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Self-regulation in European Contract Law

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Abstract

This paper addresses self-regulation as a complementary means to harmonize and regulate European Contract Law. In the context of the paper SR is conceived as a complementary device to legislation and as a monitoring device to verify ECL implementation.

Within self-regulation different players and forms of rule-making are examined.

In relation to players different private organizations are considered: independent organizations and self-interested organizations, which will be further differentiated according to the nature of the represented interests.

In relation to the institutional environment a distinction is assumed between market and private non market rule-making. In the market environment private organizations provide rules, including standard contract forms for a price or more generally for remuneration, in the non market environment private organizations provide contract rules for free.

The main aims of the paper are (1) to demonstrate the necessity to consider self-regulation (hereinafter SR) as a significant component of the debate concerning the definition of Common Frame of References (hereinafter CFR), (2) to identify the role and the limits of self-regulation in the formation of European Contract Law particularly associated with competition law and fairness, and (3) to show the strong correlation between the governance of self-regulatory bodies and the substance of European Contract Law (hereinafter ECL)

Keywords

Contract law, Self-regulation, European law, Competition law, Consumer

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Self-regulation in European Contract Law¹

Fabrizio Cafaggi

1. Introduction

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¹ This paper was presented at the SECOLA conference in Prague, in June 2005. It has benefited from several comments. Thank to H. Collins, S. Grundman, N. Reich and S. Whittaker for useful comments made to that presentation. I am particular thankful to Hans Micklitz for comments made on a later version. Thanks to Federica Casarosa, Barbara Gabor, Bjorn Lundqvist and Veljko Milutinovic for research assistance. Responsibility is my own.

The first part of the essay is concerned with rule-making procedures in ECL and the role of SR. SR may serve different purposes in this respect.² It operates as a standard-setting mechanism for contracts, in particular through standardisation. It contributes to monitoring the conduct of contracting parties to ensure compliance, and it provides enforcement mechanisms.

In Europe, integrated markets require a high level of coordination, made more difficult by the coexistence of legal systems based on different languages and cultures. Collective private standardisation of contract forms may represent a partial response to these problems. Standardised contracts lower transaction costs but limit the space of choice for contracting parties and therefore may reduce freedom of contract. Furthermore they might decrease competition for innovative contract clauses among rival firms.

Standardisation encounters limits based on :

- (1) competition law and policy, related to questions of both *whether* and *how* to standardise, and
- (2) contract law, mainly related to the mode of standardisation and the content of contract clauses, particularly unfairness.

Contemporary standardisation is often not only the result of traditional trade associations' activity but the outcome of negotiating processes involving consumers associations and, in many countries, public authorities. The latter can be subdivided into two main categories: public interest representation organizations, such as ombudsman, and public regulators (i.e Independent Regulatory Agencies, IRAs, or governmental departments).³ IRAs are involved primarily when markets are highly regulated, affecting contracts content and the contracting parties (imposing obligation to contract). Their intervention may modify the role of competition law as a limit to standardisation.

My aim is to define the different limits to self-regulation, particularly those imposed by contract and competition law, its internal consistency and its potential role.

The second part of the essay is devoted to monitoring compliance and its role in the implementation of ECL. For different reasons BtoB and BtoC standardised contracts may require a high level of monitoring compliance. Different legal devices are illustrated by the Directives on unfair contract terms, and those on injunctions and late payment⁴. Within this framework consumers and trade associations can become '*monitoring agents*' of the European harmonisation process mainly to protect consumers and small and medium enterprises⁵.

² On the relationship between self-regulation and contract law see H. Collins, *Regulating contracts* (Oxford: OUP, 1999).

³ For example in Sweden the Consumer Agency headed by the Consumer Ombudsman has been very active in negotiating standard contracts with the business community, see *infra* n 30.

⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ [1993] L95/29, Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ [1998] L166/51 and Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, OJ [2000] L200/35.

⁵ Such a role however is certainly not strengthened by Regulation 2006/2004 on the cooperation among Consumer Protection Authorities [(Regulation on consumer protection cooperation), 27th October 2004], where the balance seems to have shifted towards public control. An open question concerns the interests of competitors and the possibility of protecting them through the Unfair Trade Practices Directive.

The Directive on late payment confers upon associations of small and medium enterprises (SMEs) the power to bring actions against firms which introduce clauses violating the directives. In this context associations can be monitoring agents of EPL on behalf of SMEs. This is an example of judicial monitoring of ECL performed this time by trade associations.

This monitoring function complements more traditional ones performed by the European Commission and by national institutions at MS level mainly operating through administrative law devices. The effectiveness and intensity of monitoring depend on the incentives that members can provide and by the necessity to acquire dominant influence. The current competitive framework in which both consumers and trade associations operate may provide significant incentives.

My conclusion is that self-regulation currently performs several functions at European level, it is already relevant for European Contract Law and may perform important functions in the process of drafting the CFR and more broadly in the process of harmonisation of ECL.

In relation to **standard setting**, SR can often be an **agent of harmonisation** operating (1) outside of legislation in the realm of freedom of contract, or (2) as a complement of European legislation contributing to producing soft law instruments or (3) as a means of implementing European harmonising legislation in place of national legislation when there is formal delegation to private organizations.

In relation to **monitoring**, it can operate as an agent to ensure implementation of EU law but can also govern differences that arise from diverging market structures or types of business conduct related to different national identities or business communities.

Both functions should be strengthened and can become part of a more structured institutional design aimed at ensuring that European private law integrates the different private competences and legal traditions. Furthermore to acknowledge the role of SR may shed light on the necessity to widen the choice among different regulatory strategies and to incorporate regulatory contracts into the domain of the new European Contract Law.

2. Self regulation and European Contract Law

SR is concerned with different types of contractual relationships. It encompasses *lex mercatoria* and BtoC relationships. The main focus of the essay is related to the latter but some references will also be made to the role of *lex mercatoria* on the formation of European Contract Law. Self-regulation has been indicated by the Commission and the Parliament as one of the possible means to harmonize European Contract Law. Building on the indications provided by the Action Plan the following Communication suggests promoting the use of EU-wide standard terms and conditions.⁶ Such a measure is definitely related to the development of a CFR It can operate at the European level in

⁶ See COM (2003), 68, final, part. 81-88 and then Communication from the Commission to the European Parliament and Council. European Contract Law and the revision of the acquis: the way forward, Brussels, 11.10.2004 COM (2004) 651 final (hereinafter ECL and the revision of the acquis). 'The second measure sought to promote the development by private parties of Standard Terms and Conditions (STC) for EU wide use rather than just in one single legal order', 6 See on these questions D. Staudenmayer, European Contract Law-what does it mean and what does not mean? In S. Vogenauer and S. Weatherill, The harmonization of contract law, Hart, 2006, p. 235 ff.

the framework of a multilevel system. The Commission has however modified its initial position declining the idea of operating as a facilitator hosting a website for the presentation of EU-wide standard terms and conditions⁷.

SR can perform different functions. It is useful to distinguish an institutional set of functions from a substantive one.

From an institutional perspective SR can complement :

- (1) legislative functions by contributing to the definition of contractual terms,
- (2) regulatory functions by defining (a) sector specific guidelines or, more specifically in the area of information regulation, (b) by introducing cognitive intermediaries.⁸
- (3) monitoring functions of European Contract Law by verifying correct implementation of EU law at Ms level.

From a substantive perspective it can contribute to the creation of standard contract forms according to different models and to their correct administration, ensuring compliance with EU legislation, in particular competition and consumer law. Accordingly, SR could contribute to contract law at EU level by defining European standard forms. Then implementation can occur at national level either through national self-regulatory systems or directly through enterprises applying the framework contract to specific transactions. The Commission in this context is seen a 'facilitator' of self-regulated production of contracts standard terms.⁹

Two main choices may characterize the use of Self-regulation as a means of harmonising European Contract Law:

- 1) **Complement or substitute.** Self-regulation can be a partial or a total device for harmonization, ie (a) it can be a complement to hard or soft law harmonisation or (b) it can, in certain areas, substitute hard law harmonization .
- 2) **General or sector-specific.** Self-regulation can be general and/or sector specific, i.e. it can operate within the general CFR or it can specify for individual sectors, unregulated or regulated (banking, insurance, securities), the general standard forms to be used.

SR is certainly limited by several constraints. In particular it is subject to competition law and to mandatory contract law limitations that can be found in the *acquis communautaire* and in the common principles of contract law in member states.¹⁰ Competition law and contractual fairness control both what can be standardised

⁷ See U. Bernitz, The Commission's Communication and standard contract terms, in S. Vogenauer and S. Weatherill, n. 6 above, 185 ff. part. p. 189

⁸ See on information intermediaries S. Grundmann, W. Kerber, 'Information Intermediaries and party autonomy – The example of securities and insurance markets', in S. Grundmann, W. Kerber, S. Weatherill, *Party autonomy and the role of information in the internal market*, (Berlin: Walter de Gruyter, 2001) 267.

⁹ See ECL and the revision of the *acquis*, n 6 above, 6, 'the content of STC is for market participants to determine and decision whether to use STC is also one for economic operators. The Commission only intends to act as a facilitator and an "honest broker" i.e. bringing interested parties without interfering with substances'.

¹⁰ As to the relationship between the use of self-regulation, Standard Terms and Conditions and competition law, the Commission explicitly acknowledge the limits associated with competition law. 'The Commission does not intend at this stage to publish separate guidelines relating to the development and use of STC. It has already pointed out that it generally takes a positive approach towards agreements that promote economic interpenetration in the common market and encourage the development of new markets and improved supply conditions. Although agreements on the development or use of EU-wide STC will therefore generally be looked upon positively, in certain

and how it should be standardised. The following analysis is devoted to a comparative examination of these two techniques and to illustrate the different yet consistent goals they pursue.

3. Self-regulation in European consumer contract law : paving the way for a more general approach?

The role of SR in consumer contract law specifically illustrates an intermediate hypothesis between the general approach which would concern the entire contract law and the sector-specific approach, regarding for example electricity, telecom or securities. Consumer law stands somehow in the middle: it is a policy area which is not sector specific but is limited to transactions between firms and consumers¹¹.

Self-regulation in the field of consumer law can support regulatory functions aimed at ensuring competition and improving freedom of choice by consumers related to different contractual terms. In particular, the comparability of different costs and quality of services can play a major role to ensuring the consolidation of an internal competitive market. It is generally held that it is the responsibility of MS to ensure such a comparability either by imposing obligations directly on undertakings or by promoting self-regulation as a response to high research costs.¹² However the Commission could promote European initiatives to foster coordination.

In which domains can self-regulation contribute to rule-making? Self-regulation, as a form of private regulation, can in principle only concern enabling rules. As we shall see, a different conclusion can be reached in relation to delegated self-regulation and co-regulation when a legislative act can legitimise the use of self-regulation and its ability to deviate from mandatory rules.¹³ But what is the current balance between mandatory and enabling rules in European contract consumer law?¹⁴

European legislation in consumer contract law has followed different patterns over time. While the initial stream was characterized by mandatory rules and the main goal of legislation by consumer protection, a second stream (the Consumer sales Directive 99/44) has opened to different types of contract rules that also encompass enabling rules.¹⁵ In the future, it is likely that European consumer legislation and more in general European Contract Law will encompass both mandatory and enabling rules.

cases agreements or concerted practices to use STC may be incompatible with the competition rules'. See ECL and the revision of the *acquis*, n 6 above, 7.

¹¹ See E. Hondius, Self-regulation in consumer matters at European level, in F. Cafaggi (ed.) *Reframing self-regulation in European private law*, (The Hague: Kluwer, 2006) pp. 237 ff.

¹² See for example Art 21 and 22, Universal service directive 2002/22. In particular, art 22 imposes on Member States' regulatory authorities the obligation to ensure that undertakings to 'publish comparable, adequate and up-to-date information for end-users on the quality of their services'. National regulatory authorities can use different organizational models to ensure such achievement, among which certainly self-regulatory arrangements.

¹³ A relatively structured regime of co-regulation in consumer law has been introduced in the UK with section 8 of the Enterprise Act where the Office of Fair Trading has been given the power to approve and withdraw approval of Consumer Codes. See on the issue G. Howells and S. Weatherill, *Consumer protection law*, 2nd ed. (Aldershot: Ashgate, 2005) 586 ff.

¹⁴ See S. Grundmann et al., n 6 above.

¹⁵ See the description of S. Grundmann, 'The Optional European Code on the Basis of the *Acquis Communautaire*—Starting Point and Trends', 10 *European Law Journal* (2004) 698.

A new culture concerning the harmonising role of enabling rules is developing although not always institutionally perceived.

The debate concerning the use of SR in consumer law has somehow followed this pattern. The dominant mandatory nature of consumer contract rules has led many scholars and legal systems to oppose the use of SR in the field, with the preoccupation that it would reduce the level of consumer protection. Now that consumer contract law is characterised by a combination of mandatory and enabling rules (see Directive 99/44), and that there is growing awareness of the regulatory capacity of enabling rules, the role of SR in consumer contract law should be re-discussed.¹⁶ Furthermore, the important changes concerning regulatory techniques and the development of co-regulation suggests that the fears then put forward might be today largely ungrounded.

Perhaps the most significant area is that of drafting standard contract forms. Standardising contract forms can at the same time benefit both firms and consumers. This activity can certainly reduce consumer search costs, however the regulatory function of consumer self-regulation should not be overestimated. The limits of consumers associations to operate as co-regulators are still quite significant.

Beyond standardisation SR can provide general rules as it is the case for codes of conducts. Directive 2005/29 EC of 11th May 2005 concerning unfair trade practices provides another good illustration of the potential role of self-regulation and co-regulation in the consumer field.¹⁷ This role, however, has been strongly reduced in the final version of the directive, while being much wider and better articulated in the initial proposal.¹⁸ However, the importance of self-regulation to define what constitutes a misleading practice is clear, as are the responsibilities arising when a binding code of conduct is in place. A new general principle is introduced: when a firm has committed itself to a code of conduct, non-compliance will be considered a misleading practice if the commitment is firm and verifiable and the trader has indicated in commercial practice that he is bound by the code.¹⁹

Certainly the modes of self-regulation play a very important role in ensuring that a high level of consumer protection is achieved in the building of a European system of contract law. However the analysis of different modes through which SR can contribute to the creation of ECL can not be limited to consumer law and should encompass also business to business relationships. A general model of SR related to all contractual relationships should be devised.

4. European Contract Law and different self-regulatory arrangements

Self-regulation may contribute in different ways to the creation of European Contract Law. To illustrate a functional and a structural distinction can be employed. According to the functional distinction, mentioned above, self-regulation can perform standard

¹⁶ For a general and relevant scholarly contribution on these questions see Collins, n 2 above.

¹⁷ See 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, OJ [2005] L149/22. On the relationship between the directive and consumer contract laws at European and national level see recital 15.

¹⁸ On the Proposal see the contributions in H. Collins (ed.) *The forthcoming EC Directive on unfair commercial practices* (The Hague: Kluwer international, 2004).

¹⁹ See art 6.2 (b), i and ii, Dir Directive 2005/29, n. 17 above

setting, monitoring and enforcement. In relation to structure it can operate through contractual or organizational models.

Self-regulation can perform standard setting functions both in the area of consumer protection and in that of business to business transactions. It may play a role in defining general standard terms and conditions of Contract law.²⁰ The functions may differ, given the complementary nature of SR to state regulation, in the areas of BtoC, BtoB²¹, and BtoB. SR can play, and *de facto* plays, a more relevant role in BtoB relationships and more in general in relation to *lex mercatoria*.²²

Self regulation can also operate as a monitoring system to identify different modes of implementation of European Contract Law intertwined with the uses of private autonomy. If the intuitions of neoinstitutional economics are correct, there might be good reasons to believe that the exercise of freedom of contract differs in relation to institutional frameworks, but also to behavioural patterns of contracting parties. It is therefore likely that different contract clauses might be introduced due to the presence of different socio-economic actors within the same market. Self-regulatory bodies can monitor these processes and help to coordinate and govern the differences. The role of self-regulation would differ if monitoring concerns BtoB or BtoC relationships.

In addition, SR can operate to solve contractual disputes by complementing the judiciary.

In this part of the paper, I focus on standard-setting and distinguish between its different dimensions. Later I will deal with monitoring.

SR can contribute to the definition of general terms and conditions within the CFR envisaged by the European Commission. It can play a more significant role in the design of framework contracts and standard contracts in specific sectors (banking, insurance, transport, etc.). Given the enabling nature of many contract clauses, self-regulation may complement legislative activities to provide default models that can standardise terms. Several initiatives are already in place, especially for those industries with relevant network effects such as insurance, banking, telecom and transport.

5. The different models of private and self regulation in European Contract Law and its relevance to competition and contract law

Different models of SR are employed in the domain of ECL. The most significant distinction is related to the alternative between contractual and organizational modes.

Within the contractual model of SR different activities can take place:

- creation of standard contract forms, or
- broader engagements aimed at defining a complex set of rules associated with consumer transactions or

²⁰ An example in this area is provided by the activity of the International chamber of commerce which provides terms for international commercial contracts: The Uniform Customs and practice for documentary credits (UCP) and Incoterms (international commerce terms).

²¹ By B to b relationship we mean relationship between firms that operate in an asymmetric context be it asymmetric market power or asymmetric information or caused by other factors.

²² BtoB refers to business to business relationships operating on equal arms. B to b, instead refer to relationships between firms with different contractual power.

- even more broadly to different types of transactions defined in scope by the regulatory field (energy, telecom, environment, etc.) concerning relationship with customers and end-users.

When the contractual model is employed, the parties design a regulatory contract to regulate conduct concerning contractual and non-contractual relationships. To some extent regulatory contracts may coincide with framework contracts but they may be very detailed or, on the contrary, very general, simply defining principles to be detailed in framework contracts. The obligations arising out of these contracts can in principle only affect signatories of the contract, but in fact often also regulate relationships between signatories and third parties. For example, these contracts may oblige parties to introduce or to refrain from introducing clauses in contracts with third parties, be they firms or consumers. The performance of these obligations is monitored by parties through the conventional apparatus of contract law. Although these contracts are generally not specifically regulated by civil codes or common law, with some adjustments, general contract law should be deemed applicable to them²³.

The main issue is related to the effectiveness of these contracts in relation to third parties. For example, if the signatory of a code of conduct is bound to refrain from inserting a clause in a contract with a consumer, how can the breach of the code affect the contract between the firm and the consumer? Does it only have consequences among signatories, usually firms, or can the consumer, technically a third party, sue the enterprise on the grounds of the breach of regulatory contract or the code of conduct?²⁴. Legal systems of European Member States differ quite significantly but reasonable reliance on the binding nature of the regulatory contract can be a relatively strong basis for such a claim. The principle of reliance is becoming a strong basis for enforceability in contract law and more broadly in consumer law as the Directive on unfair trade practices shows.²⁵

The complexity of these regulatory arrangements may require a stronger and broader set of devices than those that can be provided by contracts. Parties may thus decide to set up an organization with different legal forms: association, foundation, company, cooperative, etc. Such an organization would produce rules through the enactment of codes of conduct and regulatory contracts, but also guidelines, codes of best practice, etc. dealing both with internal governance and with the activity concerning members and their relationship with third parties. The organization will generally monitor its compliance through a specific apparatus or delegate this function to an independent body unlike the contractual system which will generally refer to a public judge or an arbitrator.

So far we have considered models employed by private parties and implicitly assumed that these would be firms. In the real world there may be higher diversity.

²³ Adjustments may be required in the area of *causa/cause/consideration*, and in that of remedies, where sanctions for breach should not be focused on damages but on specific performance (i.e. to enforce the regulatory obligations) and the typical contractual sanctions can be combined with reputational ones.

²⁴ The implications of this alternative are clear. If the consumer is allowed to bring a legal action on the ground of the regulatory contract she can claim damages even in case of void contracts and pre-contractual unlawful conduct breaching obligations determined in the code of conduct. Otherwise she will only be able to sue on the grounds of a valid contract and therefore will have no contractual remedy in case of breach of regulatory obligations by the firm when the contract is void.

²⁵ See F. Cafaggi, *Regulatory contracts, Codes of conducts, reasonable reliance and third parties*, unpublished manuscript.

Both the contractual and organizational alternative can involve different categories. In the realm of BtoC relationships there are framework contracts or organizations composed of trade and consumer associations. In the realm of B to b relationship we observe the same phenomena with the development of framework contracts and mixed organizations. Here the main problem is connected to the relationship between these contracts and/or organizations and the individual positions of members and non-members. Do these contracts bind only members? Or can they bind non members too? In the case of consumers can a framework contract signed by consumers' associations prevent consumers from bringing a legal action against the firm belonging to the trade association which signed the contract? The answer, according to the general contract and organizational law, is in many legal systems negative. The main role of these contracts in relation to third parties and organizations is only persuasive due to the privity constraints. However, the rules defined by these contracts and/or organizations may have some legal effects to the extent that they are recognised as custom or practices and thus constitute minimum standards.²⁶

The current relative weakness of these instruments as regulatory tools has been in part the driver for the development of co-regulation or delegated self-regulation at European and national levels.²⁷ There is a diffused scepticism about the credibility of self-regulation and its ability to deal with conflict of interests and with market complexity. In addition and perhaps most importantly enforcement of self-regulatory arrangement is generally deemed insufficient.

The development of regulated self-regulation has taken different forms. Worth mentioning are co-regulation and delegated self-regulation:

- a) where the government or an IRA themselves become part of the regulatory arrangement. They can sign codes of conducts, promote or favour their drafting, they can approve them *ex post*;²⁸
- b) when there is a formal delegation by a legislative or administrative act without direct intervention of a public authority.²⁹

These two models can be briefly analysed in relation to the alternative between contract and organizations. In the first case, co-regulation, we can further sub-divide the typologies. Contracts are generally trilateral with the participation of trade and consumer associations, and some public entity. Here the legal regimes may vary if the legal systems distinguish between government contracts and private contracts. The applicable law would depend upon the meaning attributed to the participation of a public entity to the self-regulatory arrangement. In some case it would be contract law in other cases administrative law.

In the second case contracts are still produced by one category (firms) or by two private groups (firms and consumers) but the public entity can provide the legitimacy to broaden the effects of those contracts beyond the signatories.

²⁶ See F. Cafaggi, *The regulatory function of customs and usages in European Contract Law*, unpublished manuscript.

²⁷ See F. Cafaggi, 'Rethinking Self-regulation', in Cafaggi n. 11 above.

²⁸ Concerning Sweden, see *infra* n. 30.

²⁹ For example a clear relation between the use of expertise and co-regulation is expressed in the European Commission, European Governance, White Paper, Brussels, 25.7.2001, COM(2001) 428 final: 'Co-regulation combines binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise. The result is wider ownership of the policies in question by involving those most affected by implementing rules in their preparation and enforcement. This often achieves better compliance'.

Symmetrically for the organizational model: we can have dual-stakeholder model in which firms and consumers, individually or associated, create an organization whose activity is legitimated *ex ante* or *ex post* by the government or multi-stakeholder organizations where the government participates directly into the organization. Direct or indirect governmental participation may affect not only governance issues but also the nature of the regulatory activity and its effects on third parties.

It should be mentioned that in countries where consumer protection is perceived as a public interest function, the role of the associations is mainly performed by public or quasi-public entities. In these cases contracts are signed by the trade associations and the Consumer Ombudsman or Consumer Agency.³⁰

To conclude, we can have different types of contractual and organizational arrangements aimed at contributing to produce contract rules in BtoC and BtoB relationships.

Contractual agreements, designed to define contract terms can take the following forms:

- A1) Single-stakeholder agreements (only among firms)
- A2) Dual-stakeholder agreements (between firms and consumers or different firms)
- A3) Multi-stakeholder agreements (firms, consumers, government, IRAs, etc).

Organizational arrangements can also be subdivided in three categories:

- O1) Single stakeholder organization (only among firms)
- O2) Dual stakeholder organization (between firms and consumers or different firms)
- O3) Multi-stakeholder organization (firms, consumers, government, IRAs, etc.)

These distinctions are relevant for the reasons outlined above, ie the effects of contracts, and the activity of the organizations may be different according to the identity and powers of the participants.

Table 1

	Unilateral (single stakeholder)	Bilateral (dual- stakeholder)	Multilateral (multi- stakeholder)	
Contractual	Only among firms	Between trade and consumer (or other trade) associations	Among trade, consumer associations and public actors	
Organizational	Composed only of firms	Composed of trade and	Among trade, consumer	

³⁰ For example in Sweden the Consumer Agency headed by the Consumer Ombudsman enters into contracts with trade associations in various fields, for instance on standard contracts and on marketing rules. Much of the work of implementing consumer policy is founded on results achieved through these agreements with the business community. For examples of these agreements (in Swedish) see the website of the Consumer Ombudsman <http://www.konsumentverket.se/mallar/sv/artikel.asp?lngArticleID=315&lngCategoryID=854>.

In Germany The only agreement sometimes referred to as such and involving government representatives is the “Vergabe- und Ver-tragsordnung für Bauleistungen Teil B (VOB/B)” (Awarding and Contracting Code for Construction Services). It is sometimes argued that the different State agencies involved in its negotiation do actually not only represent state interest, but also private homeowners/builders. For a critique of this viewpoint see H.-W. Micklitz, Die Richtlinie 93/13/EWG des Rates der Europäischen Gemeinschaften vom 5.4.1993 über missbräuchliche Klauseln in Verbraucherverträgen und ihre Bedeutung für die VOB Teil B, available at http://www.vzbv.de/start/index.php?page=themen&bereichs_id=2&themen_id=55&dok_id=290&search_1=vob&search_2=&hilting=yes (last visited July 7, 2006).

		consumer or other trade) associations	associations and public actors	
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The content of these contracts when they regulate BtoC transactions has to be scrutinized under both competition law and contractual unfairness. The content of these contracts when they regulate BtoB transactions has to be scrutinized under competition law and unfairness either partially (see the case of late payment directive) or totally, when unfair contract terms scrutiny is applicable to all contractual relationships. As we shall see these variables have a legal relevance both in contract for the purpose of determining fairness and in competition law

Table 2

	Contract	Organization		
Regulatory contracts	Agreements Concerted practices	Decisions by associations of undertakings		

I will first explore in greater depth the alternatives above defined. Then I will identify some features of the competition scrutiny and unfairness scrutiny, and finally examine some possible reasons for variations of competition and (un)fairness evaluation in different legal systems

To what extent might the nature of the self-regulatory body that defines the standard terms affect the regulatory output, ie the contractual models?

The organizational alternative implies the relevance of the composition of the self-regulatory body and the representation of different interests.

In the contractual alternative, the nature of the parties who participate in the agreement affects the nature of the regulatory contract. If the regulatory contract is defined only by undertakings it is a unilateral act, if both manufacturers and consumers participate it is a bilateral contract, if other constituencies participate is a multilateral contract. To the extent that legal systems differentiate the legal regimes of these acts there are differences.

The organizational perspective incorporates the alternative as a matter of composition of the body. If, within the self-regulatory body, only manufacturers are represented, the regulatory contract would only be a unilateral act. If in the organization both categories are represented, would the framework contract or the code of conduct have contractual basis? If this approach is accepted then the composition of the regulator would affect the nature of the act. If the composition is multi-stakeholder then the contract will be multilateral.

When contract terms are defined by an association of undertakings a question might arise as to the nature of that organization and the amenability to judicial review of the activity it performs. The regulatory contract in this case could be scrutinized under aspects impossible to scrutinize if the standard forms were simply the outcome of a contractual agreement of a purely private self-regulatory body.

Other relevant factors concerning the organizational models may be the for-profit or non-profit form of the organization and the gratuitous or non-gratuitous nature of the activity. The question is whether we can expect different outputs (standard terms and contracts) from for profit or non-profit organizations, and from selling arrangements or gratuitous ones.

Most of the organizations that produce standard contract terms and forms have a non profit form. However this should lead to the conclusion that they pursue charitable goals. They are typically mutual and they supply these forms to their members, which are for profit enterprises. There is an agency relationship affecting the regulatory output (standard contract forms or terms). They act in their own self-interest and in the interest of their affiliates. As it is the case for competition law purpose this distinction should not play a big role.

A more convincing perspective is related to the distinction between mutual and public interest organizations. The former pursuing exclusively the interests of its members that latter aiming at public interests. The real difference might be between independent and not independent organizations. There are some organizations that are independent from both suppliers and consumers that produce standard contract forms. They generally operate in the international market. If we were to make a distinction between different regulations concerning standard forms this distinction, more than the for-profit non profit, should be the one to look at.

There are two final points worth mentioning, concerning both contractual and organizational models.

One aspect is related to the nature of the produced services or goods. Whether these terms and contracts are sold in the market or are simply supplied gratuitously might make a difference in terms of the nature of the output and may play a role in the institutional design concerning the use of self-regulation and co-regulation at European level.

The other aspect is related to the legal protection of the regulatory output. Often standard contract forms are copyrighted or protected through unfair competition law. An open and relatively unexplored question concerns the relationship between the modes of diffusion (for sale/gratuitous) and the nature of protection (copyright/unfair competition)³¹.

Furthermore suppliers and users of contract terms and forms may have different preferences. Often there is segmentation on both sides and private organizations that are monopolists try to balance these interests internally through their governance systems, those which operate in a competitive setting tend to maximize their members' welfare at the expenses of other segments of the contracting population. Analogous reflections can be made for contractual models. In both cases competition law preserves the heterogeneity of the preferences system.

6. Contract standardisation and the nature of standard form contracts: coupling competition and contract law controls.

Standardisation and differentiation of contracts represent one feature of self-regulation of contract law worth focusing upon³². Trade associations generally operate as contract standardisers but there are other forms of governance concerning contract terms which are less one sided. In the latter case the role of contractual or organizational arrangements is to govern differentiation of contractual terms in ways compatible with the functioning of industry. Instead of drafting contract forms they can issue guidelines

³¹ See F. Cafaggi, *Private organizations and transnational contract law*, unpublished manuscript.

³² See E. Hondius, n. 11 above, pp. 237 ff., J. Calais Auloy and F. Steinmez, *Droit de la consommation*, 6th ed., (Précis : Dalloz, 2003).

concerning principles or more general rules. At transnational level the problem is concerned with the governance of *lex mercatoria*.³³ The question of standardisation in this case takes different forms. They may produce both positive and negative effects. It is very difficult, if not impossible, to define *ex ante* the optimal level of contract standardisation/differentiation.

The benefits of standardisation concern both firms and consumers.³⁴

The incentives to standardise may exist independently from anticompetitive goals. The problem thus is to distinguish between competitive and collusive standardisation. The proposed criterion is the incompleteness of standardisation, to be compatible with competition, standardisation of contracts should not be complete.³⁵

Differentiation may produce positive effects. It promotes competition among firms and it enhances freedom of consumers' choice. Again it should be pointed out that contracts' differentiation in services contracts implies product differentiation. Differentiation can also produce negative effects by increasing research costs and decreasing contracts and products comparability.

There are limits to standardisation in the interest of consumers. Standardisation can be scrutinized under competition law and under unfair contract terms. In addition, further scrutiny of contract standardisation may occur in regulated sectors where public

³³ On this question see A. Stone Sweet, 'The new *lex mercatoria* and transnational governance', 13 *Journal of European environmental policy* (2006) 627 ff. and U. Bernitz, the Commission's Communication cit. p. 191.

³⁴ For firms, contract standardisation may generate product standardisation thereby producing economies of scale and scope, and reduction of production costs. The effects are quite different if contracts are related to products or to services. In the latter case, when the contract is the product itself, as it is the case for banking, securities or insurance, standardisation of contracts and products coincide and are likely to reduce competition among firms to a higher degree.

For consumers, contracts' standardisation reduces consumers' research and learning costs. There might also be a functional link between standardisation and transparency, as a normative requirement. Market transparency may in fact require a certain level of contract standardisation to ensure comparability. Sometimes standardisation is a precondition for the creation and the efficient functioning of a market.

Secondly, contracts' standardisation may reduce switching costs. Switching costs operate in relation to repeat contractual relationships. When switching costs are high, consumers may be locked in. When they are low consumers' ability to choose and move is enhanced. However depending on the context standardization may also increase switching costs and constitute the primary achievement of the drafter. The nature of switching costs may affect the interpretation of the standardisation and contribute to decide whether or not is anticompetitive. Switching costs may be exogenous or endogenous (produced by the firms to lock consumers in). Endogenous switching costs tend to be anticompetitive and may influence the evaluation concerning compliance with competition law.

An illustration of the benefits of standardisation is provided by recital 14 of Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector ("the Insurance Block Exemption"), OJ [2003] L 53/8 'Standard policy conditions or standard individual clauses and standard models illustrating of a life assurance policy can produce benefits. For example, they can bring efficiency gains for insurers; they can facilitate market entry by small and inexperienced insurers; they can help insurers to meet legal obligations; and they can be used by consumer organizations as a benchmark to compare insurance policies offered by different insurers'. See more specifically Art 5, Condition for exemption, and Art 6, Agreements not covered by the exemption.

³⁵ See M. Grillo and M. Polo, 'La standardizzazione dei contratti bancari con particolare riferimento alle Norme bancarie uniformi', in *Cooperazione e credito* (1997) 475. 'La sola condizione che deve essere soddisfatta affinché la standardizzazione possa essere compatibile con un equilibrio non collusivo è che essa non sia completa'.

or private regulators have to control the content of contracts and their compliance or lack of violations of regulatory goals.

According to competition law, standardisation should not be abusive, i.e. it should not be a means to introduce contract clauses imposing unfair burdens on consumers. Consumer welfare would be negatively affected in both cases but in different ways. In fact there can be anticompetitive but not abusive contract standardisation.³⁶ On the other hand there might be abusive standardisation, unlawful under the Unfair Contract Terms Directive, but compatible with competition law.³⁷

A second issue concerning the limits of self-regulation in relation to standardisation is related to the modes of negotiating standard contract terms. Under directive 93/13 Art. 3.2, individually negotiated terms fall outside the scope and judges can test unfairness only using general contract law.³⁸ When terms have not been individually negotiated they are subject to scrutiny under the unfair contract terms directive.

No specific rules are provided in the Directive to distinguish between individual and collective negotiations. Collectively negotiated standard form contracts fall within the scope of the Directive, since the directive is aimed at conferring rights upon individual consumers. Thus bilateral or multilaterally negotiated standard form contracts, as defined above, should be subject to judicial scrutiny to test their compliance with rules concerning unfair contract terms. This will occur even when negotiated contracts are only recommended and not legally binding for firms. In competition law, negotiated standard form contracts have not been treated much differently from unilaterally defined standard contract terms³⁹. While collectively negotiated standard contract forms may have a strong political impact on the rate of litigation, legally they do not deprive individual consumers of their rights to claim unfairness. To acknowledge the role of collective negotiations and more in general of self- and co-regulation may suggest some changes in current European law.⁴⁰

³⁶ There are cases from Sweden, where the Competition Authority has scrutinized standard agreements negotiated and entered into between different Trade Associations and the the Swedish National Board for Consumer Policies (headed by the Consumer Ombudsman). These agreements are consumer friendly. However, at least on one occasion the Competition Authority declared anticompetitive an agreement negotiated and entered into by the Consumer Ombudsman, see Case Dnr. 1788/93 *Sveriges Trähusfabrikers Riksförbund* (A Case concerning individual exemption of an agreement under the equivalent of Article 81 (3)). See also Case Dnr. 1837/93 *Sparbankerna* and Case Dnr. 1867/93 *Bankföreningen* regarding standard agreements drafted by Trade organizations or co-operations after consultation with both the Swedish Financial Supervisory Board and the Swedish National Board for Consumer Policies and scrutinized by the Swedish Competition Authority.

³⁷ Often, however, abusive standardisation is considered anticompetitive. It should always be kept in mind that the abusive nature of contract clauses is the effect and not the cause of the anticompetitive nature of the agreements.

³⁸ On the debatable rationale see S. Weatherill, *Consumer law and policy*, (Cheltenham : Edward Elgar, 2005) p. 118

³⁹ See below text and footnotes.

⁴⁰ See below the conclusions par. 15.

7. The competition law limits to using self-regulation in ECL

The relationship between competition and consumer law has been the recent focus of scholarly debate, echoed by institutional interventions.⁴¹ The nature of this relationship is very relevant for the questions we are addressing from both an institutional and a substantive standpoint. The main issues concern the nature of the relationship between the two areas, their scopes and functions.⁴² Are consumer and competition law functional complements or equivalents when promoting consumer welfare? If consumer law is mainly interpreted as a regulatory field how can it complement competition law?⁴³

It should be pointed out at the outset that in MSs there are very different traditions concerning the role of trade associations, consumer associations and public authorities for the creation of contract law rules, standard contract forms in general and specifically consumer contracts. While in Nordic countries the role of consumer associations is relatively weak and trade associations negotiate their standard terms with Ombudsmen and Consumer Agencies, in other other MS they are powerful because entrusted of public functions⁴⁴. Finally in a third group MSs bilateral negotiations are more common and the public authority intervenes, if at all, only *ex post*.⁴⁵

⁴¹ See A. Albor Lorens, 'Consumer Law, Competition law and the Europeanization of private law', in F. Cafaggi (ed.), *The institutional framework of European Private Law*, (New York: OUP, 2006), pp. 245 ff.; T. Wilhelmsson, 'Cooperation and competition regarding standard contract terms in consumer contracts', 17 *European Business Law Review*(2006) 49; Micklitz, n 10 above, 49 ff, J. Stuyck, 'EC Competition law after modernisation: More than ever in the interest of consumers', *Journal of Consumer Policy* [2005] 1; Howells and Weatherill, n 13 above, 517 ff.; N. Reich, 'The "Courage" doctrine: encouraging or discouraging compensation for antitrust injuries?', 42 *Common Market Law Review* (2005) 35.

⁴² These questions are addressed in the Green paper on Damages actions for breach of EC antitrust rules, Brussels, 19.12.2005, COM(2005) 672 final. Recent ECJ case law has further specified the rule defined in C-453/99, *Courage v. Crehan*, [2001] ECR I-6297, stating that : 'Article 81 must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, when there is a causal relationship between the latter and the harm suffered, claim compensation for harm. In the absence of Community rules governing the matter, it is for the domestic legal system of each member state to prescribe the detailed rules governing the exercise of that right'. Then the Court points out what MS have to specify the concept of causal relationship, the identification of the competent courts and the rules of civil procedure, the limitation period, the extent of damages and in particular punitive damages. See C-295/04, *Manfredi v. Lloyd Adriatico and others*, 13 July 2006, (ECJ-nyr).

⁴³ The answer to this question may very well depend on the functional approach to consumer law. It is important to underline the two-way relationship existing between consumer and competition law. Competition law presupposes that market failures, particularly asymmetric information, have already been addressed through administrative regulation or consumer contract law. Does Consumer law presuppose a competitive market? In case it does not do its features change if the market is monopolistic or competitive?. Many devices, for example rules on information, would be deprived of their most important functions, ensuring freedom of choice, in a non-competitive market. Market forms affect substantially the function and the structure of consumer law. This variable should be explicit and different rules allowed according to the structure of the market.

⁴⁴ See E. Hondius, n. 11 above, pp. 237 ff. part. 239.

⁴⁵ See supra note 30 and also J. Hellner, 'The Consumer's Access to Justice in Sweden', *RabelZ* (1976) 727 ff.; see also A. Bakardjieva Engelbrekt, *Fair trading law in flux?: national legacies, institutional choice and the process of Europeanisation*, PhD thesis 2003, Stockholm University, 312.

When applying competition law a relevant distinction is often made between laws that impose on trade associations the obligation to consult consumer associations and laws that impose or favour agreements between trade and consumer associations. In this context I shall focus on a particular aspect of this relationship: the limits imposed by competition law to new modes of private regulation, particularly self-regulation, potentially affecting its use for European Contract Law. Thus not only pure forms of self-regulation but also delegated self-regulation and co-regulation will be considered.

The competition limits are defined in articles 81 and 82 of the Treaty as interpreted by the Commission and the ECJ, and specified in Guidelines issued by the Commission.⁴⁶ The ECJ case law, applying competition law principles to self-regulatory arrangements, is very rich in relation to agreements or decisions where there is some public intervention either *ex ante* or *ex post*. Less rich is the case law regarding bilateral agreements between trade and consumer associations concerning standard contract forms, except for cases in which these agreements are imposed by law featuring mandated self-regulation.

The analysis is focused in general on SR arrangements with special but not exclusive emphasis on standard contract forms concerning business to consumer transactions. It is related both to consumers of goods and of services.

In certain areas, for example insurance, European Regulations with block exemptions have been enacted so as to permit contract standardisation.⁴⁷ There are normative differences related to sectors and in particular between those where contract terms define the product, as it is the case for insurance, credit or securities, and those where contract terms are instrumental to the exchange.

When looking at the limits imposed by competition law on self-regulatory arrangements, it becomes clear that they differ between firms producing goods and undertakings producing professional services. It is true that suppliers of professional services are considered undertakings and therefore subject to competition law, nonetheless the application of the test to self-regulatory arrangements concerning products is different from that related to services produced by professionals.⁴⁸ This distinction is less relevant in relation to industry-provided services as banking and insurance show.⁴⁹

To evaluate competition limits to the use of SR in ECL three issues have to be addressed:

- a) The framing of these arrangements for competition law purposes.
- b) The applicability of competition law to different types of self-regulatory arrangements.
- c) The types of control and the effects on these arrangements once competition law is deemed applicable.

⁴⁶ See in particular Guidelines on the applicability of Art. 81 of the EC Treaty to horizontal cooperation agreements, OJ [2001] C3/2.

⁴⁷ In the insurance sector see Reg 358/2003, n. 34 above, and before Reg 1534/91 on the application of Article 81.3 to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ 1991 L143/1. On this question see Wilhelmsson, n. 41 above, 63 ff.

⁴⁸ According to the case law of ECJ the proper practice of the profession may require regulations that produce anticompetitive effects. See C-309/99 Wouters [2002] ECR I-1577, para. 110. For a wider examination see Communication from the Commission, Report on Competition in professional services, Brussels, 9.2.2004, COM (2004) 83 final.

⁴⁹ Some specificities are however significant. See in the sector of insurance the block exemption regulation 358/2003, n. 34 above.

As mentioned, one relevant area of self-regulation is represented by contract standardisation. Within this frame I shall consider not only standard forms but also codes of conducts and governing rules of trade associations that can affect contract terms employed by members in their contractual relationships.⁵⁰

How are self-regulatory arrangements framed for the purpose of competition law scrutiny? There is a relative symmetry between SR arrangements and the different typologies considered by competition law as the following table shows.

Table 3

	Single-stakeholder	Dual-stakeholder	Multi-stakeholder	
Contractual SR Agreements (Art. 81)	Contracts only among firms	Bilateral contract between associations Between trade and consumer (or other trade) associations	Multilateral contract. Among trade, consumer associations and public actors	
Organizational SR Decisions of undertakings (Art. 81)	Organizations composed only by firms	Association of associations. Composed by trade and consumer associations	Association of associations. Among trade, consumer associations and public actors	
Usages/Customs Concerted practices				

The different models of SR examined above are well reflected in the competition law regime.⁵¹

Certainly the formal differences between contract and competition law are still very relevant and for good reasons since contract and competition law perform different functions.⁵² However these differences are not such so as to prevent a comparison between competition and contract for the purpose of a unified theory of self-regulation in European Contract Law.

The contractual model of self-regulation is reflected in the category of agreements while the association of undertakings can be related to the organizational

⁵⁰ The constitution of a trade association, its governing rules have been considered decisions of associations of undertakings for the purpose of the application of Art. 81. See Commission Decision in Aspa JO [1970] L148; and Nuovo Cegam Commission Decision 30 March 1984, OJ [1984] L99.

⁵¹ See the tables 1 and 2 above.

⁵² On the relationships between competition and contract law a lively debate has developed recently : see R. Pardolesi, 'Il contratto e il diritto della concorrenza', in G. Gitti (ed.) *L'autonomia privata e le autorità indipendenti*, (Bologna: Il Mulino, 2006) 159 ff; M. Maugeri, *Abuso di dipendenza economica e autonomia privata*, (Milano: Giuffrè, 2003); G. Vettori, 'Contratto e concorrenza', in G. Vettori (ed.), *Concorrenza e mercato. Le tutele civili delle imprese e dei consumatori* (Padova: Cedam, 2005) 1.

model.⁵³ It is unclear what the functional equivalent of concerted practices can be in the field of self-regulation. Perhaps some correlation with customs and usages can be drawn but a full analysis of this comparison is beyond the scope of this essay.⁵⁴ We can therefore distinguish between contractual and organizational self-regulatory arrangements in competition law as well.

Within this framework, is the distinction between single, dual and multistakeholder agreements/organizations relevant in competition law?

Can organizations where there is bilateral (firms and consumers, or firms with different market powers) or trilateral representation (including public actors or other private organizations) be considered associations of undertakings or agreements for the purpose of Art. 81?

Is the applicable test different from that applied to single-stakeholder agreements and organizations?

Can agreements, signed by trade and consumer associations and approved by public authorities, be considered scrutinisable under Art. 81 EC?

In the case of an affirmative response, should they be scrutinized under competition law, or should they be exempted if their main goal is to pursue consumer protection and/or public interest?

At the core of these questions is the issue concerning the relevance of the nature of different participants to self-regulatory arrangements?

On the one hand the difference between single and dual stakeholder organizations, and in particular the role of consumers associations may suggest that a different set of rules may be put in place. On the other hand the participation in different ways of public authorities may affect the nature of the self-regulatory body. In simple words, what is decisive to define the threshold for the application of competition law? Who they are, or what they do?⁵⁵

The European Commission and the European Court of Justice are always forced to enter a functional examination of the role played by the participants to the self-regulatory arrangements and which interests they are meant to represent. The nature of the participants in the association defining standard forms, or the signatories to the agreement is certainly a significant feature but not a decisive element to decide whether or not 'competition law control' should apply. If they represent the public interest and not only that of one category, particularly of firms, these decisions are generally held to be compatible with competition law.⁵⁶ The path along the nature of the participants to

⁵³ The organizational model from a private law perspective can employ different forms beyond association, such as foundations, companies, cooperatives.

⁵⁴ For a broader examination see Cafaggi n 25 above.

⁵⁵ According to the case law the fact that the an association with regulatory functions consist of members other then only representatives of the industry is taken into account in assessment of whether competition law rules will apply to the activity of the association or not.

⁵⁶ See C- 185/91, *Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH and Co. KG*, [1993] ECR I-5801, par. 24 :

'It must be therefore be stated that in reply to the question submitted that Article 3(f) the second paragraph of article 5 and article 85 of EEC Treaty do not preclude rules of a Member State which provide that tariffs for the long distance transport of goods by road are to be fixed by tariff board and are to be made compulsory for all economic agents, after approval by the public authorities if the member of those boards, although chosen by the public authorities on a proposal from the relevant trades sectors, are not representatives of the latter called on to negotiate and to conclude an agreement on prices but are independent experts called on to fix the tariffs on the basis of considerations of

the agreement or the association does not seem very promising. While relevant, this criterion should not be decisive to decide on the applicability of competition law.

While it would be inappropriate for the purpose of deciding the applicability of competition law to distinguish between associations composed only by undertakings and associations with mixed composition, i.e. undertakings and consumers' associations, it is clear that the latter should require a different approach when internal power allocation reflects public interest's concern. This should imply the recognition of the specificity of negotiated self-regulation, both when it is bargained only among firms or between firms and consumers, and when public actors also participate in the drafting of codes of conduct or of standard forms contracts. Currently the negotiated nature of the agreement does not play any meaningful role but the presence of signatories, such as consumer associations, may be revealing of public interest. In this case it should affect the nature of the applicable test.

A more difficult question concerns organizations and agreements where the State or a public agency is represented. Here the divide between pure self-regulation and delegated private regulation becomes blurred since the criteria, generally used by ECJ, refer to *ex post* approval. In other contexts, the substitution power by the public entity, when the activity of the self-regulatory body is unlawful, has been used to decide on the applicability of Art. 81.⁵⁷

The question of whether and how competition law is applicable should be dealt using a different approach from that currently employed by Commission and ECJ. The scrutiny concerns the rationale for public participation into the self-regulatory arrangement to evaluate whether the public interest, represented by public actor's intervention, justifies the limits to competition introduced by standardization.⁵⁸

Different constraints related to competition law are in place according to the adopted regulatory model. In particular different rules apply to pure self-regulation, to co-regulation, and to delegated self-regulation due to the role of public authorities and their duties to comply with competition law principles. They reflect a balance between interests protected by competition law and other public interests different from those related to purely private entities. The anticompetitive nature of specific contract clauses may be disregarded if the overall purpose of standardised contract terms or that of the code of conduct is consumer protection or public interest protection, as it would be the case for certain environmental agreements. Often these conflicts concern EU competition law and national public interest, thus they can be articulated as vertical conflicts; however it may happen that they relate to different EU rules (competition and environment, competition and consumer protection) even if they take place at national

public interest and if the public authorities do not abandon their prerogatives but in particular ensure that the boards fix the tariffs by reference to considerations of public interest and, if necessary substitute their decision for that of the board'.

⁵⁷ For a notable (and somewhat controversial) recent case, see Case C-35/99, Criminal Proceedings Against Manuele Arduino [2002] ECR I-1529, where the Court of Justice found that the practice, used by the Italian Bar, of fixing attorney's fees in decisions, which were binding (to a large extent) on national courts when awarding legal costs, is *not* caught by Article 81(1), predominantly because the tariffs, once decided by the Bar, had to be approved by the Minister for Justice who, in turn, had to consult the Interministerial Committee on Prices and the Council of State. The Opinion of Advocate General Léger in that case is highly insightful for, although he reaches effectively the same conclusion as the Court, his approach is more subtle, as he places great emphasis on *effective control* by the Member State of the common pricing scheme.

⁵⁸ This is also explicit in the reasoning of the Advocate General in the case cited previously.

level; in this case we can speak of horizontal conflicts. The distinction between vertical and horizontal conflicts reflects different balancing tests to decide between competition policy and other interests.

The normative suggestion is to allow the application of competition law to self-regulatory arrangements, but to modify the test so as to balance the different goals pursued by these codes in the interests of consumers or, more in general, those of market participants. The change concerning the test applied by ECJ should move from a formal evaluation of a state's participation into these agreements to a substantive examination of public interest(s) involved. When public interests at stake are high the competition threshold can be lowered.. Such a change may have a positive impact on the use of self-regulation, co-regulation and delegated private regulation in the field of ECL, and ensure that its consolidation proceeds.

8. Applicability of competition law to codes of conduct and other self-regulatory arrangements influencing the formation of ECL

I now turn to a more detailed analysis of the distinction between different self-regulatory arrangements characterized by the absence/presence of public authorities in competition law.

When is competition law applicable to self-regulatory arrangements? The answer is related to different kinds of SR arrangements, and in particular to the distinction between pure SR and delegated SR or co-regulation.⁵⁹ Do EU institutions have different criteria according to the regulatory model employed in each sector to decide whether and how competition law is applicable?⁶⁰ When do self-regulatory arrangements become state measures?

The two major sets of cases concern the breach of competition law provisions by undertakings (Arts. 81, 82 and 86) on the one hand, and the breach of the same provisions read together with Art. 3(1) g and Art. 10 of the Treaty by state measures, on the other hand.

Before entering a more specific analysis concerning different regulatory modes, some general remarks on the distinction between the legal nature of the rule-maker and that of the regulatory activity, may be useful.

The Commission and the Court are not always clear when they use criteria to decide the applicability of Arts. 81 and 82 to the regulator, to the regulatory activity, or to both. In other words they sometimes apply the private-public divide to the regulator and sometimes to the regulatory activity. As I shall show later, the preferable criterion is that related to the activity, and those elements associated with the legal form of the

⁵⁹ For a taxonomy see F. Cafaggi, 'Rethinking self-regulation', European University Institute Working Paper, n.13/06 available at www.eui.eu.

⁶⁰ On this question see J. Szoboszlai, 'Delegation of State regulatory powers to private parties- Towards and active supervision test', 29 *World competition* (2006) 73; F. Castillo de la Torre, 'State action defence in competition law', 28 *World Competition* (2005) 407; J. Temple Lang, 'National measures restricting competition and national authorities under article 10 EC', 29 *European Law Review* (2004) 397; H. Schepel, 'Delegation of regulatory powers to private parties under EC competition law : towards a procedural public interest test', 39 *Common Market Law Review* (2002) 31-51.

regulator should only be used as a proxy for defining the relevant features of the activity and its potential effect on competition.⁶¹

The question of applicability is partly related to the legal form of the regulator. It is concerned with the nature of the association of undertakings. In particular, the issue is when does a professional body or a trade association act as an association of undertakings for the purpose of article 81 EC Treaty?⁶² An association of undertakings does not have to engage in economic activity itself in order to be subject to Art 81.⁶³ The criterion is that its action should affect the economic sphere.⁶⁴

Competition law is applicable only if the private regulator can be considered an association of undertakings for the purpose of Art. 81 and a dominant undertaking for the purpose of Art. 82. Alternatively it would be possible to consider the undertakings as separate entities and evaluate whether the code of conduct or the framework agreements they sign qualify as an agreement for the purpose of Art. 81.

It is important to consider from a competition law perspective two features already underlined in the definition of organizational models.

- a) Does the legal nature of the association have any relevance?
- b) Does the composition of its membership play a significant role? In particular, what is the role of the distinction between associations of experts and association for interest representation?⁶⁵

The first question can be broken down into more sub-questions related to the definition of association of undertakings for the purpose of applying competition law to self-regulation.

- a) Is it relevant that the association is itself qualified as an undertaking?
- b) Is it relevant that the association is a for profit or non profit organization?
- c) Is it relevant that the association has public or private status? In particular whether its board is nominated by private organizations, or by public entities?

⁶¹ For example the non-profit or for profit nature of the organization can be a relevant feature to qualify the regulatory activity of the association but can not be decisive. A functional analysis concerning the goals and nature of standardization is always needed.

⁶² In relation to professional bodies the Report on Competition in professional services summarised the current law in the following way:

‘5.1.2 Self-regulation as a decision of an association of undertakings.

Para. 69 A professional body acts as an association of undertakings for the purpose of Article 81 when it is regulating the economic behaviour of the members of the profession. This is true even where professionals with employee status are admitted, since professional bodies normally and predominantly represent independent members of the profession.

Para. 70 It makes no difference that some professional bodies have public law status or have certain public interest tasks to perform or allege they act in the public interest

Para 71 A body regulating professional conduct is however not an association of undertakings if it is composed of a majority of representatives of public authorities and it is required to observe pre-defined public interest criteria. Rules adopted by a professional body can only be regarded as State measures, if the State has defined the public interest criteria and the essential principles with which the rules must comply and if the state retained its power to adopt decisions in the last resort’.

⁶³ Joined Cases C-209/78 to 215/78 and C-218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125, paragraphs 87 and 88; and Joined Cases C-96/82 to 102/82, C-104/82, C-105/82, C-108/82 and C-110/82 *IAZ and Others v Commission* [1983] ECR 3369, paragraphs 19 and 20.

⁶⁴ See C- 303/99, n 49 above, para 63.

⁶⁵ The role of the distinction is to prevent application of competition law in cases where the regulatory body is acting in the public interest and not in the interest of the industry.

Whether the nominees, even if appointed by public entities, represent specific private interests or the public interests?⁶⁶

The answers provided by ECJ can be summarised as follows.

Professional associations can be controlled for their economic activity but not for their deontological activity.⁶⁷ The association does not have to carry out economic activity itself.⁶⁸

As to the distinction between pure self-regulation, delegated regulation and co-regulation in relation to competition law, ECJ has developed a taxonomy of different possible roles of public authorities in relation to agreements and decisions of associations, most of them related to the role of SR. This taxonomy is due to the general principle that competition law applies to undertakings, and does not apply directly to States. However, early on the ECJ pointed out that according to articles 3.1, 10, 81, 82 of the EC treaty States have to comply with the duty of loyal cooperation and can not enact measures that violate community law.⁶⁹ Self-regulatory arrangements in which not only individual firms and trade associations but also public authorities are involved can be scrutinized under competition law as long as they translate into economic activity and the agreement has been made or the decision has been taken by an undertaking or an association of undertakings.⁷⁰

An association of undertakings which has been delegated regulatory power has to comply with competition law rules.⁷¹ When there is delegation, the main question is whether the delegated activity can be considered state action, thus subject to the state action defence, or can be qualified as private action, subject to competition law rules.

⁶⁶ It is unlikely to be the case, depending on the exact composition of the board. See Joined Cases C-180/98 to C-184/98 *Pavlov and others* [2000] ECR I-6451, para 87; Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, para 23.

⁶⁷ See e.g. C-303/99, n 49 above.

⁶⁸ See e.g. AG opinion, Case C-309/99 *Wouters and Others* [2002] ECR I-1577, at para 77.

⁶⁹ There are two questions: (1) whether the rule-making power can be delegated and (2) how it can be delegated without violating competition law. As to the first question a preliminary issue is when there is delegation. In this framework both *ex ante* delegation and *ex post* approval are considered. If there is delegation the question is whether it is lawful or unlawful

Unlawful delegation can constitute a violation of the duty of loyal and sincere cooperation between EU and Ms. See C-267/86 *Pascal Van Eycke v. ASPA NV*, [1988] ECR 4769 ff., part 16.

‘It must be pointed out ... that articles 85 and 86 of the Treaty are concerned only with the conduct of undertakings and not with national legislation. The Court has consistently held, however, that articles 85 and 86 of the Treaty in conjunction with article 5 require the member states not to introduce or maintain in force measures even of a legislative nature, which may render ineffective the competition rules applicable to undertakings. Such would be the case, the Court has held, if a Member state were *to require or favour the adoption of agreements, decisions or concerted practices contrary to article 85 or to reinforce their effects or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere*’ (italics of the Author).

And see earlier Case C-13/77, *S.A.G.B. Inno-B-M. c. Association des détaillants en Tabac*, [1977] ECR 2115.

⁷⁰ See C-267/86, n 48 above, para 16. and following case law. For a Swedish case where the Swedish Competition Authority scrutinized standard agreements negotiated between the Swedish National Board for Consumer Policies (headed by the Consumer Ombudsman) and Trade Associations, see e.g. Case Dnr. 1837/93 *Sparbankerna*; 1867/93; Case Dnr. 1788/93 *Sveriges Trähusfabrikers Riksförbund*; and Case Dnr. 316/1999 *Branchföreningen Svenska Värmepumpföreningen*.

⁷¹ See Case C-250/2003, *Mauri*, Order of the Court, 17 february 2005. *Mauri* has reduced the availability of State action defence.

The applicability of article 81 and 82 can only be excluded if the association is a public authority and does not exercise economic activity.⁷² Such a development has broadened the scope of economic activity and has widened the definition of undertaking and associations of undertakings.⁷³

9. Distinguishing self-regulatory arrangements in competition law

When competition is deemed applicable to self-regulatory arrangements, then agreements, decisions of undertakings and concerted practices are scrutinized to verify whether they are, in fact, anticompetitive.

The Commission considers contractual terms and standard form contracts as an agreement or decision between undertakings within Art. 81(1).⁷⁴ The ECJ confirms such a view.⁷⁵ Within agreements, not only binding contracts between different categories of firms but also unilateral acts enacted by firms of the same sector can be scrutinized.⁷⁶ These unilateral acts may have effects on third parties regardless of their formal consent. However recently greater attention has been paid to effective consent in relation to agreements between producers and distributors.⁷⁷

Agreements are generally made among firms.⁷⁸ But agreements concerning unfair contract terms can take place among undertakings and consumers endorsing the dual-stakeholder pattern. The participation in the agreement of a consumer association

⁷² See C- 303/99, n 49 above, para 56.

⁷³ See Case C-185/91 n 57 above.

⁷⁴ See *Putz v. Kawasaki motors (UK) Ltd* OJ [1979] L 16/9 [1979] 1 CMLR 448; *Sandoz* OJ [1987] L 222/28 [1989] 4 CMLR 628 upheld on appeal, Case 2777/87 *Sandoz Prodotti Farmaceutici SPA v. Commission* [1990] ECR I-45 (ECJ).

⁷⁵ *Sandoz Prodotti Farmaceutici SpA v. Commission*, n. 75 above.

⁷⁶ The distinction between what has or has not been accepted by distributors may be vital in these cases. Contrast, for example *Sandoz*, n. 75 above, with the more recent *Bayer* case. In the latter case (Case IV/34.279/F3 - *ADALAT*, OJ [1996] L201/1, recitals. 189-199, 211 and Article 1 of the Decision), the Commission found that the practice, engaged in by subsidiaries of Buyer in France and Spain, of restricting supplies to wholesalers in areas where parallel exports to the UK may occur, is a restrictive agreement within the meaning of Article 81.1. Both the CFI (Case T-41/96 [2000] ECR II-3383) and the ECJ (Case C-2 and C-3/01, *Bundesverband der Arzneimittel-Importeure EV and the Commission v. Bayer A6*, [2004] ECR I-23), rejected the Commission's interpretation, not least because the restriction of supplies by the Buyer subsidiaries was not beneficial for the wholesalers-nor was it explicitly endorsed by them). For a comment on the case, with the relevant history of the concept of agreements, see C. Brown, "Bayer v. Commission-the ECJ Agrees", 25 *ECLR* (2004) 386. It will be remembered, of course that, notwithstanding the difficulties encountered when trying to prove the existence of an agreement, when a producer is dominant, the same or similar conduct vis-a-vis its retailers may be scrutinised under Article 82: Cases No. IV/34.073, IV/34.395 and IV/35.436 - *Van den Bergh Foods Limited*, OJ [1998] L 246/1, upheld in Case T-65/98, *Van den Bergh Foods Ltd v Commission*, [2003] ECR II-4653).

⁷⁷ See n. 75 above and P. Fattori e M. Todino, *La disciplina della concorrenza in Italia*, (Bologna: Il Mulino, 2004) 55-56.

⁷⁸ Within this category we can distinguish between agreements among firms belonging to the same association and agreements among firms belonging to different associations. Equally, it must be noted that Community competition law uses the term "undertaking", which includes "every entity engaged in an economic activity": Case C-41/90, *Höfner and Elser v. Macroton GmbH* [1991] ECR I-1979, para. 21. Thus, it may also include individuals, as was the case, for example, in *Reuter/BASF* [1976] OJ L254/40, where the Commission examined an agreement between an inventor and the company which bought up his patents.

or its consent does not however alter the applicable test. In the absence of a direct precedent on this specific point,⁷⁹ we can reach the conclusion that, according to current interpretation, collectively negotiated agreements would be subject to the same scrutiny as unilateral acts unless this negotiation reflects public interest concerns that may trigger exemption (or even downright exclusion from the scope of Article 81 altogether).⁸⁰

The problem of standardisation is well known. To the extent that standard form contracts are defined by associations or groups of firms they have to meet the competition threshold.. How far should firms go in standardising contract terms so as to maintain a sufficient level of competition?⁸¹ Economic theory has provided useful insights on the degree and the content of standardisation compatible with competition law.⁸² National authorities apply this standard to some extent.

As to the organizational model, both the constitution of an association and its operations may be scrutinized under competition law. When SR operates through an organizational model, the scrutiny mainly concerns the decisions by associations of undertakings. The very constitution of a trade association has been qualified both as a decision and as an agreement.⁸³ The Commission also considers recommendations concerning the adoption of standard contract forms to be decisions of associations of undertakings under Art. 81(1).⁸⁴

The boundaries between agreements and decisions of associations of undertakings are not well defined but since the consequences do not greatly differ for the purpose of application of Art. 81 I will not focus on this distinction.⁸⁵ Instead, it is

⁷⁹ Although there have been notable cases concerning groups of purchasers, such as Case C-250/92, *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvarerelskab AmbA* [1994] ECR I-5641, where an association of farmers was formed for the purpose of purchasing collectively (and at lower prices) certain types of farming equipment.

⁸⁰ REIMS II OJ [1999] L275/17. *Gøttrup-Klim* (n. 80 above) was a case where the application of Article 81 was excluded altogether, due, essentially, to the fact that the collective purchasing association exercised countervailing buying power against the manufacturers of the relevant products. For an extensive discussion of so-called “public policy” cases, see G. Monti, “Article 81 and Public Policy”, 39 *Common Market Law Review*. (2002) 1057.

⁸¹ T. Wilhelmsson claims that there is an interest of consumers to promote business cooperation in order to enable ombudsmen and consumer associations to negotiate contract terms with business. It follows that it would be in consumers’ interest to reduce the level of competition. See Wilhelmsson, n. 41 above, 58 ff. It is unclear however why coordination among business, instrumental to negotiations, should necessarily reduce competition. A high level of negotiation can be perfectly compatible with competitive markets to the extent that the goal of negotiation is to exclude unfair terms and make firms compete about fair terms.

⁸² See Grillo and Polo, n 35 above.

⁸³ See *Nuovo CEGAM*, n. 51 above. Also, according to Whish:

‘It has been held that the constitution of a trade association is itself a decision, as well as regulations governing the operation of an association. An agreement entered into by an association might also be a decision. A recommendation made by an association has been held to amount to a decision and it has been clearly established that the fact that the recommendation is not binding upon its members does not prevent the application of article 81 (1)...Regulations made by a trade association may amount to a decision within the meaning of Article 81(1)’. R. Whish, *Competition Law* (5th ed., London, Lexis Nexis, 2003), pp. 97-98.

⁸⁴ See, e.g. *Publishers’ Association (Net Book Agreements)*, OJ [1989] L22/12

⁸⁵ Compare for example *ASPA* with *Nuovo Cegam*, both n. 51 above. In the former, the constitution of an association was qualified as a decision, while in the latter it was qualified as an agreement. See *BNIC v. Clair* para. 20, ‘an agreement made by two groups of traders, such as the wine growers and dealers must be regarded as an agreement between undertakings or associations of undertakings. The

necessary to point out that the distinction is relevant for the application of Art. 82. This argument can be deduced from the fact that, under Art. 81, an agreement between undertakings (due to the fact that it involves “undertakings”) will fall under the scope of Art. 82 if any of the undertakings is dominant or if they are in a collective dominant position. A decision among associations of undertakings, on the other hand, is not necessarily an undertaking and it is not, therefore, automatically caught by 82, which only covers undertakings.

The crucial points concern the nature of the decision and its effects, in relation to the members of the association and third parties. It is relevant whether these decisions are binding or non-binding on the members, and whether they are price-related, directly or indirectly, or not.⁸⁶

Generally, associations define standard contract forms to be used both by their members among themselves, and with third parties firms in case of BtoB transactions, or consumers in relation to BtoC transactions.

If these recommendations are binding they tend to be considered almost *per se* unlawful, particularly when they define prices or determine contractual clauses relevant for price determination.⁸⁷

fact that those groups meet within an organization such as the board does not remove their agreement from the scope of Art. [81] of the Treaty’. Equally, the distinction between agreements and concerted practices is of no consequence for the lawfulness of a given line of conduct: see n. 87 below. This lends further support to the conclusion that the classification of conduct under one of the three types envisaged under Article 81(1) is of little or no legal effect.

⁸⁶ Proofs of these criteria may found in Commission Regulation (EC) 358/2003, n. 34 above, whereby standard policy conditions may not be exempted when they are binding and create a significance imbalance between rights and obligations. According to recital 15,

‘standard policy conditions must not lead either to the standardisation of products or to the creation of a significant imbalance between the rights and obligations arising from the contract. Accordingly, the exemption should only apply to standard policy conditions on condition that they are not binding, and expressly mention that participating undertakings are free to offer different policy conditions to their customers. Moreover standard policy conditions may not contain any systematic exclusion of specific types of risk without providing for the express possibility of including that cover by agreement and may not provide for the contractual relationship with the policy holder to be maintained for an excessive period or go beyond the initial object of the policy. This is without prejudices to obligations arising from community or national law to include certain risks in certain policies’.

⁸⁷ See *BNIC v. Clair*, n 86 above, para. 22 ‘for the purpose of article 85(1) it is unnecessary to take account of the actual effects of an agreement where its object is to restrict, prevent or distort competition. By its very nature, an agreement fixing a minimum price for a product which is submitted to the public authorities for the purpose of obtaining approval for that minimum price, so that it becomes binding on all traders on the market in question, is intended to distort competition in the market’. In a similar vein, see *Case 234/83, SA Binon & Cie v. SA Agence et Messageries de la Presse* [1985] ECR 1985, para. 44. In vertical restraints cases, the (often subtle) distinction between recommended resale prices on the one hand-which are lawful-and recommendations that are *de facto* binding on resellers on the other-which constitute a restriction of competition by object and must, therefore, be individually examined under Article 81(3), remains of vital importance. See Commission Notice: Guidelines on Vertical Restraints, OJ [2000] C291/1, points 47 and 48. In terms of fixing conditions of trade other than the direct fixing of prices, however, the application of Article 81(1) becomes somewhat more complex: see joined cases C- 215/96 and C-216/96 *Bagnasco v. BNP and Carige* ([1999] ECR I-00135) where the Court stated: ‘standard bank conditions, in so far as they enable banks, in contracts for the opening of a current-account credit facility to change interest rate at any time by reason of changes occurring in the money market, and to do so by means of notice displayed on their premises or in such a manner as they consider most appropriate, do not have as their object or effect the restriction of competition within the meaning of article 85(1) of the Treaty’,

Non binding yet price-related recommendations concerning contract clauses are scrutinised either under article 81 or 82; if they affect competition, they are generally found to be unlawful.⁸⁸

Binding but non-price related decisions are generally considered less strictly.⁸⁹ The category more likely to be held compatible with competition law is that of non binding and non price-related standard contract forms.⁹⁰

Thus the test for binding and non binding recommendations tends to be different, the former stricter, the latter lighter.⁹¹ It is clear, however, that non-binding decisions and agreements can be unlawful under Article 81.⁹²

para 37. Finally, it must be noted that agreements to fix vital parameters of trade, such as the right of one undertaking to associate itself with another, may fall outside the scope of Article 81 altogether, if the purpose of the restriction is justified by an imperative public policy concern, such as the need to ensure the proper functioning of the legal profession in a given Member State. See Case Wouters, n. 49 above. Equally, it could be argued that even vertical price fixing (resale price maintenance) may fall outside of the scope of Article 81(1), if its purpose is to protect culture, within the meaning of Article 151(4) of the Treaty. See Council Resolution of 8 February 1999 on fixed book prices in homogeneous linguistic areas OJ [1999] C42/2 and V. Emmerich, "The Law on the National Book Price Maintenance", 2 *European Business Organization Law Review* (2001) 553. and G. Monti, n. 81 above.

For Swedish case law see *infra* n. 69.

⁸⁸ Case 96/82, n 64 above, para. 20 'Article [81(1)] of the treaty applies also to associations of undertakings insofar as their own activities or those of the undertakings affiliated to them are calculated to produce the results which it aims to suppress. It is clear particularly from the latter judgement that a recommendation, even if it has no binding effect, cannot escape article [81 (1)] where compliance with the recommendation by the undertakings to which it is addressed has an appreciable influence on competition in the market in question'. See also FENEX, [1996] OJ L181/28, where recommended tariffs were viewed in their wider context of co-ordinating market conduct, not least pricing conduct. In either case, however, some degree of *compliance* by the members of the association was found, in the sense that the recommendations were not ignored. *How much* compliance exactly is required in order to find a restriction within the meaning of Art. 81(1) can be a very tricky question, as was evidenced in the Bayer case (n. 77 above), as well the seminal judgment of the ECJ in Cases C-89, C-104 and C-114/85, *Ahlström Oy v. Commission (Woodpulp)* [1988] ECR 5193.

⁸⁹ This is due to the fact that restrictions on price form part of the set of restrictions by object or "hardcore restraints", which trigger the automatic application of Art. 81(1)-provided, of course, there is an appreciable effect on interstate trade. The other restrictions are, in the case of horizontal agreements, restrictions of output and the sharing of markets/customers and, in the case of vertical restrictions, an absolute restriction of parallel trade. Any conduct falling outside of the hardcore set must be assessed in the light of its effects on the relevant market. See Communication from the Commission-Notice: Guidelines on the application of Article 81(3) of the Treaty, OJ [2004] C101/97, point 23; Commission Notice: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ [2001] C3/2, points 18-20; Guidelines on Vertical Restraints, n. 87 above, points 46-47.

⁹⁰ The prime example of this phenomenon may be found in Recital 14 and Articles 1(1)(c) and 5 of the Insurance Block Exemption, n. 86 above. Standard policy conditions in insurance contracts are exempt under that Regulation, under the condition that it must be explicitly provided that undertakings are not in any way *obliged* to adopt them. In Sweden, the Swedish Competition Authority has on a number of occasions stated that non-binding standard contract not encompassing stipulation regarding price is compatible with the Swedish Competition Act, see e.g. Case Dnr. 316/1999 *Branchföreningen Svenska Värmepumpföreningen* and Case Dnr. 1788/93 *Sveriges Trähusfabrikers Riksförbund*.

⁹¹ Fattori and Todino, n. 78 above, p. 91: Citando C. Dec. Fedetab 20.7.1978, OJ 1978 L. 224/29, Carte da parati in Belgio Comm. Dec. 23.7.1974, OJ 1974, L. 237/3.

	Price-related	Not-price related
Binding recommendations	Almost always unlawful	Depends
Not binding recommendations	Often unlawful	Generally lawful

National authorities have developed different criteria concerning the test of compatibility of standard form contracts recommended by associations with competition laws.

What is the relationship between the scrutiny of standard forms concerned with competition law and that of administrative or judicial authorities concerned with fairness in contract law? To what extent is the evaluation of the anticompetitive nature

Formally speaking, the ECJ and the Commission make no distinction between “agreements” and “concerted practices” under Art. 81 in terms of whether a given line of conduct is lawful or not. It is possible, in fact, to classify the same conduct under either heading, as was the case in Case T-1/89, Rhone-Poulenc v. Commission [1991] ECR II-867. Such an interpretation is supported by the very wording of Art. 81, which speaks of agreements *or* concerted practices, without making a distinction as to their respective unlawfulness. Equally, agreements themselves do not need to be *contracts*. They can be in the form of so-called “gentlemen’s agreements”, as was established early on in Case 41/69 ACF Chemiefarma v. Commission [1970] ECR 661. Nonetheless, more recent case law tends to indicate that concerted practices may be more difficult to prove, as they require a certain *conduct* to follow the joint intentions of the parties. See A. Jones and B. Sufrin, *EC Competition Law* (2nd ed. Oxford, OUP, 2004) pp.151-154. Accordingly, it is, *de facto*, much easier to prove and condemn an agreement if it is binding under the law. In such cases, the regulator need not look further to find the requisite market conduct, as the parties have agreed to be obliged to act in an anticompetitive manner. Importantly, in economic terms, once the competition authority finds the existence of a binding agreement, it is impossible for the parties to argue that there was so-called “tacit collusion”, i.e. a situation where their market conduct is aligned by the very nature of the market in question and not by an explicit concurrence of wills aimed at restricting competition (“explicit collusion). On the distinction between tacit and explicit collusion and its implications for competition policy, see, generally, M. Motta, *Competition Policy: Theory and Practice* (Cambridge, Cambridge University Press, 2004), Ch. 4.

⁹² See C-96/82, n 64 above, paras 20-21:

‘Article [81 (1)] of the Treaty applies also to associations of undertakings in so far as their won activities or those of the undertakings affiliated to them are calculated to produce the results which it aims to suppress. It is clear particularly from the latter judgement that a recommendation even if it has no binding effect, cannot escape article [81(1)] where compliance with the recommendation by undertakings to which it is addressed has an appreciable influence on competition in the market in question.

21 In the light of that case law it must be emphasized, as the commission has pertinently stated, that the recommendation made by Anseau under the agreement to the effect that its member undertakings were to take account of the terms and the purpose of the agreement and were to inform consumers thereof, in fact produced a situation in which the water supply undertakings in the built-up areas of Brussels, Antwerp and Ghent carried out checks on consumers premises to determine machines connected to the water supply system were provided with a conformity label. Those recommendations therefore determined the conduct of a large number of Anseau’s members and consequently exerted an appreciable influence on competition’.

The non binding recommendation is illegal to the extent that actually produces effects on market’s participants behaviour. If that influence was only potential because no evidence of behaviour exists would that be still enough to consider it unlawful? Art. 81 covers agreements, decisions and concerted practices, the *object or effect* of which is to distort competition. Therefore, even cases where no actual effect has been achieved the mere purpose of the decision might breach this rule, if the agreement restricts competition by its object. See the text in n. 90 and n. 92 above.

of agreements or decisions affected by considerations of fairness? Do competition and contract law overlap in this respect?

Fairness in standard contract terms affects what can be standardised and how standardisation can occur. In relation to the selection of what can be standardised it has been held that time and method of delivery of goods should be left to individual agreements⁹³. Fairness also affects modes of standardisation. A standardised contract clause may be allowed or forbidden according to its fairness i.e. depending whether it creates an unbalance and violates the good faith principle (art. 3 dir. 93/13 EC).

It is very rare that fairness is explicitly mentioned by competition authorities, but there are important signs that often the scrutiny concerning the anticompetitive nature of standard contract may be influenced by implicit fairness considerations.⁹⁴

Firstly, Regulation 358/2003, where exemption is conditional upon the absence of a significant imbalance between rights and obligations arising from the contract.⁹⁵ The language reflects that of Dir. 93/13. Many of the listed clauses whose presence would not allow exemption seem to be inspired more by fairness conditions than by anticompetitive effects.⁹⁶ This is so, to a large extent, due to the fact that one of the four requirements for exemption under Art. 81(3) is “a fair share” being given to consumers. Clauses which are directly prejudicial to consumer interests may, therefore, preclude the Commission from finding that a restriction of competition is offset by countervailing improvements for consumers.

Secondly case-law at ECJ level and national level; even if no explicit references to fairness occur, often the same clauses considered unfair are objectionable from a competition law perspective.⁹⁷

An open question concerns the influence of the institutional framework on the degree of overlap between competition and contract law. While functionally distinguished these two limits can certainly influence each other. We can distinguish different times of control in competition and contract law. *Ex ante* competition control is rare. It occurs only when formally or informally the national authority is asked to give an opinion on the standard contract forms. When only *ex ante* competition law control is available because the individual MS has chosen judicial *ex post* control and rejected *ex ante* administrative control in contract law it may happen that the Competition authorities are influenced also by fairness consideration. On the contrary, when two different institutions control *ex ante* the potential anticompetitive nature and

⁹³ See for example in England the decisions of OFT. On this point see H. Micklitz, The politics of judicial cooperation, *The politics of judicial cooperation in the EU*, (Cambridge: CUP, 2005), p. 394.

⁹⁴ On rare exemption would be a Swedish case from 1993 where the Competition Authority did not make a distinction between *abuse* as stipulated in the equivalent to Art. 82 and the contractual stipulation of *unfair*. See Case Drn. 760/94 *Ånge Elverk*, a case concerning Abuse of Dominance.

⁹⁵ See recital 15, Reg 358/2003, n 34 above.

⁹⁶ See for example, Art. 6 Reg. 358/2003 Agreements not covered by the exemption, n. 34 above. Art. 6.1 (e) allow the insurer to modify the term of the policy without the express consent of the policy holder. Art. 6.1 (f) impose on the policy holder in the non life insurance sector a contract period of more than three years. Certainly these clauses can also have an anticompetitive effect but they sound more related to fairness consideration.

⁹⁷ See, for example, the Commission’s decision in Zanussi, OJ [1978] L322/36, where it was found that, by drafting the manufacturer’s warranty in such a way that the consumer could only seek servicing from a dealer who imported the appliance into his own Member State, the manufacturer had violated Article 81. The concurrence between unfairness and competition is even more explicit under Art. 82,. The question is about the meaning attributed to unfairness, given the explicit reference made in Art 82(a) to unfair purchase and selling prices and to unfair trading conditions.

the potential unfairness, it is more likely that the two tests are kept separate and independent.

10. Standard setting, self-regulation and ECL. Some preliminary conclusions

The space of private autonomy occupied by collective entities that define standard form contracts and more in general rules concerning firms' and consumers conducts is wide both at European and national level. It tends to be broader in regulated sectors.

Two different sources of self-regulation have been distinguished in relation to European Contract Law: one is concerned with general contract law the other with standard form contracts. We have recalled the distinction between purely private self-regulation, delegated private regulation and co-regulation.⁹⁸

Different forms of private regulation operate within each sector. The influence of self-regulation on contract law making is relevant in financial markets but also significant in telecom, media, and, to a lesser extent, in energy, gas and transport, except for the environmental aspects.⁹⁹ In regulated markets the use of co-regulation is higher than in unregulated markets where pure self-regulation is more relevant, and direct or indirect participation of IRAs or governmental actors is relatively frequent in the definition of standard contract forms thereby determining co-regulatory arrangements.

Currently, the differences between purely privately negotiated agreements among associations of undertakings and agreements simply favored, promoted or required by the law is significant. In this field the legitimacy of regulated self-regulation is much higher than that of purely privately negotiated self-regulation. However further research, in particular empirical research, is needed to verify whether standard contracts, produced by pure self-regulation, differ extensively from those produced within a regime of regulated self-regulation or co-regulation.

There is no specific regime concerning self-regulation at European level. It would be important to produce at least general guidelines, given the divergences existing at MS level ¹⁰⁰.

The contribution of SR to European Contract Law is mainly related to enabling rules. Trade and consumer associations define standard contract terms and other rules within the space left by the European or the national legislator either by deviating from legislative default rules or by specifying and integrating them. There is some role for specifications of mandatory rules and general clauses such as good faith or public order.¹⁰¹ In the first hypothesis SR can substitute enabling rules, in the second it integrates mandatory rules or general principles.

The relationship between co-regulation and European Contract Law is potentially different. Co-regulation, being generally based on a legislative act, allows changes of mandatory rules by private organizations to the extent permitted by the statute. It may empower private organizations of limited law making power. Unlike national systems, where co-regulation can affect the mandatory nature of a contract rule

⁹⁸ See above par. 3.

⁹⁹ For an overview see Cafaggi, n 26 above.

¹⁰⁰ On these questions see Cafaggi, n. 11 above.

¹⁰¹ On the role of good faith in European standard form contract law, see Micklitz, n. 94 above.

by transforming it into an enabling one, the European legislation in contract law has so far not used this approach extensively.¹⁰²

We have seen that different self-regulatory models are used to concur to the creation of European Contract Law: contractual and organizational.¹⁰³ In terms of its effectiveness the relevant distinction is between unilateral and negotiated formation of contract law. Unilateral definition of rules should be subject to stricter control to prevent abusive exercise of private regulatory power. However, according to Directive 93/13, while individually negotiated contracts are subject to a different regime, collectively negotiated standard form contracts are usually treated as unilaterally enacted standard forms in relation to the fairness control, therefore subject to the principles stated in the directive. Fairness control over standard contract forms ensures that self-regulation is directed at enhancing freedom of choice and therefore freedom of contracts of consumers^{104/}

Competition law contributes to define the limits and constraints of the use of self-regulation. The benefits of self-regulation are particularly high in relation to contract standardization. Furthermore it can favor the integration of European market by coordinating undertakings operating in different national markets willing to widen their field of activity.

Competition law limits the scope of self-regulation in relation to the creation of standard contract forms. The competition control used to differentiate very strongly the test for applicability of Art. 81 between pure self-regulation and delegated private regulation. The reasons for such a disparity are far from clear, especially when delegation of self-regulation is attributed unilaterally only to one category as it is the case in many services supplied by professionals. Intuitively unlike purely private self-regulation co-regulation and delegated self-regulation can pursue public interests goals that can be balanced with the costs of reducing competition.

The influence of co-regulation and delegated SR on contract law in this area is quite significant at MS level, but the degree of services' recipients protection from abusive exercise of private regulatory power is relatively low. The difference with the development of contract law, associated with the use of private regulation in securities and more in general in financial markets, is highly significant but difficult to justify. Recent developments in the European case law show that stricter tests will be applied to delegation in order to broaden the domain of competition law control to drafting standard contract forms.¹⁰⁵

Limitations are less relevant in relation to codes of conducts, where the nature of the framework rules is less likely to reduce competition among undertakings.

These limits are not in opposition to the rationale of using SR to create a European Contract Law. On the contrary they are consistent with a concept of freedom of contract based on the principle of private autonomy even if collectively exercised.

¹⁰² Within the Unfair contract term directive there is some sign that collectively negotiated agreements may affect the nature of the unfairness control though specific reference was intentionally made only to individually negotiated agreement. See the examples in the national legal system concerning tenancy law, F. Cafaggi, 'Tenancy law and European Contract Law', comparative report in the framework of the Tenancy law Project, European University Institute, available at <http://www.eui.eu/LAW/ResearchTeaching/EuropeanPrivateLaw/tenancyLaw.shtml> (last visit 28 september 2006).

¹⁰³ See above

¹⁰⁴ But see on these questions Wilhelmsson, n. 41 above.

¹⁰⁵ See Case Arduino, n. 58 above, Case C-198/01 Consorzio Industrie fiammiferi (CIF), 9th September 2003, ECR I, and C-250/2003, n 72 above.

Competition law is aimed at enhancing or preserving the space of contractual freedom of parties with lower market power. It only prevents abusive standardisation that reduces contractual and in particular consumers' choices and therefore would constrain freedom of contract.

Ensuring freedom of contract constitutes the main objective of both fairness control and competition control. In this respect they should be seen as functional complements more than as alternatives expressing conflicting values..

A coordinated system of standard contract forms provided sector by sector can reduce undertakings and consumers' search costs without decreasing competition. General guidelines at EU level should be provided to define standard form contracts at European level in BtoB and BtoC transactions.

In conclusion: rule-making in contract by private organizations is already very relevant at European level. This activity is subject to different types of scrutiny: the first is that of contract law, in particular the fairness control required by the unfair contract term directive. The second is provided by competition law. The limits on standardisation are quite relevant and formally they do not overlap with those of contract law because they pursue complementary goals.

The functional distinction between the two bodies of law operate as a double mechanism to allocate freedom of contract between organizations and individuals in order to preserve fairness within contractual relationships and competition within the market.

11. Self-regulation and monitoring the implementation of ECL

Monitoring compliance with the law is a crucial goal of European law and *a fortiori* for European Contract Law. While it is generally attributed to public bodies, private organizations can play a very significant role.

The contribution provided by private organizations to monitoring compliance is not only efficiency-driven but it can also be stimulated by democratic considerations. On the efficiency side, centralised rule-making may be inappropriate for an integrated market whose regulatory specificities are very high at MS level. Monitoring costs, incurred by coordinated private organizations, can be considerably lower than those faced by public centralised administrations, given the ability to use their governance bodies as market monitors. On the democracy side, participation of social actors to peer monitoring can improve democratic legitimacy of new regulatory processes and ensure higher compliance rates. New regulatory strategies invite stronger involvement of social actors to reduce agency costs and to increase regulatory legitimacy.

The judicially developed principle of effectiveness has been a powerful driver for ensuring compliance.¹⁰⁶ It has recently brought about significant potential changes in the law of remedies for breach of competition law provisions.¹⁰⁷

¹⁰⁶ See T. Tridimas, *The general principles of EU law*, 2nd ed, (Oxford: OUP, 2006) 418 ff.; M. Claes, 'The national Court's mandate in the European Constitution', 129 ff; M. Dougan, *National remedies before the Court of Justice : issues of harmonisation and differentiation*, (Oxford: Hart, 2004).

¹⁰⁷ See C- 295/04, n 42 above :

'In the absence of Community rules governing that field it is for the domestic legal system of each member state to set the criteria for determining the extent of the damages

The ‘better law making’ trend, developing at EU level, underlines the importance of *ex ante* impact assessment and *in itinere* verification together with *ex post* enforcement of EC law.¹⁰⁸ It is however unclear what should be the allocation of oversight power between Community institutions, private actors and MS. Furthermore a thorough analysis of incentives and potential conflicts is still missing.

In an integrated market, where technology favours cross-border exchanges, in order to ensure control the necessity of a coordinated network of supervisory authorities has become clear. Administrative cooperation among Consumer Protection Authorities has been promoted at European level to tackle cross-border infringements of consumer law.¹⁰⁹ It is unclear whether that represents a turn with respect to directive 98/27 on injunctions or simply a complement to it.

The Regulation on administrative cooperation 2004/2006 provides for some type of informal delegation of enforcement functions to other bodies.¹¹⁰ This reference can imply some degree of involvement by private bodies and in particular by consumer associations. Monitoring is thus not left exclusively to the Commission and to the Member States, but can be attributed to market actors that can often perform it more efficiently and effectively. They have been empowered through general Directives such as dir. 98/27 or sector specific directive such as Dir. 93/13 Art. 7, Dir. 2005/29 Art. 10.

Different combinations between rule-making and monitoring and private-public actors can thus occur. In addition to pure systems we can have mixed systems.

(1) We can have legislation whose compliance is monitored by private actors through ADR or the judicial system.

	Public	Private	Mixed
Rule-making	x		
Monitoring		x	

for harm caused by an agreement or practice prohibited under article 81 EC, provided that the principles of equivalence and effectiveness are observed.

Therefore, first, in accordance with the principle of equivalence, it is possible to award particular damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the Community competition rules it must also be possible to award such damages in actions founded on Community rules. However, Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.

Secondly, it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by a conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss(*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest’.

For an application of the principle of effectiveness in a different area joined cases C-392/04 and C-422/04 *Arcor v. Germany* 19 september 2006.

¹⁰⁸ See Communication from the Commission on European Governance: better law making, COM(2002)275 final; the Reports from the Commission Better Law making, 2004 COM) 2005 98 final 21.03.2005; and the Communication from the Commission to the Council and the European Parliament, Better regulation for growth and Jobs in the European union, COM (2005) 97 final 16.3.2005.

¹⁰⁹ See Reg. 2006/2004, n. 5 above, On the role of consumer organizations see in particular recital 14 .

¹¹⁰ See Art. 4.2 and 8.3, Reg 2006/2004, n. 5 above.

But we can also have the opposite: codes of conducts enacted by private associations whose compliance is monitored primarily by public entities such as regulators.

	Public	Private	Mixed
Rule-making		X	
Monitoring	x		

Monitoring compliance with law can take at least two forms: judicial monitoring or administrative monitoring. By judicial monitoring I mean the power of individuals, associations and public entities to bring a legal action before a Court when there is a violation of European Contract Law and the right to obtain a remedy warranting compliance with EC law.¹¹¹ By administrative monitoring I mean the power of administrative entities to monitor directly the compliance and to sanction violations when they occur. Here, the terms judicial and administrative refer to the different institutions that private associations can activate to promote monitoring in the interests of their members and/or in the general interest.

It should be pointed out that often the power to exercise judicial monitoring translates into indirect rule-making power. Public and private organizations by threatening judicial actions engage into negotiations with trade associations defining standard contract terms. Thus the line between rule-making and monitoring is not always bright.

More complex systems have recently developed, coordinating judicial and administrative monitoring and giving a more significant role to associations.¹¹² I call these new systems *governance monitoring*. By this, I mean a governance structure empowered to verify if there is compliance with European rules, and enabled by legislation to take action where violations occur, in particular to ensure that measures by European and national institutions are adopted to warrant compliance.

Currently, the European system allows associations to monitor the process of implementation of European Contract Law. This function does not only relate to correct implementation by the States but to compliance by market actors. Public powers and in particular Community institutions maintain their powers and duties to monitor implementation of European law. It is clear that it is predominantly voluntary not mandated monitoring.

The voluntary nature of monitoring by market actors and in particular by consumers' associations - given the absence of a duty to exercise this function in the

¹¹¹ It is important to underline that not only private entities and individuals but also public entities have been entrusted the power to bring legal actions before Courts for breach of Community law. See in particular art 3, Dir 98/27.

¹¹² An example of a governance system for monitoring in the field of unfair contract terms is provided by France where a collaborative model between the judiciary and la Commission de clauses abusives has ensured better monitoring. Judges can ask opinions to the Commission de clause abusives and la Commission issues Recommendation to market actors that can be used as standards by judges. See on this model J.Calais Auloy and Steinmetz, n. 32 above. The English model is more centred around the Office of Fair Trading, with its own powers and the power to bring action before Courts. See Howells and Weatherill, n 13 above. For a comparison see S. Whittaker, 'Contractual control and contractual review in England and France', *European Review of Private Law* (2005) 757, 765 ff., underlying the differences between the French and the English model; the former mainly relying upon consumer associations the latter mainly on public bodies, particularly the Office of fair trading.

public interest - does not make, in principle, the system less effective than it would be if associations had a legal duty to monitor.

The question is what are the incentives of consumers and trade associations to monitor compliance and how they can be improved by introducing a better legislative framework. To the extent that there is coincidence between the goals of EC legislation and those of the associations, their monitoring constitutes a form of empowerment and it is reasonable to presume that incentives to perform it are quite strong. When the goals are more oriented to market integration than to consumer protection the incentives' structure may not be adequate and legislative intervention can provide additional incentives.

Recent directives seem to change this framework by introducing a new principle: **the exercise of rule-making entails responsibility on monitoring and enforcement**. If an entity makes rules, for example enacting a code of conduct, it has to take the responsibility of monitoring its compliance in the interest of consumers.¹¹³ The rationale is that the enactment of a code of conduct generates 'consumer confidence' which needs to be legally protected as part of the pillars of the internal market.¹¹⁴ This would not imply a duty to monitor *per se*; such a duty and the related responsibility would arise only if a code of conduct concerning unfair trade practices were adopted.

When there is pure voluntary monitoring we have an example of self-regulation. If it were coerced monitoring, with the imposition of a duty by the legislation, we would have mandated self-regulation. When the modes of this monitoring are coordinated with those of public authorities we would have co-regulation, when they are determined by the legislation and performed by private parties we would have privately delegated self-regulation.

Two points should be underlined in relation to the domain of monitoring activities:

- a) Judicial monitoring of compliance about EC law by associations concern not only BtoC but also BtoB relationships.
- b) Judicial monitoring by associations concerns not only contractual relationships but also non-contractual relationship, as is often the case in unfair competition or in the field of product safety.

In relation to consumer protection, Directive 98/27 is the paramount case of private monitoring but we find other examples in single directives, for example in the Unfair Contract Terms Directive 93/13, in the Unfair Trade Practices Directive 2005/29.

In relation to monitoring BtoB standard contract forms, we find fewer examples, but still several relevant ones. In the Late Payment Directive 2000/35 the monitoring function is attributed to the SMEs associations.

The effectiveness of a judicially based monitoring strategy may be different for BtoC and BtoB. We observe a higher degree of litigation in consumer disputes than in the past, partly promoted by legislative reforms. While this trend was not driven by

¹¹³ See art 2 g, dir 2005/29 (n. 17 above), where the owner of the code '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'.

The principle had already been introduced in some MS. For example in the UK section 8 of the Enterprise Act of 2002 had imposed, that the sponsor of the Code has to demonstrate the ability to monitor and to enforce the Code to obtain the approval of the Office of Fair Trading. See Howells and Weatherill, n 13 above, 587 ff.

¹¹⁴ On confidence building as a strategic pillar of the internal market and function of European institutions see H Micklitz, N. Reich, S. Weatherill, 'EU Treaty Revision and Consumer protection', 27 *Journal of Consumer Policy*, 2004, 367.

monitoring needs, the monitoring function may have improved due to the higher level of litigation.

In this essay I will mainly devote attention to judicial monitoring and only briefly refer to governance monitoring. I would like to show that associations of consumers and firms may play a significant role in monitoring compliance of EU law both at European level and at MS level, despite the rules on standing. The creation of networks of associations at EU level and the adoption of framework agreement can provide more effective monitoring mechanisms. Self-regulation could provide the necessary institutional support,.

The role of associations as monitoring agents of compliance with EU law was, in the past, predominantly performed through preliminary rulings. Today, the legal regime of cross-border violations and the recognition of standing for consumer associations in foreign countries allow much broader forms of private cooperation among associations willing to use the judicial system to monitor compliance.¹¹⁵ The principle of effectiveness of EC law, within the limits defined by ECJ, permits private parties, individuals and associations to seek remedies that may not be available under national law,¹¹⁶. The link between effectiveness and deterrence has been made quite explicit by the most recent case law, reinforcing the monitoring function of different market actors.

12. The role of consumer associations as monitors of European Contract Law. Article 7 of the Unfair Contract Terms Directive 93/13, Art 3 of Dir. 98/27.

In the Unfair Contract Term Directive, an important role is played by associations to prevent the use of unfair contract terms in contracts concluded by firms (professionals) and consumers. States have to ensure that adequate and effective means exist to prevent such a practice in the interests of consumer and competitors; however Art. 7 Dir. 93/13 indicates that only persons or organizations having legitimate interests in protecting consumers may take action. Public and private bodies, in particular consumer associations may bring actions, asking Courts to police unfairness.¹¹⁷ In principle public bodies and private associations have different interests and therefore different incentives to monitor. While the former in theory should have a more balanced perspective between interests of firms and consumers, the latter are clearly one-sided¹¹⁸.

¹¹⁵ Art 4.1, Dir 98/27.

¹¹⁶ See in the field of breach of competition law C-295/04, n 42 above, and before C-453/99, n 42 above.

¹¹⁷ Standing to bring legal actions before Courts has been recognised to associations and in many MS to public entities as well, and in particular to regulators. For example in the UK where the OFT was given the power to monitor and then this power as been expanded to other qualifying bodies among which consumers associations.

This change has been introduced by Regulation 1999 under the pressure of litigation see *R. v. secretary of State for trade and industry ex parte Consumers' association and Which?* . For an examination of the effects of this litigation in reforming Regulation 1994 and enacting Regulation 1999 see Micklitz, n. 94 above, p. 379 ff.

¹¹⁸ This statement should be qualified by taking into account the level of capture that public bodies are subject to.

When they coexist Public bodies tend to become more consumer oriented under the pressure of consumers' associations¹¹⁹.

Competitors' associations, instead, do not necessarily have standing for unfair contract terms under the directive, but some MS have recognised it¹²⁰.

What does taking action mean? Surely at least two sets of remedies are available for associations policing standard contract forms: injunctions and contracts' avoidance. A separate issue is related to liability, i.e. the ability of consumers' association to sue individual firms or trade associations for damages caused by the recommendation or use of unfair terms.¹²¹ Punitive pecuniary sanctions in the form of *astreintes* or equivalent often support the enforcement power; but legal systems differ in making this remedy available.¹²² Finally, publications of decisions in the media constitute an important reputational device to dissuade firms from engaging into unfair practices.

The content and quality of the monitoring function by associations strongly depend upon the available remedies and, when a choice is permitted, upon the selected remedy¹²³. If associations predominantly used injunctions, their monitoring would be aimed at preventing violations and constitute a judicial complement to monitoring by public institutions. But injunctions may not be sufficient to deter. Harms may have occurred before the injunctions become effective. Furthermore, injunctions may not deter sufficiently future behaviour. For these reasons they have to be complemented by pecuniary remedies: compensatory and punitive damages.

¹¹⁹ Micklitz suggests that "the introduction of a right for consumers association to seek an injunction in the courts has considerably strengthened the position of the OFT as a consumer-protection oriented public authority." See Micklitz, n. 94 above p. 413.

¹²⁰ But see the Spanish statute implementing the directive 93/13 where it provides standing for trade associations. Art. 16: 'Las acciones previstas en el artículo 12 podrán ser ejercitadas por las siguientes entidades: (1) Las asociaciones o corporaciones de empresarios, profesionales y agricultores que estatutariamente tengan encomendada la defensa de los intereses de sus miembros'. Also in the UK competitors have action against unfair contract terms. See Regulation 1999 see Micklitz, n. 94 above, p. 378.

¹²¹ The possibility to bring an action for damages is foreseen in article 422-1 Code de la consommation in France (action en réparation conjointe). See Calais Auloy and Steinmetz, n. 32 above.

In Italy the remedies are defined by article 140 of the Codice del Consumo:

'I soggetti di cui all'articolo 139 sono legittimati ad agire a tutela degli interessi dei consumatori e degli utenti richiedendo al Tribunale:

- 1) di inibire gli atti e i comportamenti lesivi degli interessi dei consumatori e degli utenti
- 2) di adottare le misure idonee a correggere o eliminare gli effetti dannosi delle violazioni accertate
- 3) di ordinare la pubblicazione del provvedimento su uno o più quotidiani a diffusione nazionale oppure locale nei casi in cui la pubblicità del provvedimento può contribuire a correggere o eliminare gli effetti delle violazioni accertate'.

In the UK the collective harm is not defined in the Enterprise Act of 2002 but specified in the OFT Guidance. An harm is collective when potentially affects consumer generally or a group of consumers. See Howells and Weatherill, n 13 above, 593.

¹²² See for example in relation to the possibility of imposing *astreintes* art. 421-6 Code de la consommation in France, art. 140.7 Codice del consumo in Italy and art. 1 of the Spanish statute Ley 39/2002, 29 octubre 2002, Modificación de la ley 1/2000 de 7 enero de enjuiciamiento civil. A significant difference is related to the beneficiary of the *astreintes*: in the French case is the association in the Italian and the Spanish is the State. This difference may of course affect the incentives to exercise the monitoring function.

¹²³ On the different models of judicial protection of collective interests see M. Taruffo, 'Modelli di tutela giurisdizionale degli interessi collettivi', in L. Lanfranchi, *La tutela giurisdizionale degli interessi collettivi e diffusi* (Torino: Giappichelli, 2003) 53 ff.

A second dimension, affecting the quality of monitoring, is concerned with the effects of the judgement. The recognition of the prohibitory effects of injunctive relief in some legal systems goes beyond the single case and apply to all associations. A firm or a trade association enjoined by a judge would be prohibited from using those terms and all representative consumer associations can rely upon that *res judicata* to enforce the judgement.

Thirdly, the interaction between individual and collective monitoring. Often the violation of European Contract Law concerns both individual and collective rights. Thus both individuals and associations have standing for the same violation. However, they do not always have identical remedies. In some cases individuals have injunctions but can not claim damages, in other cases *vice versa*.¹²⁴ This divergence may be interpreted as a strategy reflecting unequal ability to monitor among different actors and the necessity to select judicial disputes to verify compliance in a cost-effective manner.

13. The role of consumer associations in the Directive 98/27 and its relationship with Directive 93/13 and Directive 2005/29.

First let us consider injunctions. The possibility to seek injunctions is explicitly stated by Article 7 of the Directive 93/13.¹²⁵ It is important to point out the relationship between Directive 93/13 on unfair contract terms and Directive 98/27 on injunctions for the protection of consumers' interests¹²⁶. In particular, the coordination between the two directives affects standing, since the criteria established by Dir. 93/13 are broader than those defined in dir. 98/27. While in the Unfair Contract Terms Directive a concept of diffused monitoring has prevailed, Dir. 98/27 endorses a more selective system, where only registered associations can bring legal actions.

¹²⁴ Punitive damages have been denied by Tribunale Milano, sentenza 15-09-2004, *Foro italiano* 2004, **.

“Inoltre Codacons ha chiesto la condanna di Bpm al risarcimento del danno punitivo la cui liquidazione ha rimesso all'equo apprezzamento del giudice. La domanda è inammissibile per carenza di legittimazione attiva di Codacons non essendo azione riconducibile ad alcuna di quelle tipizzate dall'art. 3, 1° comma, l. 281/98. Per completezza si rileva la sua infondatezza nel merito: Codacons assume che il danno punitivo «consiste in una sanzione ulteriore rispetto al risarcimento per il pregiudizio effettivamente subito e persegue molteplici finalità» tra cui «la punizione del soggetto autore dell'illecito, unitamente a quello della deterrenza e della prevenzione». Nel nostro ordinamento giuridico allo stato (pur conoscendo l'esistenza di un orientamento di dottrina che attribuisce, in alcune ipotesi di danno non patrimoniale, al risarcimento anche una componente sanzionatoria con funzione di deterrente) non sussiste alcun riferimento positivo fondante la categoria del danno punitivo. Il danno, anche non patrimoniale, che dà luogo al risarcimento consiste nella conseguenza immediata e diretta dell'inadempimento, del ritardo (art. 1223 c.c.) o del fatto illecito (art. 2043, 1223, 2056 c.c.); il risarcimento ha dunque la finalità di compensare il pregiudizio arrecato attraverso la restaurazione, anche per equivalente, della situazione del soggetto leso antecedente all'illecito'.

It should be reminded that under Italian law *astreintes* are allowed but the sums go to a fund and then are redistributed among associations.

¹²⁵ In France the relevant provisions are article 421-2 and 421-6. See Calais Auloy and Steinmetz n. 32 above, 598 (for transboundary injunctions, 601 ff.).

¹²⁶ See P. Rott, 'The protection of consumers' interest after the implementation of the EC injunctions directive into German and English law', 24 *Journal of consumer policy*, 401 ff..

A second issue concerns the relationship between consumers and competitors. While interests of both consumers and competitors should be protected, according to the Directive only consumer associations, and not competitors' associations, should monitor the fairness of contract terms.

The last paragraph of article 7 of Dir. 93/13 is concerned with identification of potential defendants and clearly indicates that trade associations, which have imposed or recommended standard form contracts, can be brought to Court. Italy infringed community law because it did not include recommended clauses by trade associations and the ECJ found it in violation¹²⁷. Legislative reform took place and now actions can be brought before Courts concerning both individual firms and trade associations that have used recommended standard forms.

In some legal systems, a difference is drawn between associations representing the interest of professionals and entities, with public or private law status, which do not represent either professionals or consumers, such as chambers of commerce. Recommended standard form contracts by such institutions could not be challenged before a Court unless used by an individual professional. The rationale behind this interpretation is that the status of the drafter prevails over a substantive examination of the content but it also shows a more general principle whereby fairness of contract terms drafted by impartial institutions should be differently scrutinized from those drafted by partisan institutions. From my perspective this distinction should imply that compliance with European law by chambers of commerce recommending standard form contracts should be ensured through different remedies.

What is thus the future of negotiated self-regulation? Should we have different approaches concerning monitoring when the organization is multi-stakeholder and represents all the conflicting interests? Should we have a different approach when the

¹²⁷ In relation to the Italian system the omission concerning recommended clauses has been upheld violation of directive 93/13 Art. 7.3, C-372/99, ECJ 24th January 2002, *Foro italiano* (2002) IV 233; C-473/00, ECJ 21st November 2002, *Foro italiano* (2003) IV 16.

The Italian legislator has thus modified the law according to ECJ interpretation. This is the modified formula of art. 1469 sexies c.c. now part of the new Italian Consumer code art 37 and 140: 'Le associazioni rappresentative dei consumatori e dei professionisti e le camere di commercio, industria ed artigianato e agricoltura, possono convenire in giudizio il professionista o l'associazione di professionisti che utilizzano o che raccomandano l'utilizzo di condizioni generali di contratto e richiede al giudice competente che inibisca l'uso delle condizioni di cui sia accertata l'abusività ai sensi del presente capo'.

On the question see even before the modification Corte d'Appello Roma, sentenza 7th May 2002, *Foro italiano* (2002) I 2823, 2843:

'Ai sensi dell'articolo 7, par. 3 della direttiva 93/13 Cee legittimati passivi nell'azione inibitoria sono i professionisti e le associazioni di professionisti che utilizzano o anche soltanto raccomandano l'inserzione delle clausole. Deve quindi ritenersi sussistente la legittimazione passiva dell'Ania, in quanto secondo i principi ermeneutici che regolano l'interpretazione delle norme di derivazione comunitaria, il diritto interno deve essere interpretato in modo conforme alla lettera ed allo scopo della norma comunitaria, atteso che trattandosi di direttiva avente efficacia diretta stante il suo tenore una diversa interpretazione dell'art. 1469 sexies c.c. comporterebbe l'esigenza di disapplicare tale norma, in quanto essa sarebbe contrastante con una norma comunitaria di diretta operatività. [...] E' comunque assorbente il rilievo che l'attività che la stessa appellante definisce di mero studio e ricerca in merito alle problematiche assicurative è di fatto destinata a facilitare l'adozione di modelli uniformi nella contrattazione con la massa dei consumatori, onde non può escludersi l'appartenenza dell'Ania ad una delle categorie indicate nell'articolo 1469 sexies'

See also Tribunale Roma, 8th May 1998, *Foro italiano* (1998) I 1989.

framework contract has been negotiated among conflicting classes? Even if we accept to differentiate the test of unfairness depending on the status of the drafters and the negotiating procedure, should this change affect individual rights? My claim is that the distinction should only refer to the protection of collective interests, while individuals, especially those who do not feel represented by the associations, should be able to bring a legal action before the Court. Individual monitoring should be preserved.

A second issue was related to the possibility of enjoining recommended and non-binding standard forms. ECJ stated that even purely recommended standard forms can be enjoined. The monitoring function thus concerns not only current use of unfair terms but also potential one.

Consumers' association have been granted the power to claim damages for liability associated to the potential use of unfair contract terms in standardised contracts¹²⁸. The protected interest is collective and it implicitly refers to the monitoring function. Liability in this case does not have primarily a compensatory function but concurs with injunction to policing violations. It provides additional incentives for consumer associations to monitor and for undertakings' associations to comply.

A preliminary conclusion is that consumer associations under Dir. 93/13 can monitor the implementation of European law through judicial remedies in particular injunctions and damages. Such a function enables them to ensure the correct application of EU law at MS level. This is a typical role for traditional self-regulation. Associations do not have a duty but only the power to employ judicial means. This leaves entirely open the space for public control both at the European level by the Commission and at national level by public authorities.

A different avenue would be to impose a duty on associations to police EU law implementation at European and national level. This solution should be incorporated in

¹²⁸ In France la Cour de Cassation has recognised such a right to Consumers' Associations to claim damages. Calais Auloy and Steinmetz, n 32 above, p. 601, referring to Civ. 1, 5 oct. 1999, *Droit des affaires* (2000) J 110, note Paissant.

In Italy case law has gone in different directions. See Tribunale di Roma, 4.12.2003, *Archivi Giurisprudenza Circolazione e sinistri Stradali* (2004) 642 ff.

‘Deve essere in primo luogo riconosciuta l’ammissibilità dell’intervento adesivo dipendente siegato da Cittadinanzaattiva nel presente giudizio, alla luce di quanto disposto dall’art. 3 l. 30 luglio 1998, n. 281 che ha riconosciuto alle associazioni dei consumatori e degli utenti rappresentative a livello nazionale, inserite nell’apposito elenco previsto nell’art. 5 la legittimazione ad agire a tutela di interessi collettivi al fine, fra l’altro di ottenere l’adozione di misure idonee a correggere le violazioni accertate dei diritti fondamentali dei consumatori o ad eliminare effetti pregiudizievoli. Sulla base di tale normativa l’interesse di Cittadinanzattiva all’accoglimento della domanda proposta dai signori ABCD non può essere qualificato di mero fatto, ma risulta giuridicamente rilevante in quanto compreso negli scopi istituzionali dell’associazione, la cui attività è rivolta, fra l’altro alla tutela del diritto fondamentale dei consumatori alla sicurezza dei prodotti’.

Often the right to claim damages is granted to individuals and denied to associations see Tribunale di Genova 2.8.2005, *Danno e Responsabilità*, 2005, p. 1225 “ Le associazioni dei consumatori e degli utenti sono legittimate ad agire a tutela di interessi diffusi e non a tutela di una pluralità di interessi individuali facenti capo a distinte persone fisiche.”

In Uk the use of unfair contract terms has been made an offence: ‘Under the enterprise act 2002, one of the duties of the Office of Fair Trading is to promote good consumer practices such as approving consumer codes; and earlier legislation which remains in force makes it an offence for a commercial seller to use in a consumer sale an exemption clause made void by legislation’. See G.H. Treitel, *An outline of the law of contract*, 6th ed. (Oxford: OUP, 2004) 118- 119; Howells and Weatherill, n 13 above, 587 ff.

a legislative Act and would qualify as a form of delegated self-regulation or as a form of co-regulation.

The current solution is inspired by the principle of coexistence and differentiation. What are the possible justifications of having concurring monitoring systems in place? Is this a cost-justified solution? To answer to these questions it is important to define the effects of judicial monitoring. Judicial monitoring is quite expensive and time-consuming. It has been interpreted by the associations either as a last resort remedy or as a way to negotiate in the shadow of the law. The reasonable threat of bringing a legal action before the Court may serve as a powerful instrument to negotiate fair contract terms with Trade Associations. These negotiations often take place and may contribute to police contractual clauses *ex ante*. However, as we have seen, negotiations remain informal and tend to be opaque. Lack of transparency creates major problems when negotiations take place between public bodies, agencies or ministries and trade associations. To the extent that such negotiations informally prevent these bodies from exercising their policing powers by using judicial devices to monitor implementation of EU law, they should be warranted publicity and some kind of proceduralisation to make it accessible to different actors.

14. The role of trade associations as monitors of European Contract Law. Art. 3 of the Late Payment Directive and SMEs' associations.

Directive 2000/35 concerning late payments in commercial transactions is aimed, among other things, at ensuring control over unfair contract terms by SMEs' associations. Unfair terms concerning late payments are defined in Art. 3(3) of the Directive while a right to act for associations is defined by Art. 3(5). The purpose of the directive is to reach limited harmonization¹²⁹.

The implementation of the Directive has evidenced the different national traditions related to the definition of unfair terms. Unlike with Directive 93/13, in this case MS have used different criteria to define a clause abusive in relation to delay of payment¹³⁰. Like in Directive 93/13, control over unfair terms concern not only binding but also recommended standard contract clauses. As in the unfair contract terms there are individual and collective remedies. Remedies granted to associations also differ

¹²⁹ See C-302/05 Commission v. Italy 26 october 2006 para 23.

¹³⁰ Compare art 9.1, 2 and ar. 3 of the Spanish statute, Ley 3/2004 de 29 diciembre 2004, with article 7 of the Belgian statute, loi 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales :

‘Art. 7. Toute clause contractuelle qui déroge aux dispositions du présent chapitre sera révisée par le juge, à la demande du créancier, lorsque compte tenu de tous éléments du cas d’espèce, y compris les bonnes pratiques et usages commerciaux et la nature des produits et des services, elle constitue un abus manifeste à l’égard du créancier, étant entendu que les conditions équitables que le juge détermine ne peuvent pas accorder au créancier plus de droits que ceux dont il disposerait en vertu des dispositions du présent chapitre.

Lors de l’appréciation du caractère manifestement abusif au sens de l’alinéa précédent, le juge considérera entre autres si le débiteur a des raisons objectives de déroger aux dispositions du présent chapitre. Toute clause contraire aux dispositions du présent article est réputée non écrite’.

quite significantly among MSs. While in some cases only injunctions are warranted, in other cases references to damages and to restitutionary remedies are made.¹³¹

When remedies in tort are granted they can couple avoidance of contract clauses. A clause concerning delay of payment can be declared unfair and therefore void and at the same time give rise to damages for the harmful effects produced. In some legal systems these remedies are considered functionally restitutionary. Furthermore, some countries specifically proscribe pecuniary remedies and the publication of the judgement.¹³² These divergences are compatible with the directive since the choice of remedies is left to Member States in accordance with the principle of procedural autonomy (arts. 3.4 and 3.5 of the Directive). Article 6.2 of the Directive leaves MSs the possibility of increasing creditors' protection, thereby reaffirming the minimum harmonisation nature of the directive.

¹³¹ Compare art 9.4 of the Spanish law, and art 9 f the Belgian law with art 8 of the Italian law.

Art. 9.4 : 'las acciones de cesación y de retractación en la utilización de las condiciones generales a que se refiere el apartado anterior podrán ser ejercidas conforme a la ley 7/1998 de 13 abril sobre condiciones generales de la contratación, por la siguientes entidades

a) las asociaciones, federaciones de asociaciones y corporaciones de empresarios, profesionales y agricultores que estatutariamente tengan encomendada la defensa de los intereses de su miembros'.

Art 9 of the Belgian law:

'L'action en cessation, visée à l'article 8 est formée à la demande :

1° des intéressés;

2° du ministre compétent ou des ministres compétents pour la matière concernée;

3° de l'autorité professionnelle ou d'un groupement professionnel ou interprofessionnel jouissant de la personnalité civile.

Par dérogation aux articles 17 et 18 du Code judiciaire, les instances visées à l'alinéa précédent, 3°, peuvent agir en justice pour la défense de leurs intérêts collectifs statutairement définis.

L'action en cessation formée à la demande d'une instance visée à l'alinéa 1er, 3°, peut être dirigée, séparément ou conjointement, contre plusieurs entreprises du même secteur économique ou contre leurs groupements professionnels ou interprofessionnels qui utilisent ou recommandent l'utilisation des mêmes clauses contractuelles générales, ou de clauses similaires.

Art 8.1 of the Italian law d.lgs. 231/2002:

'Le associazioni di categoria degli imprenditori presenti nel Consiglio nazionale dell'economia e del lavoro (CNEL), prevalentemente in rappresentanza delle piccole e medie imprese di tutti i settori produttivi e degli artigiani, sono legittimate ad agire, a tutela degli interessi collettivi, richiedendo al giudice competente:

a) di accertare la grave iniquità, ai sensi dell'articolo 7, delle condizioni generali concernenti la data del pagamento o le conseguenze del relativo ritardo e di inibirne l'uso;

b) di adottare le misure idonee a correggere o eliminare gli effetti dannosi delle violazioni accertate;

c) di ordinare la pubblicazione del provvedimento su uno o più quotidiani a diffusione nazionale oppure locale nei casi in cui la pubblicità del provvedimento possa contribuire a correggere o eliminare gli effetti delle violazioni accertate'.

¹³² See art. 8 of the Italian law n 132 above.

The Italian law clearly reflects the rule defined by l. 281/1998 implementing directive 98/27 concerning consumer associations rights. The pecuniary remedy associated to the delay related to prohibitory or restitutionary order looks very much alike the *astreintes* regulated by art. 5 bis l. 281/1998. Notice however that unlike the provision concerning *astreinte* in relation to consumers' associations where the beneficiary is a State owned fund responsible to promote initiatives in favor of consumers in this case the beneficiary is not identified and most likely should be the plaintiff.

As said above, in relation to consumers associations, the monitoring function is affected by the set of available remedies. The reduction of remedies only to injunctions may limit the monitoring ability of associations. The inability to recover damages may under-deter firms willing to use unfair terms concerning payments.

A second dimension here is related to the effect of the judgement. In relation to injunctions, some legal systems extend the value of the judgement beyond the litigants. The enjoined firm or association that has recommended the unfair clauses is prohibited to use them in relation to all SMEs' associations.¹³³

Standing, granted to associations of small and medium enterprises, to enjoin these clauses represent another example of the monitoring function of EPL. Like in the case of consumers' associations the rationales are various. On the one hand, to reduce transaction costs. Associations can save costs in monitoring firms' behaviours especially when control is not related to individual contracts but to standard forms. On the other hand, asymmetric market power. The asymmetric market power may prevent contracting parties from bringing legal action. Collective protection may supplement individual protection when individual small and medium enterprises may lack sufficient incentives to bring legal actions. The role of associations is to police asymmetric market power by seeking injunctive relief.

15. Concluding remarks and some (modest) proposals

State monopolies on rule-making and monitoring implementation of European contract law show significant weaknesses. If they ever existed certainly they have today disappeared. The necessity to complement the role of the States as rule makers and monitors with that of private, non necessarily market, actors is emerging in the field of contract law in relation to the formation of the Common frame of reference (CFR).

In this contribution I have argued that democratically legitimated private organizations, both consumers and trade associations, currently have and in the future may play an ever more important role as producers of European Contract Law rules. However private rule-making organizations differ quite substantially. Most represent private interest groups, others, still a minority, are independent organizations that produce contract terms and forms as parte of their cultural mission. Some of them sell contract forms together with other services other provide them as public goods making them available for free. These distinctions should be considered both in designing the governance system related to European Contract Law and in regulating the boundaries between self and co-regulation. Promotion of co-regulation should favour the birth and consolidation of independent private organizations without penalising current for profit

¹³³ See, in relation to the Italian system, D. Amadei, 'Le disposizioni processuali del d.lgs. 9 ottobre 2002, n. 231: la tutela degli interessi collettivi e le modifiche al procedimento di ingiunzione', *Responsabilità Civile e previdenziale* (2003) 887.

'La produzione degli effetti nei confronti delle associazioni rimaste estranee implica anche l'estensione della esecutività, la possibilità di utilizzazione della sentenza come titolo esecutivo o comunque in funzione dell'esecuzione forzata del suo contenuto. Questa soluzione sulla legittimazione ad agire esecutivamente delle associazioni rimaste estranee al giudizio è utile in funzione dell'esigenza di garantire la realizzazione dell'ordine inibitorio, in quanto potrebbe darsi il caso che la singola associazione resasi attrice che ha ottenuto la sentenza inibitoria rimanga poi inerte relativamente alla esecuzione coattiva consentendosi la supplenza di altro ente parimenti legittimato'.

organizations. The governance of these organizations and their accountability has overarching importance to ensure their legitimacy.

Contract rule makers can complement mandatory rules and general principles, enacted at EU level, by specifying them and substitute enabling rules when they do not fit with specific needs of their members and are compatible with general interests. The activity of private rule-making, both in the form of pure self-regulation and in that of co-regulation and delegated private regulation, is limited by competition law and contract law. Competition law defines what can be standardised, and what ought to be left to individual contracting parties. Standardisation has to be incomplete and does not have to define prices directly, and to some extent, even indirectly to be compatible with competition law principles.

As the essay demonstrated these limits do not contradict the general principles of European Contract Law, in particular freedom of contract. On the contrary they ensure that private rule-making operates to achieve the enhancement of freedom of contract and freedom of choices for consumers and small and medium enterprises. Competition law provides legitimacy together with democratic governance principle concerning the rule making function of these organizations. A regulatory framework should prevent private organizations exercising rule making from externalising costs on third parties to the extent that competition law does not cure the problem.

Consumer and trade associations play also an important role to monitor conducts of individual undertakings and other trade associations concerning national laws implementing European Contract Law. Currently this activity is mainly performed by private organizations individually and often within the boundaries of MS. A self-regulatory framework could provide better coordination among different organizations located in each MS and improve effectiveness in monitoring. Guidelines concerning self-regulatory cooperation at EU level should be produced.

One of the most relevant issue concerns monitoring of European Contract Law rules produced through self-regulation. For example can trade and consumer associations be expected to monitor effectively compliance with European contract rules when drafting standard form contracts? Should consumers associations, exercising monitoring functions, be forbidden from negotiating standard contract forms?

While taken separately rule-making and monitoring, self-regulation seem to be quite effective, when burdened with multiple tasks and in particular with sanctioning their own members private organizations show some significant flaws. Compliance and enforcement has been one of the major weaknesses of the self-regulatory system.

New principles, emphasising liability to monitor and to enforce these rules have been introduced at national and European level in relation to State institutions. Stringent obligations on private organizations whose compliance is to be monitored by public authorities may warrant better results. New co-regulatory arrangements have to be introduced if private regulation is to gain a significant role in European Contract Law. Pure self-regulation may not warrant sufficient effectiveness.

The institutional design currently in place needs thus to be improved.

First the necessity to separate rule making and monitoring. When private organizations that complement public rule-making (state or international) also exercise monitoring powers some devices must be introduced like those provided by separation of powers and judicial review to avoid conflict of interest. Otherwise the organizations responsible for rule-making would coincide with those responsible for monitoring compliance with their own rules. Capture may be a risk and it has to be contrasted with

adequate institutional devices. In this context it is very important to distinguish between single, dual and multistakeholder contractual arrangements and organizations. The higher the number of participants with conflicting divergent interests the lower the probability of conflict of interest.

On the side of contract law, the role of trade and consumer associations should be explicitly recognised and regulated at EU level but only through general principles. Even leaving in place the current significant differences among national models, where national legal systems adopt either more market oriented self-regulatory arrangements or more co-regulatory instruments, the function of private organizations can be further promoted as a concurring agent of harmonisation of European law. This is particularly relevant in heavily regulated market such as securities, banking, energy and telecom, where the dialogue with national regulators and European Committees is a necessary condition of ECL development.

On the side of competition law, the rationales for the differences concerning the tests to scrutinize these agreements or decisions of undertakings have to be clarified. Two areas appear particularly problematic:

- 1) the differences between pure and delegated self-regulatory arrangements which affect the applicability of competition law and its effects
- 2) the conditions for granting exemptions related to consumer interest protection and to public interest protection.

Private organizations have to change their cultural and organizational clothes as well. If they want to become democratically legitimated actors of the process of Europeanisation of private law, they clearly have to operate in a coordinated dimension and revise their internal governance rules. While it is appropriate that a process of coordination and integration among private organizations takes place, it would be useful that a certain degree of pluralism is preserved so that different legal cultures can continue to exist and some degree of competition take place. This should occur at national but more importantly at transnational level. It is important that the networks of consumer organizations overcome national boundaries. They should have transnational dimension and represent competing legal cultures. Their legal status as well some general principles concerning their governance structure should be re-defined accordingly.

The role of self-regulation in the process of the creation of ECL is relevant but substantial changes at the institutional level are needed to improve the quality of its contribution. A challenge for European scholars and institutions is in front of us.