Table of Contents

List of Contributors  xiii

Preface
New Modes of Regulation in Europe: Critical Rethinking of the Recent European Paths  xv
Fabrizio Cafaggi

Part One  1

Chapter 1  3
Rethinking Private Regulation in the European Regulatory Space
Fabrizio Cafaggi

1  Introduction  3
2  Three Fundamental Questions and the Challenges Faced by Private Regulatory Law  12
   2.1 Technocratic Versus Interest-Based Regulatory Bodies  12
   2.2 The Private-Public Law Divide and the New Regulatory Processes  14
   2.3 The Changing Allocation of Powers Between Regulators and Judiciary  16
3  Private Regulation, Conventional Modes and New Challenges: Reframing Self-Regulation  18
4  A Taxonomy: Locating Private and Self-Regulation in Coordinated Regulatory Processes  21
   4.1 Public Regulation  22
   4.2 Co-Regulation  27
   4.3 Delegated Private Regulation  29
   4.4 Ex Post Recognized Private Regulation  33
   4.5 Judicial Definition of a Regulatory Body  34
Table of Contents

4.6 Preliminary Conclusions 35

5 Framing the Effects of Coordination Between Public and Private Regulators on Private Regulatory Law: Three Issues 36
   5.1 Regulatory Pluralism 36
   5.2 Conflict of Interest 38
   5.3 Liability of Private Regulators 39

6 Monopoly Versus Regulatory Plurality 40
   6.1 When the Private Regulator is a Monopolist 48
   6.2 Private Regulatory Plurality 50
   6.3 Some Comparative Assessment Concerning Monopoly Versus Plurality of Private Regulators 53

7 Conflict of Interest and Private Regulation 55

8 Private Regulators, Coordinated Regulatory Strategies and Liability Systems 58
   8.1 Liability of Private Regulators 67
      8.1.1 Failure to Regulate 69
      8.1.2 Abuse of Regulatory Power 71
      8.1.3 Wrongful or Defective Regulation; Breach of Regulatory Obligations 72
   8.2 Assessing the Liability Question in Relation to the Organization of the Regulatory Space 73

9 Concluding Remarks 74

Chapter 2
The Constitutional Dimension of Self-Regulation 77
Aileen McHarg

1. Introduction 77

2 Perspective One: A Constitution-Centred Approach 80
   2.1 The Substance of Regulation 80
   2.2 Regulation as a ‘Governmental’ Activity 83

3 Perspective Two: A State-Centred Approach 90

4 Perspective Three: A Regulation-Centred Approach 95

5 Conclusion 104

Chapter 3
Agents Without Principals? Delegation in an Age of Diffuse and Fragmented Governance 107
Peter L Lindseth

1 One Take on the Recent Past 107

2 A Different Take 110

3 A Cultural-Historical Dialectic 111

4 New Dimensions 115
Table of Contents

5. 'The Private Role in Public Governance' in the American Case 118
6. The Drawbacks of Contract, the Advantages of Delegation 124
7. Conclusion 130

Chapter 4
Self-Regulation and the Meta-Regulatory State 131
Colin Scott

1. Introduction 131
2. The Nature of Self-Regulation 132
   2.1 The Self: Collective and Individuated 132
   2.2 Regulation: Full and Partial 132
   2.3 Self-Regulation and Non-State Regulation 133
   2.4 Forms of Non-State Regulatory Power 133
      2.4.1 Statutory 134
      2.4.2 Contractual 134
      2.4.3 Non-mandated 134
   2.5 The Public-Private Divide in Self-Regulation 135
3. The Relationship of the State to Self-Regulation 136
   3.1 Delegation 136
   3.2 Observer 137
   3.3 Sanctioned Self-Regulation 137
   3.4 Enforced Self-Regulation 138
   3.5 Co-Regulation 138
   3.6 Meta-Regulation 139
4. Normative Issues 140
   4.1 Hierarchical Accountability 140
   4.2 Accountability Through Competition 141
   4.3 Accountability Within Communities 143
5. Conclusions 143
Bibliography 144

Chapter 5
Constitutional Boundaries to Self-Regulation: a Comparative Appraisal 147
Jacques Ziller

1. The monopoly of public authorities in establishing legally binding general norms 148
   1.1 Vertical Limitations to Delegation of Normative Power 149
      1.1.1 Limitations to Delegation Per Se 150
      1.1.2 Limitations to Delegation to Private Bodies 151
Table of Contents

1.2 Horizontal Limitations to Delegation of Normative Power 152
2. Rights as Boundaries to Self-Regulation 153
  2.1 The Diversity of Sources of Rights 153
  2.2 The Issue of So-Called Horizontal Effect of Fundamental Rights 154
3. The Specific Case of EC/EU Law 155
  3.1 Legal Bases for EC/EU Law-Based Self-Regulation 156
  3.2 The Issue of EC/EU Soft Law: ‘New Modes of Governance’ and Legal Bases 158

Part Two 161

Chapter 6
The Government and Citizenship of Self-Regulation 163
Damian Chalmers

1. Introduction 163
2. Self-Regulation and Government 164
3. The Regulative Relations of Self-Regulation 170
  3.1 The Territorial Power of the Gatekeeper 170
  3.2 The Political Subjectivity of the Gatekeepers 171
  3.3 Action-Orientated Belief and the Gatekeepers 171
  3.4 Government Strategies of Inducing Responsibility 172
4. The Political Goals of Self-Regulation 172
  4.1 Problem-Solving Self-Regulatory Regimes 172
  4.2 Policing Self-Regulatory Regimes 174
5. Self-Regulatory Regimes and the Reallocation of Power 176
  5.1 Territorial Power: Centralization, Competition and Differentiation 176
  5.2 Political Subjectivity, Mediation, Compliance and Opposition 178
  5.3 Hegemony, Political Authority and Action-Oriented Belief 181
  5.4 Government Strategies of Inducing Responsibility – a Politics of Virtue and a Politics of Compliance 183
6. A Legal Framework for Self-Regulatory Regimes 185
7. Conclusion 188

Chapter 7
A Constitutional Perspective on Self-Regulation:
The Case of the European Social Dialogue 191
Stijn Smismans

1. Self-Regulation Through the European Social Dialogue 192
2. European Social Dialogue from a Labour Law Perspective 195
Table of Contents

3. The European Social Dialogue from a Constitutional Perspective
   3.1 UEAPME: Looking at the Social Dialogue Through Locus Standi
   3.2 The Democratic Principle: From the ECI to the CFI
   3.3 The Necessary Shadow of Hierarchy Over the Social Dialogue
     3.3.1 Public Intervention, and the Threat Thereof, to Induce the Social Partners to Bargain
     3.3.2 Setting and Controlling the Conditions (and Content) of the Bargaining Process
       3.3.2.1 Defining and Controlling who Participates in the Social Dialogue
       3.3.2.2 Defining and Controlling the Conditions for Implementation by Council Decision

4. Self-Regulation and the Limits of the Constitutional Perspective

5. Conclusion

Chapter 8
Marie Curie Fellow, Law Department, European University Institute of Florence and Faculty of Law, University of Nancy
Ségalène Barbou des Places

1. Two Arguments in Favour of Exposing Self-Regulatory Bodies to Competition
   1.1 The Problems with Self-Regulation; the Example of Professions
   1.2 The Legitimacy Input
     1.2.1 Regulatory Pluralism and the Exit Option
     1.2.2 Competition, Costs and the Public Interest
   1.3 A Dynamic that Frames the Formation of Self-Regulation
     1.3.1 Increased Responsiveness to Economic Actors’ Needs
     1.3.2 Competition as a Discovery Procedure

2. Conditions and Limits of Competition Amongst Self-Regulatory Systems
   2.1 Conditions for Regulatory Competition to Emerge and Develop Efficiently: The Link with Public Intervention
   2.2 Conditions for the Emergence of Competition
   2.3 Conditions for Efficient Regulatory Competition
     2.3.1 The Many Variables that Can Influence the Outcome of the Game
     2.3.2 Tamed and Assisted Competition Among Self-Regulators

ix
2.4 Limits of Using the Regulatory Competition Model 231
   2.4.1 Competition Among Self-Regulatory Bodies: A Complex Case of Regulatory Competition 231
   2.4.2 Composite Self-Regulation 232
   2.4.3 A Same Actor for Different Roles 232
   2.4.4 What is the Alternative to Inefficient Competition? 233
2.5 Competition as a Process of Justification by Comparison 234
3 Conclusion 235

Part Three 237

Chapter 9
University of Utrecht 239
Ewoud Hondius

1 Introduction 239
2 Survey of Self-Regulatory Schemes 240
3 Un peu d’histoire 243
4 Some Definitions 243
5 Self-Regulation as Peer Regulation 244
6 Self-Regulation as Speedy Reaction to New Developments 244
7 Taking Care of Details 245
8 Self-Regulation’s Missing Teeth 245
9 The Failing Traders 245
10 Self-Regulation and Anti-Trust 245
11 Transposition of EU Directives by Self-Regulation 246
12 Future of Self-Regulation 247

Chapter 10
Self-Regulation, Politics and Law: the Example of the Media 249
Tony Prosser

1 Introduction 249
2 Self-Regulation and Law 251
3 The Politics of Self-Regulation 254
4 Press Self-Regulation in the UK 256
5 Broadcasting Regulation: The Government’s Proposals and Co-Regulation 260
6 The Communications Act 2003 262
Table of Contents

7. Self-Regulation and the BBC 265
8. The Communications Act and Market Liberalization 266
9. Conclusion 268

Chapter 11
A European Perspective of Self-Regulation in the Media 271
Susanne Nikoltchev

1. The European Framework 272
   1.1 Council of Europe 272
   1.2 The European Union 276
      1.2.1 Conditions for Self-Regulation 278
      1.2.2 Conditions for Co-Regulation 279
2. Examples for Self- and Co-Regulation 280
   2.1 Print Media 281
   2.2 Internet 282
   2.3 Broadcasting 283
   2.4 Media Neutral Schemes 285
   2.5 Pan-European Structures 286
3. Conclusions 287

Chapter 12
Corporate Social Responsibility (CSR) as a Model of
‘Extended’ Corporate Governance: an Explanation Based
on The Economic Theories of Social Contract, Reputation
and Reciprocal Conformism 289
Lorenzo Sacconi

1. CSR: Much Disorder Under the Sun 291
2. Business Ethics and the Lawyer’s Presumption 294
3. A Definition of CSR 296
4. The Economic Bases of the Idea that the Firm has ‘Further’
   Responsibilities Towards its Stakeholders 299
   4.1 Theory of the Firm 299
   4.2 The Risk of Abuse of Authority 300
5. How Can we Identify CSR Duties (Without Arbitrariness)? 304
   5.1 The Social Contract as a Criterion for Strategic
      Management 304
   5.2 Social Contract and the Emergence of the Firm 306
      5.2.1 Narrow Fiduciary Proviso 308
      5.2.2 Extended Fiduciary Proviso 308
   5.3. The ‘Cocietary Interest’ of the Company and Extended
      Fiduciary Duties 309
## Table of Contents

6. An Objective-Function for the Firm? 309  
   6.1 A Computable Solution to the Firm’s Bargaining Game 310  
   6.2 From General to Particular, but not Vice Versa 313  
7. What Norms can Effectively Bring About CSR? The Role of Company Law 315  
8. Is it Possible to Affirm CSR by Means of Self-Regulation? 317  
   8.1 Self-Regulation (1): the Discretionary Approach 317  
   8.2 The Reputation Game 319  
9. The Fragility of Reputation and the Cognitive Role of Norms 322  
   9.1 Self-Regulation (2): Voluntary Compliance with Explicit Norms 322  
   9.2 The Logic of a CSR Strategic Management Standard 324  
      9.2.1 Generality and Abstractness of Principles 324  
      9.2.2 Precautionary Protocols of Behaviour 326  
      9.2.3 Communication and Dialogue with the Stakeholders 326  
10. Stakeholders’ Moral Preferences as a Reinforcement Factor of Motivation 328  
   10.1 Conformist Preferences 328  
   10.2 Motivational Reinforcement 331  
12. Intermediate Social Bodies, Multi-Stakeholder Dialogue 341  
CSR Assurance and Independent Verification

**Conclusion** 345

Chapter 13  
**Epilogue: On Regulating the Regulation of Regulation** 347  
*Neil Walker*

1. Introduction: Framing Regulation 347  
2. Taking Self-Regulation Seriously 349  
3. Reframing Regulation?