of all the relevant stakeholders when the private regulator expresses only the interest of the industry.

declined to play any role<sup>106</sup>. While it is desirable that integration through standardisation occurs on the basis of potentially competing private initiatives, a 'soft' role of coordination by the Commission is certainly desirable to promote services associated to the use of European standard contract forms. Pure market competition for standard contract forms may reduce legal pluralism. New modes of governance often can support legal integration better than complete harmonisation<sup>107</sup>. The Commission should rethink its policy choices to abstain from and to promote different forms of coordination aimed at reducing inefficiencies when devising these standard contract forms.

There are many other examples of privately produced rules that integrate private law (produced by the EU). The payment system provides a good illustration of both diachronic evolution and synchronic complementarity between private law and private regulation. At the beginning, the Euro payment system has mainly been regulated privately by the Single Euro Payments Area governed by the European Payments Council (EPC)<sup>108</sup>. The PSD Directive of 2006 has redefined the boundaries between public and private regulation leaving room for private rules produced through the rule books approved by the EPC<sup>109</sup>. In the area of banking law the recent European Code concerning switching and portability clearly constitutes an example of complementarity integrating the law of contract concerning withdrawal<sup>110</sup>.

Additional forms of accountability should be promoted in order to improve both the rule-making process and the quality of the final regulatory product (standard contract forms, codes, rulebooks). To open the rule-making process to multiple stakeholders will increase effectiveness and presumably reduce ex post litigation; improving the quality of standard contracts will help to achieve a better regulation target, which should operate both in the public and private domain.

### **Private regulation, risk control and European extra-contractual liability**

Risk regulation and management has become one of the main functions of the regulatory State<sup>111</sup>. Extra-contractual liability and public regulation have been complementary strategies employed to detect risks and provide both enterprises and consumers with the right incentives to minimise risks and associated costs<sup>112</sup>. What is the role of private regulation in risk management and control? To what extent it has contributed to European legal integration?

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<sup>106</sup> See S. Whittaker, 2008, *supra* n. 81, p. 154 ff.

<sup>107</sup> See F. Cafaggi, 2008, *supra* n. 67, p. 289 ff., C.F. Sabel and J. Zeitlin, 'Learning from difference: the new architecture of experimentalist governance in the EU', (2008) 14 ELJ 271 ; C. Scott, 'Governing without law or governing without government? New-ish Governance and the legitimacy of the EU' (2009) 15 ELJ 160.

<sup>108</sup> See the Rulebooks produced by European Payments Council available at <[www.europeanpaymentscouncil.eu](http://www.europeanpaymentscouncil.eu)> (the following Rulebooks have been developed by the EPC: SEPA Credit Transfer Scheme Rulebook, SEPA Core Direct Debit Rulebook, SEPA Business to Business Direct Debit Rulebook. In addition the EPC has also been working on the framework for cards standardization, 'SEPA Cards Standardisation Volume').

<sup>109</sup> See European Parliament and the Council, Directive 2007/64/EC of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC [2007] OJ 319/1.

<sup>110</sup> See Common principles for bank accounts switching adopted by the European Banking Industry Committee, available at <<http://www.eubic.org/Position%20papers/2008.12.01%20Common%20Principles.pdf>> (last visited 18 February 2009).

<sup>111</sup> See I. Ayres and J. Braithwaite, *Responsive regulation: Transcending the deregulation debate*, OUP, 1992; J. Jordana and D. Levi-Faur, 2006, *supra* n. 16; J. Braithwaite, *Regulatory capitalism: How it works, ideas for making it work better*, Edward Elgar, 2008.

<sup>112</sup> The debate concerning the regulatory functions of private law in general, and specifically on civil liability is in place. Different streams of scholarship advocate such a function. Typically this is the approach of law and economics, see G. Calabresi, *The Costs of Accidents*, Yale University, 1977; S. Shavell, 'Liability for Harm versus Regulation of Safety' (1984) 13 J Legal Studies 357; Id., 'A Model of the Optimal Use of Liability and Safety Regulation' (1984) 15 Rand J Econ 271.; Id., *Economic Analysis of Accident Law*, Harvard University Press, 1987; W.M. Landes and R.A. Posner, *The*

The role of private regulation in European extra-contractual liability has not been fully investigated<sup>113</sup>. Private regulation at EU level has increased legal integration by defining standards considered to be the floor level. National courts have however rarely referred to these standards following more national patterns<sup>114</sup>. Has private regulation contributed to harmonise liability standards in different sectors of civil liability?

European private regulation concerning risk management differs from traditional public State regulation at least in two dimensions: it modifies the potential barriers to trade and it may increase effectiveness at the price of externalizing some costs. Transnational private regulation strategically forces to do away with traditional State protectionism, which was geared towards keeping risks out of territorial boundaries. This does not mean that private regulation cannot have protective, often anti-competitive, effects on the industry, it simply means that they mainly concern incumbents regardless of their location<sup>115</sup>.

I shall briefly show that the choice between public and private regulation affects the regulatory function of extra-contractual liability<sup>116</sup>. Stronger private regulation expands the role of liability, while a shift to public regulation may decrease its importance and change the ex ante/ex post mix of regulatory strategies.

Attempts to define European general principles have so far ignored the role of regulation and in particular that of private regulation. The Principles of European tort law devote no attention to the influence of private regulation and standard-setting in tort regimes<sup>117</sup>. Also the DCFR pays little attention to private regulation in extra-contractual liability both in relation to the definition of liability regimes and that of defences<sup>118</sup>. Reasonable expectation is at the core of definition of due care in negligence, but the extent to which private regulation and/or custom may contribute to create these expectations is not specified. Nor it is clear which common principles may be extracted from MSS' law. In relation to the product liability regime the provisions reflect Directive 85/374 and references are made to the relation between the existence of the defect, consumer expectations, and mandatory provisions, which might concern co-regulatory arrangements to the extent that they include mandatory provisions.

Clearly, private regulation assumes higher relevance in enterprise liability regimes, but references to privately produced standards concern many other areas of 'accident law' where custom and social norms play a significant role. From property to family law disputes concerning unlawful conduct, references to private norms to define liability regimes are frequent.

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*Economic Structure of Tort Law*, Harvard University Press, 1987; S. Rose-Ackerman, 'Tort Law in the Regulatory State', in P. Schuck (ed.), *Tort Law and the Public Interest: Competition, Innovation, and Consumer Welfare*, Norton, 1991, at 80 ff. This approach has also been endorsed by the socio-legal studies movement see H. Collins, *Contract law*, Lexis Nexis, 2004; C. Parker, C. Scott, N. Lacey, and J. Braithwaite, *Regulating Law*, OUP, 2004. Critiques of this approach are made by some tort scholars, see, e.g. Stapleton, 'Regulating Torts', *ibidem*, at. 122 ff.

<sup>113</sup> This paragraph draws on F. Cafaggi, 'Product safety, private standard setting and information networks', in F. Cafaggi and H. Muir Watt, 2009, *supra* n. 2, p. 215 ff. and F. Cafaggi, 'A Coordinated Approach to Regulation and Civil Liability in European Law: Rethinking Institutional Complementarities', in F. Cafaggi, 2006, *supra* n. 66, p. 00

<sup>114</sup> In the Third report on the application of Council directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products [COM(2006)496 final], the Commission has drawn attention to different interpretations of defect given by national Courts. On these questions see D. Fairgrieve (ed.), *Product liability in comparative perspective*, CUP, 2005.

<sup>115</sup> Concerning self-regulated professions see in particular **Case C-55/94, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano**, ECR 1995 Page I-04165, and more recently **Wouters**, *supra* n. 38. Concerning product safety see *C-254/2007 Commission v. Belgium*, GU 24.5.2007 C 128/28.

<sup>116</sup> See F. Cafaggi and H. Muir Watt, 2009, *supra* n. 2.

<sup>117</sup> See Principles of European tort law drafted by the European Group on tort law.

<sup>118</sup> See book VI of DCFR..

In this context, I would like briefly to analyze the influence of private standard-setting on liability regimes, both injurer's and victim's liability, and remedies<sup>119</sup>. Important differences exist between unilateral and negotiated rule-making concerning safety standards, when products are likely to generate externalities<sup>120</sup>. The number and power of constituencies taking part in the drafting process affect not only legitimacy, but also the effectiveness of private regulation in controlling risk associated with product safety. I shall ask not only if private regulation influences European legal integration, and if so, how this occurs but also whether it satisfies the legitimacy and accountability criteria.

At the outset, a distinction between private technical and normative standards affecting extra-contractual liability should be highlighted<sup>121</sup>. In both cases, there is an influence of private standards on standard of care or defect, but the approach is slightly different. Codes of conduct ruling on information and product safety may concern choices and risks beyond pure technical standardization. The distinction is also blurring because organisations like the ISO are transforming their identity and moving from mere product standardisation to service and management standards. The integration of international standards in the European and state civil liability systems may be different<sup>122</sup>; it can occur directly through judicial recognition at the State level, at times through endorsement by other international organisations (WTO, etc.) which impose them on States, and, at times through direct legislative or regulatory endorsement<sup>123</sup>.

The production of technical standards is regulated by European legislation and generated by European and national standardisation bodies<sup>124</sup>. With this new approach, a co-regulatory regime has been designed allocating the normative task to European and national institutions and the technical ones to private European and national standardisation bodies<sup>125</sup>.

Technical standardisation is highly relevant for European integration especially after the adoption of the 'new approach'<sup>126</sup>. Harmonisation of technical standards has contributed to European legal integration directly and indirectly in property, tort and contract law<sup>127</sup>. Often private technical standardisation has anticipated legislative harmonisation.

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<sup>119</sup> See G. Spindler, 'Interaction between product liability and regulation at the European level', in F. Cafaggi and H. Muir Watt, 2009, , *supra* n. 2, p. 251

<sup>120</sup> See M. Faure, 'Regulatory strategies in environmental liability' in: F. Cafaggi and H. Muir Watt, 2009, *supra* n. 2, 137.

<sup>121</sup> See F. Cafaggi, 2009, *supra* n. 114, p. 215

<sup>122</sup> D. Shelton, 'Commitment and compliance: the role of non binding norms in the international legal system', (2001) 95 American Journal of International law 709.

<sup>123</sup> G. Spindler, 1998, *supra* n. 29, 316; M. Egan, *Constructing a European Market. Standards, Regulation, and Governance*, OUP, 2001; H. Schepel, 2005, *supra* n.29; F. Cafaggi, , 2006, *supra* n. 114.

<sup>124</sup> See Dir. 98/34 EEC and the General guidelines for the cooperation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade association, OJEU C 91/7 16.4.2003.

<sup>125</sup> See A. Barack, 'The CE-mark and the New European Approach to Product Law: A System of Fundamental Legal Safety Requirements and Technical Specification Standards', (1999) 6 International Journal for Consumer & Product Safety, 45; D. Hanson, 'CE Marking, Product Standards and World Trade', Edward Elgar Publishing, 2005; A. Barack, 'A Disadvantageous Dichotomy in Product Safety Law – Some Reflections on Sense and Nonsense of the Distinction Food-Nonfood in European Product Safety Law', European Business Law Review, 2009, 173.

<sup>126</sup> In the policy documents concerning the new approach to standardization a distinction is often drawn between technical and normative aspects in relation to the allocation of powers between public and private powers. See, e.g., Commission Report on Efficiency and Accountability in European Standardisation under the New Approach, COM(98)291 final. See also C. Joerges, H. Schepel, and E. Vos, 'The Law's Problems with the Involvement of Non-governmental Actors in Europe's Legislative Process: The Case of Standardization under the "New Approach"', EUI Working Paper Law 99/9 (1999); F. Cafaggi, 2008, *supra* n. 67, p. 346.

<sup>127</sup> M. Egan, 'The politics of creating a market: the internal and external impacts of standardisation' in European Union Studies Association (EUSA), Biennial Conference, 1993, available at <http://aei.pitt.edu/7158/>

Over time, a policy shift has rebalanced mutual recognition and legislative harmonisation. The latter has recently covered many areas, previously regulated by mutual recognition<sup>128</sup>. The general rule, with some differences across MSs, is still that compliance with technical standards does not exclude liability, i.e. is not a defence but has evidentiary value, while violation of the privately defined technical standard is often conclusive because generally the judicially defined standard of care runs higher than that defined by the industry<sup>129</sup>.

Technical standardisation is not the only relevant field for privately produced standards affecting the definition of liability regimes. Environmental protection, professional regulation and financial markets furnish other examples where a private multilevel regulatory structure emerges to design technical standards employed in agreements and in judicial dispute resolution.

In financial markets, they are regulated also at the global level penetrating into EU law by way of hard and soft law, and then affect national legal systems by judicial references made to them while defining standard of care of rating agencies or other 'private regulators'<sup>130</sup>. In this area, we observe important changes related to the recent financial crisis with a stronger emphasis on co-regulatory models<sup>131</sup>.

The area of product liability and product safety provides additional good illustrations of the influence of private standard-setting into liability regimes, but it also suggests that the current

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<sup>128</sup> For the use of mutual recognition as the harmonizing technique in the field of product safety standards, see recitals 29 and 30 of the GPS Directive: '(29) *It is primarily for the member states in compliance with articles 28,29 and 30 thereof to take appropriate measures with regard to dangerous products located within their territory*

(30) *However, if the member States differ as regards the approach to dealing with the risk posed by certain products, such differences could entail unacceptable disparities in consumer protection and constitute a barrier to intra-community trade*'.

Note, however, that Art. 3(3)(b) of the Directive mentions among the elements upon which conformity to the general safety requirement should be assessed the standards drawn up in the Member State in which the product is marketed. This criterion suggests that when the place of manufacturing and place of marketing are different both should be taken into account.

<sup>129</sup> See for the UK, Regulation on general product safety 2005, on which see D. Fairgrieve and G. Howells, 'General product safety: a revolution through reform?', *Modern Law Review*, vol. 69, p 59; P. Cartwright, 'The regulation of product safety', in G. Howells (ed), *The law of product liability*, Lexis-Nexis, 2007, p. 695 ff.

For France, see art. 1386-10, 'A producer may be liable for a defect although the product was manufactured in accordance with the rules of the trade or of existing standards or although it was the subject of an administrative authorization', see B. Cazeneuve, *La responsabilité du fait des produits*, Dunod, 2005, 78.

For the U.S, see Restatement third on Products liability & 402 (a). See for further references F. Cafaggi, 2009, *supra* n.114, p. 215 ff.

<sup>130</sup> The examples of accounting standards developed by the IASB and rating agencies codes of conduct provide good illustrations. Accounting standards have been recognized at EU level by the Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards [2002] O.J. L 243/1 (as amended).

On the basis of the Regulation 1606/02 the Commission adopted Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council. According to this Regulation two standards (IAS 32, IAS 39) were excluded from the adoption. (From the Recitals of the Reg. 1725/2003: "(4) *The existence of high quality standards dealing with financial instruments, including derivatives, is important to the Community capital market. However, in the cases of IAS 32 and IAS 39, amendments currently being considered may be so considerable that it is appropriate not to adopt these standards at this time. As soon as the current improvement project is complete and revised standards issued, the Commission will consider, as a matter of priority, the adoption of the revised standards further to Regulation (EC) No 1606/2002.*" These standards have subsequently been adopted in 2004.

<sup>131</sup> See for example the proposal for a regulation of the European Parliament and of the Council on Credit Rating agencies, Brussels, 12.11.2008, COM(2008) 704 final.

European regulatory framework is unsatisfactory. It is worth examining first the role of technical standards in the definition of safe and defective products and then considering private regulation concerning defects and defences the producers can employ to avoid liability. A distinction, often neglected, should however be made between product safety standards produced within a purely self-regulatory regime and private rules produced under a co-regulatory regimes, where codes and guidelines are drafted according to ex ante legislative mandate or are ex post approved by a public authority.

The influence of technical standards on a liability regime is made explicit in relation to product safety under directive 2001/95 and with the more recent Regulations 764/2008 and 765/2008 as part of the new market surveillance system<sup>132</sup>.

While the distinction between technical and normative, in this case predominantly judge made standards, is retained at both the European and national level, the interplay between the two is quite unclear. The consumer expectation about product safety and liability is correlated to the adoption of technical standard<sup>133</sup>. Noticeable differences however concern the role of technical standards in product safety (Dir. 2001/95) and product liability (Dir. 374/85). While in the former, compliance with voluntary technical standards implies a presumption of safety, in the latter, when compliance with technical standards is voluntary and not mandatory, it only contributes to identifying consumer expectations, relevant to define a defective product, but it does not exclude the existence of a defect<sup>134</sup>.

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<sup>132</sup> See for instance recital (12): “When, however, an application for such mandatory prior authorisation of a product is made, any intended decision to reject the application on the basis of a technical rule should be taken in accordance with this Regulation, so that the applicant could benefit from the procedural protection which this Regulation provides”; and recital (21) “*Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services obliges Member States to communicate to the Commission and the other Member States any draft technical regulation concerning any product, including agricultural and fish products, and a statement of the grounds which make the enactment of that regulation necessary. It is necessary, however, to ensure that, following the adoption of such a technical regulation, the principle of mutual recognition is correctly applied in individual cases to specific products. This Regulation lays down a procedure for the application of the principle of mutual recognition in individual cases, by means of the obligation on the competent authority to indicate the technical or scientific grounds on which the specific product in its current form cannot be marketed in its Member State, in accordance with Articles 28 and 30 of the Treaty*”; and recital (39) “*In order to facilitate the free movement of goods, Product Contact Points should provide, free of charge, information concerning their national technical rules and the application of the principle of mutual recognition as regards products*”.

<sup>133</sup> See for example in UK, *Alan Balding v. Law Ways Ltd.* [1996] ECC 417 where the Judge held that compliance with technical standards does not amount to due diligence under Consumer Protection Act. See C. Scott and J. Black, *Cranston’s Consumers and the law*, 3<sup>rd</sup> edn, Butterworths, 2000, p. 331; see in the Spanish caselaw, Tribunal Supremo (No. 151/2003) of 21.02.2003, *European Private law review*, 2, 2005, 171; for the Italian caselaw see Cass., sez. III, 15-03-2007, n. 6007, where the judges states that “*Chi, avendo riportato lesioni a seguito di reazione allergica alla tintura per capelli applicatagli, invochi il regime di responsabilità per danni da prodotto difettoso, è tenuto a provare il difetto del cosmetico, la cui sussistenza, per un verso, non può desumersi dalla semplice attitudine del medesimo a provocare il danno, in quanto postula l’accertamento di condizioni di insicurezza al di sotto degli standard esigibili, e, per altro verso, va comunque esclusa al cospetto di condizioni anormali di impiego, le quali possono dipendere anche da circostanze anomale che, pur non imputabili al consumatore, rendono lesivo il prodotto, altrimenti innocuo*”, and for lower courts see T. Benevento, 01-08-2005, where the court states “*Si verte in tipica ipotesi di responsabilità del produttore nell’ipotesi di evidente difetto di progettazione della conformazione del manubrio, indipendentemente dalle regolazioni particolari che ne abbia fatto l’attore o chi gli diede in uso il velocipede; l’attore ha dato prova del danno, del difetto del prodotto e del relativo nesso di causalità; ciò basta, ai sensi della disciplina di cui al d.p.r. 224/1988, richiamato anche dall’art. 9 d.leg. 115/1995 in materia di sicurezza generale dei prodotti, a fondare la responsabilità della convenuta quale casa produttrice della bicicletta, la quale per sottrarsene avrebbe dovuto fornire la prova liberatoria dell’imprevedibilità del difetto al momento della messa in circolazione del prodotto o la conformità dello stesso a norme giuridiche o a provvedimenti vincolanti*”.

<sup>134</sup> Compare art. 3(2) dir. 2001/95 with dir. 85/374 concerning the defence of compliance with mandatory requirements. See S. Whittaker, *Liability for products*, OUP, 2005; G. Howells, 2007, *supra* n. 130; F. Cafaggi, 2006, *supra* n. 114; G. Spindler, ‘Interaction between product liability and regulation at the European level’ and F. Cafaggi. ‘Product safety,

However, in a significant subset of cases, based on co-regulatory procedure for technical standards definition, the same result should be achieved: a dangerous product is also a defective product<sup>135</sup>. This difference is illustrative of the lack of coordination between product safety and liability at the European level which might result in a product being defective but not necessarily dangerous or vice versa. This lack of coordination is particularly relevant in the field of private regulation. Institutional complementarity can permit divergent conclusions concerning the role of private regulation in safety regulation and product liability only if it is the outcome of a conscious process of different regulatory functions (which it is not the case in the current European framework)<sup>136</sup>. The review process of the product safety regime should devote more attention to coordination between (private) regulation and liability.

The increasing role of private regulation in the definition of product safety poses two sets of questions: one institutional and one substantive.

The institutional dimension concerns the reallocation of normative power between judges and regulators and, as to the latter, between public and private. Clearly, the recent European market surveillance reform shows the increasing importance of regulation in monitoring and policing safety in the marketplace<sup>137</sup>. This evolution is also heavily influenced by the higher level of extra-community trade and the necessity to ensure protection to European consumers for goods and services produced outside the European Union<sup>138</sup>. The growing importance of regulation in general implies a more relevant role for private regulation both in the remit of regulatory systems but also in the domain of product liability.

In relation to the former, higher accountability of private regulators and regulatory processes is required. In relation to the latter, a more sophisticated account of the role of private regulation in judicial decision-making is necessary. A distinction between custom, pure self-regulation and co-

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private standard-setting and information networks', both in F. Cafaggi and H. Muir Watt, 2009, *supra* n. 2, p. 215 and p. 251 ff., P. Salvador Coderch and F. Gomez Pomar, *Tratado de responsabilidad civil de fabricante*, Thompson, 2008, p. 579 ff, BGH of 27 September 1994, NJW 1994,3349; judgment of the Landgericht Berlin of 18 October 1996, NJW-VHR 1997,94; C. Stato [ord. cautelare], sez. V, 16-10-2007, n. 5440 (L'eventuale estensione dell'accreditamento a tutte le prestazioni che rientrano nella branca originariamente accreditata necessita di una previa verifica di conformità delle apparecchiature diagnostiche installate, ai previsti standard di sicurezza ed impiego e non può prescindere da un giudizio di compatibilità dell'uso di tale strumentazione con l'esercizio della funzione programmatoria e pianificatoria regionale).

<sup>135</sup> As made clear by the Commission the procedure laid out in art. 4 of Directive implies an ex ante mandate and ex post approval to generate presumption of safety: "Under the terms of article 4 the Commission adopts, by comitology procedure, decisions specifying the safety requirements which the future standards should reflect. Subsequently based on the above mentioned decision, the Commission issues mandates to the relevant ESO, to develop standards which satisfy the specific safety requirements. Once a standard is drawn up and adopted by an ESO the Commission takes a decision under the comitology procedure confirming that the standard was drafted in compliance with the procedure referred to above and it publishes the reference of the standard in OJEU. This publication confers on the products manufactured according to the standard (or its equivalent national versions) the presumption of conformity with the general safety requirements of the directive under article 3(2)." Report on the implementation of Directive 2001/95 on general product safety Brussels 14.1.2009, COM (2008) 905 final

On the other hand it is fair to say that co-regulatory standards might be deemed mandatory and thus the manufacture who complies with them can be exempted from liability.

<sup>136</sup> For a detailed examinations of the inconsistencies between the regulation of product safety and the liability regime see G. Spindler, and F. Cafaggi, 2009, *supra* n. 135, p. 215 and p. 251 ff., F. Cafaggi, 2006, *supra* n. 114; H. Schepel, 2005, *supra* n. 29; S. Whittaker, 2005, *supra* n. 135; C. Hodges, *European regulation of consumer product safety*, OUP, 2005, 21.

<sup>137</sup> See Commission proposal 2007: "The proposals, following the Council's Resolution of 10 November 2003, have the objective to provide a common framework for the existing infrastructures for accreditation for the control of conformity assessment bodies, and market surveillance for the control of products and economic operators, by reinforcing and extending what exists and not weakening existing instruments such as the General Product Safety Directive which is very successful and effective." (p. 2)

<sup>138</sup> See Art 4 Regulation on Market surveillance, General principles.

regulation would imply a correlation between the regulatory process and the regulatory output. The process through which rules are produced should at least contribute to their evidentiary weight in litigation.

Privately produced rules, concerning product safety, only unilaterally enacted (industry driven) should be given different, and lower, evidentiary weight than rules negotiated among different constituencies. This is especially true if the latter were agreed upon according to procedural rules directed at ensuring accountability and effectiveness and based on legitimacy associated not with a bureaucratic selection of the most representative private organisations, but to ex post judicial review.

Professional malpractice provides another important example of the role of private regulation in the definition of standards concerning liability regimes. Europeanisation of the regime concerning professions with mutual recognition may contribute to 'harmonising' standards thereby increasing legal integration<sup>139</sup>.

In the area of environmental liability, the definition of the rights and obligations of enterprises is often made through agreements, then to be used as contributing factors to define liability standards. In this field, co-regulatory arrangements concern also remedies when complex management is required to restore the status quo or eliminate the effects of harmful conduct<sup>140</sup>. But there are also failures of private regulation as in the case of credit-rating agencies where a self-regulatory regime will soon be replaced by a co-regulatory regime<sup>141</sup>. In this area, private regulation before and the expected co-regulatory regime will contribute to harmonise standards of conduct and thus the regime of extra-contractual liability.

## Private regulation and unfair commercial practices

The role of private regulation in unfair competition law has solid and ancient roots. Born as law produced by the business community to protect economic activity from disloyal behaviour, it underwent a functional transformation, becoming a form of market regulation in the last century and represents today an integrated body of rules which protects both competitors and consumers<sup>142</sup>. Despite these changes, a strong self-regulatory component remains and characterizes this body of law concurring and to some extent promoting European legal integration. However, the shift towards

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<sup>139</sup> Following *Wouters*, supra n. 38. Above, the ECJ recognizes two ways to regulate professions: either the government has empowered the professional body to regulate the profession without the government being fully involved, or the government retains the power to adopt professional rules. Regarding the latter, these professional rules will be considered state measures and will be excluded from the scope of EU competition law. This is due to the fact that the ECJ has explicitly recognises that professionals may be subject to higher standards of conduct and therefore accepts some restrictions. However, whether or not competition rules apply will depend on whether the professional body could reasonably have considered the restriction as essential for the proper functioning of the profession. Hence, simply showing that the restriction itself is not necessary for a proper functioning does not suffice to enforce competition law. See Garoupa, 'Providing a Framework for Reforming the Legal Profession: Insights from the European Experience', European Business Law organisation review, 2008, 463.

<sup>140</sup> For a detailed examination of co-regulation in environmental remedies see F. Cafaggi, 2006, supra n. 114; M. Faure, 2009, supra n. 121.

<sup>141</sup> The rules concerning CRAs activities were defined by IOSCO code whose adoption was required by the European Commission with a Communication in 2006. Lack of compliance has triggered the proposal in 2008 of a directive regulating CRAs. It is likely that the financial crisis will bring about litigation and that the potential impact of the shift to public regulation will presumably increase even further European legal integration by defining common standards which will represent the minimum standards for CRAs performances.

<sup>142</sup> See G. Howells, H. Micklitz, T. Wilhelmsson, 'Towards a better understanding of unfair commercial practices', International journal of law and management, vol. 51, 2009, p. 69 ff.; U. Bernitz, 'The Unfair Commercial Practices Directive: Its Scope, Ambitions and Relation to the Law of Unfair Competition' in S. Weatherill and U. Bernitz, 2007, supra n. 66, p. 33-34; 23; J. Stuyck, E. Terry, T. Van Dyck, 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market', (2006) 43 Common Market Law review 107.

consumer protection has profoundly changed the scope of private regulation in unfair trade practices. Private regulation is called to face important challenges to address and solve conflicts of interests between competitors and consumers. For this reason, codes of conduct concerning unfair trade practices might require separate rules for competitors and consumers and should explicitly address modes through which resolution of these conflicts should occur.

In the area of deceptive and comparative advertising there is a long lasting tradition of codes of conduct both at national and European level<sup>143</sup>. In the past, the absolutely dominant form has been self-regulation through codes of conduct. This trend has partially changed at MS level moving towards co-regulatory approaches<sup>144</sup>. At EU level, the approach is still based on self-regulation and attempts to introduce stronger co-regulatory elements have failed<sup>145</sup>. The new regime is partially defined by Dir. 2005/29 on unfair commercial practices specifically aimed at consumer protection (UCPD), which has introduced complete harmonisation<sup>146</sup>. The previous European regime was defined by minimum harmonisation directives and upper bound limits on MS competences by the EC Treaty in particular freedom of movement<sup>147</sup>. In some MSs, the regime has evolved from self to co-regulatory, with broad and comprehensive regulatory contracts between the public and the private regulators<sup>148</sup>. In other legal systems, complementarity is instead achieved by two parallel and independent systems one designed by public legislation and the other by self-regulation.

Recognition of the relevance of private regulation, mainly in the form of self-regulation, is clear in UCPD, where a legal regime concerning liability of ‘code owners’ has been defined<sup>149</sup>. The UCPD not

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<sup>143</sup> The history of advertising law is characterized by the strong role of private regulation since the very beginning. But the broader area of fair trading is also influenced by private regulation. For an early example of national legislation encouraging promotion of private regulation by the public regulator see the UK Fair Trading Act of 1973.

<sup>144</sup> In the field of advertisement see the UK Advertising standard authority which provides few types of codes depending on the specific means of communication, see at [www.asa.co.uk](http://www.asa.co.uk); See the Italian self-regulatory code on advertisement, whose first version date back to 1996; and the Italian code of conduct on TV shopping and advertisement of astrology and similar services and on services of prediction concerning lotteries, and other kinds of games), which has been promoted by the Ministero delle Comunicazioni and other sector associations.

<sup>145</sup> See H.-W. Micklitz, ‘The General Clause on Unfair Practices’ in: G. Howells, H.-W. Micklitz and T. Wilhelmsson, *European Fair Trading Law: The Unfair Commercial Practices Directive*, Ashgate, 2006, p. 99.

<sup>146</sup> Directive 2005/29/EC, *supra* n. 67..

<sup>147</sup> J. Stuyck, E. Terryn and T. van Dyck, 2006, *supra* n. 143; G. Abbamonte, ‘The Unfair Commercial Practices Directive, an example of the new European consumer protection approach’ (2006) 12 Columbia Journal of European law 695, 2006; S. Weatherill and U. Bernitz, 2007, *supra* n. 66, p. 7 ff. H.-W. Micklitz, ‘A General Framework Directive on Fair trading’ in: H. Collins, *The Forthcoming EC Directive on Unfair Commercial Practices*, Kluwer Law International, 2004, p. 77.

<sup>148</sup> This is the example of UK where following the Communication Act of 2003 a regulatory contract between OFCOM and ASA has been signed, followed by Guidelines concerning rule-making and enforcement. ASA codes of conduct and activity is subject to judicial review since 1990, see *R. v. Advertising Standards Authority, ex parte The Insurance Service Plc* [1990] 2 Admin. L.R. 77.

“The Office of Communications (OFCOM) is the body principally responsible, by virtue of ss.1 and 2 of the 2003 Act, for setting and enforcing standards as to the content of television and radio programmes. It does that by reference to “standards objectives” identified in s.319 of the Act. OFCOM has, pursuant to statutory powers, [FN2: Contracting Out (Functions Relating to Broadcasting Advertising) and Specification of Relevant Functions Order 2004] contracted out its advertising standards codes function to two Committees of the advertising industry – its advertising standards codes function to the Broadcast Committee of Advertising Practice (BCAP), and the handling and resolution of complaints to the Advertising Standards Authority (ASA).”

<sup>149</sup> See recital 20 UCPD, “It is appropriate to provide a role for codes of conduct, which enable traders to apply the principles of this directive effectively in specific economic fields. In sectors where there are specific mandatory requirements regulating the behaviour of traders, it is appropriate that these also will provide evidence as to the requirements of professional diligence in that sector. The control exercised by code owners at national or community level to eliminate unfair commercial practices may avoid the need for recourse to administrative or judicial action and

only supports the claim that private regulation has remarkably contributed to European legal integration by harmonising 'unfair trade practices' - even in areas such as advertisement law where national specificities, starting from languages, cultures and religion, play a major role - but it also improves the enforceability of private regulation, possibly the weaker component of private regulation<sup>150</sup>. Given that many MSs have chosen administrative authorities to enforce UCPD the interplay between public and private regulators is highly relevant. Public enforcers will have to decide whether commitments were binding, while judges would have to verify whether reliance to induce to the transactional decision by the consumer was reasonable.<sup>151</sup>

The Directive defines codes of conduct as voluntary acts thus apparently excluding codes enacted on the basis of formal delegation by an administrative authority. These codes will be binding and their violation will be an unfair practice. In some countries, codes are approved ex post, i.e. without any prior delegation, by public authorities before coming into force<sup>152</sup>. In this case the code is voluntary but the approval ex post confers de jure binding nature. Even in this case a violation of the Code by the trader should be considered an unfair trade practice. The analysis should thus be limited to Codes not enacted on the basis of ex ante delegation or ex post approval. Again the distinction between self- and co-regulation is highly relevant.

UCPD is relevant even beyond unfair competition law for the general principle it introduces: when a trader claims compliance with a code of conduct, the violation of this commitment constitutes an unfair commercial practice to be sanctioned not only by private remedies but also through public enforcement<sup>153</sup>. This principle, aimed at protecting consumer reliance on traders' compliance with codes of conduct, not only enables public enforcers to use injunctions or other enforcement mechanisms to impose commitments on undertakings in order to comply with the codes but also establishes a statutory duty which may trigger a specific private cause of action when a breach occurs<sup>154</sup>. In some legal systems, it amounts to a criminal offence<sup>155</sup>. The principle does not concern exclusively codes of conduct regulating fair trade but all codes of conduct employed by traders in their marketing and selling practices. It solves the open issue of giving legal nature to codes of conduct that were considered part of social norms enforceable only through non legal instruments. There are certainly important limitations. The standard of enforceability defined by UCPD is quite high. The reference to an aspirational commitment that does not bind the trader, severely undermines the scope

(Contd.) \_\_\_\_\_

should therefore be encouraged. With the aim of pursuing a high level of consumer protection, consumers' organisations could be informed and involved in the drafting of codes of conduct". See in relation to the draft G. Howells, 'Co-regulation's role in the development of European Fair trading laws', in H. Collins, 2004, supra n. \*\*, p.119 ff. part.

<sup>150</sup> See article 11 UCPD and the implementation in the Irish Consumer protect Act, art. 73 , Italian Codice di consumo, art. 27, where in cooperative enforcement through undertakings by the infringer integrates means of enforcement.

<sup>151</sup> While only one authority is competent for monitoring UCPD, given its general application across sectors, many authorities are involved in enforcement in different markets. For example in the financial markets State regulators have enacted Guidelines or Principles for the application of UCPD.

<sup>152</sup> For example in the UK, the OFT approves the Codes of conduct in a two stage process. Once the Code is approved it carries the OFT logo which should enhance consumers' reliance on the seriousness of commitments.

<sup>153</sup> See art. 6.2, lett. b) UCPD, "A commercial practice shall also be regarded as misleading if, in its final context, taking account of all its features and circumstances, it causes or it is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

(b) non compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:

(i) the commitment is not aspirational but is firm and is capable of being verified, and

(ii) the trader indicates in a commercial practice that he is bound by the code".

<sup>154</sup> Of course no all breaches of statutory duties give rise to a private cause of actions. Ms have different requirements for allowing private remedies for breach of statutory duties.

<sup>155</sup> See For example in UK art. 9 of the consumer protection from unfair trading Regulation, in Italy, see art. 27 ff of the Codice del consumo.

of the provision ; the ability of policing the market through private regulation will depend on the interpretation of the distinction between aspirational and firm commitment<sup>156</sup>. Certainly it would not be appropriate to identify aspirational commitments with ‘best effort’ clauses and more in general with fair dealing undertakings. Symmetrically firm commitments should not be based on detailed description of practices in the codes<sup>157</sup>. The burden of proof concerning the commitment is not specified. The general rule imposes on the trader the burden of proving that the practice is not misleading. It follows that the trader should also prove that its commitment was purely aspirational and not firm.

Of course the violation of codes of conduct may trigger ‘private’ remedies specifically provided in the code itself or those following a violation of unfair competition rules<sup>158</sup>. In the first case, there are the enforcement mechanisms provided by codes, in the latter there is a form of judicial recognition transforming a privately produced rule into a standard of ‘fair competition’ whose violation can be addressed through injunctions and damages<sup>159</sup>. The binding force of private regulation is thus ensured through different enforcement means that make the co-regulatory practice credible.

The Directive brings up at least two general questions concerning the role of private regulation in European unfair competition law: (1) how the choice between minimum/complete harmonisation affects the use of private regulation; (2) which changes occur in the relationship between public legislation, using a combination of general clauses and a black list, and private regulation.

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<sup>156</sup> It is interesting that already in implementation some Ms have ‘interpreted’ the distinction. For example, the Irish Consumer protection Act art. 45 (1) “*A commercial practice is misleading if- it involves a representation that the trader abides, or is bound by a code of practice, the representation referred to in paragraph 8a9 would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make, and the trader fails to comply with a firm commitment in that code of practice. in determining whether a commercial practice is misleading under subsection (1) the commercial practice shall be considered in the factual context taking account of all its features and the circumstances for the purpose of this section, a firm commitment in a code of practice is one that is not merely aspirational but is capable of being verified*”

It is clear that the definition of an aspirational commitment is not related to a subjective factor, i.e. the intention of the trader, rather to an objective factor the verifiability of the commitment.

A stricter interpretation has been given by Belgian law

Art. 94.6 § 2 of the Loi 14 juillet 1991 as modified by loi 21 juin 2007 states: “*Est également réputé trompeuse une pratique commerciale ...lorsque elle implique*

*2° le non-respect par le vendeur d’engagements contenus dans un code de conduite par lequel il s’est engagé à être lié, dès lors que ces engagements sont fermes et vérifiables et qu’il indique qu’il est lié par le code*”

<sup>157</sup> On the distinction between firm and aspirational commitments, see the Green Paper on consumer protection, *supra* n. 60 and follow up paper, *supra* n. 68.

<sup>158</sup> In *Director General of Fair Trading v Tobyward Ltd* [1989] 1 WLR 517 (CH D) breach of the British Code of Advertisement Practice was taken into account by the court when establishing whether there was strong *prima facie* evidence of an advertisement being misleading and granting an injunction. Justice Hoffmann held that it was in the public interest for the court to support the principle of self-regulation by normally granting an injunction where the self-regulatory procedure had failed (“*It is in my judgment desirable and in accordance with the public interest to which I must have regard that the courts should support the principle of self-regulation. I think that advertisers would be more inclined to accept the rulings of their self-regulatory bodies if it were generally known that in cases in which their procedures had been exhausted and the advertiser was still publishing an advertisement which appeared to the court to be prima facie misleading, an injunction would ordinarily be granted.*”).

The *Dansk Supermarked* case (*supra* n. 47) arose from the fact that breach of a bilateral contract was considered under Danish law to constitute an act of unfair competition.

<sup>159</sup> See for example in Italy case law applying arts. 2598, 2599, 2600 Civil Code.

(1) The definition of unfair trade practices can be determined by three concurring factors: legislation, public and private regulation and practices. How does complete legislative harmonisation affect this combination? Private regulation, in particular self-regulation, is not limited by complete harmonisation. Codes of conduct concerning trade practices may define national higher standards thereby triggering a race to the top. A second, different yet related, factor is the reference to professional diligence relevant to define fairness in trade practices, which should be distinguished from private regulation. Honest market practices differ across MSs and the reference to average consumers is not sufficient to avoid divergent interpretations<sup>160</sup>. Certainly the ECJ's interpretation will help to provide a definition but it cannot undermine the fundamental goals of correlating the law with current practices which may differ across markets and countries. Differences are almost intrinsic and cannot be governed simply by legislative harmonisation. Governance is necessary<sup>161</sup>. Coordination among regulators that have the duty to enforce the directive should help harmonising these definitions, introducing the principle **harmonise or explain**. According to this principle a national regulator should have the duty to explain why in its interpretation of professional diligence it has deviated from the common interpretation.

What is the role of private regulation and that of the European Commission? In a complete harmonisation directive that acknowledges the use of codes of conduct, traders should define some coordination mechanisms to ensure consistency with the scope of the Directives when they are enacted at state level as differences of languages often require<sup>162</sup>. Some kind of regulatory coordination among private regulators with possible coordination by the Commission should thus be devised.

(2) The use of general clauses in European directives can be implemented by different legislative techniques: reproducing the same clause, adapting to the national legal system, specifying the rights and obligations, thereby reducing judicial discretion. Implementation of UCPD has been characterized by reproduction of the general clause about fairness leaving room for codes of conduct describing the nature of unfair trade practices outside of the 'black list'.

The challenge ahead is related to the use of fair trading codes as means to contribute to European integration and market regulation. The role of the Commission to promote higher and more effective coordination with European and national private regulators has to increase, following the example of technical standardization without necessarily replicating the same path.

### **Private regulation and European legal integration: a new framework.**

European private regulation pre-existed European Community law and co-exists with it today, giving rise to different forms of complementarity with European legislation. While in the initial stage of *jus commune*, a stronger role for co-regulation characterized private law, the formation of national legal systems, and in particular the era of codifications, changed the complementarity between public and private law-making. Codifications reduced cooperative law-making but increased the role of adjudication as the vehicle through which customs and practices accessed European continental legal systems. The rise of the regulatory State and the more recent transformations of regulatory strategies have brought up new forms of co-regulation with increasing trends of negotiated rule-making, affecting legal integration through different institutions.

In this article, I have explored the place of private regulation in the evolution of EPL. It affects, in different ways, the whole domain of private law, from contract to property, from civil liability to

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<sup>160</sup> On these questions see F. Cafaggi, 2008, *supra* n. 67, p. 289, part. p. 298 ff. S. Weatherill and U. Bernitz, 2007, *supra* n. 66, p. 6 ff.

<sup>161</sup> See F. Cafaggi, 2008, *supra* n. 67.

<sup>162</sup> For a broader analysis concerning the relationship between different types of legislation, including alternative between hard and soft law, and private regulation at European level see F. Cafaggi, 2008, *supra* n. 67, p. 298 ff.

unfair competition. Often European harmonised private regulation has anticipated European legislation, for example in the areas of unfair commercial practices, internet, financial markets. In other cases, forms of mutual recognition of private regulations have occurred. While the modes through which private regulation has contributed to European legal integration differ, it is quite clear that it has played and will play a significant role.

The brief examination of private regulation in the domain of contract, extra-contractual liability and unfair commercial practices, shows that role and rules concerning private regulation in EPL vary across sectors and domains. In each of those domains the rules concerning recognition and control of legitimacy of the activity of private regulators depend on the nature, mandatory or enabling, of the rules enacted through public legislation, on the relevance of business and trade practices, on the development of consumer protection through legislation or negotiation.

A high level of fragmentation and differentiation emerges, hard to reconcile with the conventional view of European legal integration increasingly linked to uniformity. Private regulation can contribute to European legal integration in forms different from that of public law-making. The necessity of plurality and competition of private regulators, unless public interest requires the creation of monopolistic positions, implies higher level of differentiation. A plurality of private regulators does not undermine European legal integration but changes its identity. Legal integration does not necessarily correspond to complete harmonisation. On the contrary, an institutional setting that ensures pluralism may generate integrative processes more respectful of legal differences across communities, often differing among themselves and from States' interests. Private regulation requires rules about communities self-governance.

In this contribution, I have examined not only the differences between private regulation and public law-making but also the complementarity through which they can enhance European legal integration; in particular distinguishing between complete and minimum legislative harmonisation. Complementarity may also imply different modes of integration complying with normative pluralism within the supremacy of Community legislation. Private regulation can implement normative pluralism and contribute to making constitutional pluralism effective. It can constitute the expression of self-governance but only when consonant with democratic principles and the rule of law.

The current framework is inadequate to stimulate the appropriate use of private regulation to the creation of EPL and the Lisbon Treaty does not significantly improve the landscape. To ensure coherence between the goals of market integration and the achievement of a social-market economy concerning both activity and governance of private regulators new rules are necessary. Their absence increases the risks of self-interested regulatory activity, its deficit of accountability, and reduced effectiveness. Lack of judicial control and participatory rights by parties affected by the process, including both regulators and beneficiaries may undermine legitimacy and effectiveness of the regulatory processes.

Better private regulation requires the introduction of three layers of rules.

1) A first set of principles, common to both public and private regulation. These include transparency, participation, accountability, proportionality, and judicial review. They can simply represent the principles defined by ECJ case law and could be easily accommodated in a European Recommendation.

2) A second set of principles concerning only private regulation, distinguishing between self- and co-regulation. These include competition law constraints, delegation by European institutions, modes of implementation of European legislation at MS level, governance and liability of private regulators, conflict of interest, impact assessment and funding. Coordination with the creation of European contract law should also contribute to defining specific rules concerning regulatory contracts in their different dimensions: from framework contracts to master agreements, from codes of conduct to rulebooks.

Complementarity between public legislation and private regulation is often needed to achieve legal integration. Different elements matter to achieve an effective institutional design: the choice of institutional level, the nature, mandatory or enabling of the rules, the general purpose or sector specificity. The choice of the European level to enact public legislation may promote more effective legal integration by private regulation. As the case of contractual standardisation shows the role of public legislation is not only to broaden legitimacy and to ensure binding effects *ultra vires* but also to facilitate European legal integration by private agreements when local differentiation may prevail.

The multilevel dimension of private regulation may imply some general rules concerning coordination between European and Member states' level based on mutual recognition of privately designed standards: the differences between complete and minimum private harmonisation should imply some shared criteria for which regulators are accountable. The principles of proportionality and effectiveness may play an important role and have an impact on assessment, they also contribute to defining *ex ante* and *in itinere* the impact of private regulation. These principles should be conceived as implementing the provisions of the Interinstitutional Agreement of 2003 and bind European institutions in their relationship *inter se* and with MSs.

3) A third set of rules, sector specific, to be introduced when directives and regulations are enacted that can also be sector specific, for example in the domain of the Lamfalussy architecture, that of professional malpractice or consumer safety.

But private regulation in European private law also poses methodological challenges. Comparative analysis is needed to go beyond the traditional approach of comparative law which still takes the State as the unit of analysis<sup>163</sup>. Sectors and standards associated with them seem to drive transnational private regulatory regimes and define their identities. However governance may contribute to mutual learning and some transplants between different regulated sectors including public policies are needed. I suggest the need for a new comparative approach related to TPRER that has to redefine both unit of analysis and methodology of comparison.

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<sup>163</sup> But see the different methodological positions emerging in the different contributions published in the *American Journal of Comparative Law*, 2008.

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