

Self-regulation in European Contract Law

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I. Introduction

This essay focuses on rule-making procedures in European Contract Law (hereinafter ECL) and the role of self-regulation (hereinafter SR). SR may serve different purposes in this respect.¹ It operates as a standard-setting mechanism for contracts, in particular through standardisation. It may interpret European and national law offering firms and consumers guidelines. It contributes to monitoring the conduct of contracting parties to ensure compliance, and it provides enforcement mechanisms.

Self-regulation plays already a significant role at European level, it is already relevant for European Contract Law and may perform important functions in the process of drafting the Common terms of references (hereinafter CFR) and more broadly in the process of harmonisation of ECL. This paper addresses self-regulation as a complementary means to harmonize and regulate ECL.

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, *i.e.* (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 the general standard forms to be used for individual sectors, unregulated or regulated (banking, insurance, securities).

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¹ On the relationship between self-regulation and contract law see **H. COLLINS**, *Regulating contracts* (Oxford: OUP, 1999).

The choice between the first two alternatives, complementarity or substitution will partly depend on the form of legislation. The role of self-regulation will increase in a principle-based legislative framework and decrease in a rule-based framework.

In practical terms SR operates both as a complement and as a substitute. It is a complement when it specifies or interprets existing legislation. It is a substitute when harmonises, by means of Standard contract forms (hereinafter SCF), Framework contracts or Master Agreements, contractual relationships otherwise regulated at State level in different fashions. In turn from the perspective of the State or the European institutions the use of self-regulation in ECL may imply a functional change: from the 'theoretical' monopoly of law making to a duopoly. But the change could be even more radical if the public legislator, be it at European or national level, becomes a coordinator and/or a mediator among different self-regulatory bodies, negotiating among themselves contract law rules. The evolution of the regulatory state in Europe will probably affect which combination between these two identities will emerge in the next future.

The main aims of the paper are (1) to demonstrate the necessity to consider self-regulation as a significant component of the debate concerning the definition of Common Frame of References related to European Contract law, (2) to identify the role and the limits of self-regulation in the formation of European Contract Law, and (3), more in general, to show the strong correlation between the governance of self-regulatory bodies and the substance of European Contract Law .

II. Rule making in European contract law

Self-regulation 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.² The functions may differ, given the

² 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).

complementary nature of SR to state regulation, in the areas of BtoC, BtoB, and Btob.³ SR can play, and *de facto* plays, a more relevant role in BtoB relationships and more in general in relation to *lex mercatoria*.

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 with the use of ADR and arbitration.

In this paper, I focus on standard-setting and distinguish between its different dimensions.

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, security, electricity, transport, etc.).⁴ We observe several SCF provided by trade associations in each field.⁵ 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.⁶

³ BtoB refers to business to business relationships operating on equal arms. Btob, instead, refers to relationship between firms that operate in an asymmetric context be it asymmetric market power or asymmetric information or caused by other factors.

⁴ In securities the rulebooks developed by Stock exchanges, particularly Euronext. See *infra* note 141.

⁵ On the role of private organisations in producing SCF within a governance perspective see **F. CAFAGGI**, 'New modes of governance in EPL' in **F. CAFAGGI** and **H. MUIR WATT**, *The making of European Private Law. Governance Design* (working title), forthcoming, EE, 2007

⁶ Examples at a European level are: model forms of contracts (Agency, Distributors abroad, Consortium Agreement and International Technology License Agreement) and general conditions of contracts developed by

Within private 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 particular a key distinction for competition law which plays a less significant role in contract law is that between interest-based versus knowledge- or expertise-based organisations.⁷

In relation to the institutional environment a distinction is assumed between different modes of rule-making supply. Private organizations provide rules, including SCF, for a price or more generally for remuneration or for free. Often private organisations do both, depending on the type of rules or on the potential users.

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. The still

the European Engineering Industries Association (Orgalime) available at <http://www.orgalime.org/publications/forms.htm> and <http://www.orgalime.org/publications/conditions.htm> (last visited March 18, 2007); standardised energy contracts developed by the European Federation of Energy Traders available at <http://www.efet.org/Default.asp?Menu=5> (last visited March 18, 2007); the European Master Agreement (EMA) sponsored by the European Banking Federation (FBE) in cooperation with the European Savings Banks Group and the European Association of Cooperative Banks; The SEPA (Single Euro Payments Area) Cards Framework developed by the European Payments Council available at http://www.europeanpaymentscouncil.eu/documents/SEPA%20Cardsframework_027_05_Version2%200.pdf (last visited March 18, 2007); Code of Conduct for EONIA SWAP INDEX prepared by the Euribor FBE available at <http://www.eoniaswap.org/Content/Default.asp?PageID=143> (last visited March 18, 2007); the Euribor Code of Conduct drawn up by the European Banking Federation (FBE), the Financial Markets Association (ACI), the European Savings Banks Group and the European Association of Cooperative Banks available at http://www.euribor.org/html/content/euribor_code.html (last visited March 18, 2007); codes of conduct (Code towards consumers and Code towards direct sellers) adopted by the Federation of European Direct Selling Associations available at <http://www.fedsa.be/main.html> (last visited March 18, 2007); Code of Conduct for European lawyers adopted by the Council of Bars and Law Societies of Europe (CCBE) and national codes of conduct available at http://www.ccbe.org/en/documents/code_deonto.htm (last visited March 18, 2007).

Examples at national level: Allgemeine Geschäftsbedingungen der privaten Banken und andere Klauselwerke (General contract terms and clauses of private banks) prepared by the Bundesverband Deutscher Banken (Association of German Banks) available at <http://www.bankenverband.de/index.asp?channel=101758&art=936> (last visited March 18, 2007); Codice di Autodisciplina (Code of conduct) adopted by the Associazione Bancaria Italiana (Italian Banking Association) available at http://www.abi.it/doc/home/conoscereBanche/sistemaItaliano/sistemaBancario/doc/tmp986312354513_3Codice_di_autodisciplina2.pdf (last visited March 18, 2007); Banking Code (March 2005) – Setting standards for banks, building societies and other banking service providers adopted by the British Bankers' Association available at <http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=347> (last visited March 18, 2007); Zasady Dobrej Praktyki Bankowej (Code of Best Banking Practice) adopted by the Związek Banków Polskich (Chamber of Polish Banks) available at <http://www.zbp.pl/site.php?s=NGQ3ZTBkNzIxMDc4> (last visited March 18, 2007).

⁷ See below text and footnote 86 the Reiff case and the following jurisprudence.

predominant choice of minimum harmonisation has made possible a high level of variation among MS currently under scrutiny.⁸

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.

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.

This function 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.

But self-regulation is not the only regulatory mode through which private regulation operates. Different regulatory strategies have developed at EU and State level and they can all contribute to the formation of ECL. But their legal regimes imply different constraints. More specifically 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 European law, in particular with competition law principles.

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 MS.⁹ Competition law and contractual

⁸ See *Green Paper on the Review of the Consumer Acquis*, Brussels 08.02.2007 COM (2006) Final.

⁹ Concerning 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

fairness control both what can be standardised 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. In this contribution I want to compare competition, contract and organisational limitations to private rule making to define the potential and current role of self-regulation in European Contract law.

A. Self-regulation and European contract law

SR is concerned with different types of contractual relationships. It encompasses *lex mercatoria*, BtoB, and BtoC relationships. The use of self-regulation in contract practices has a long history and precedes the formation of nation states.¹⁰ A sharp divide seems to characterize policy options concerning consumer contract law and inter-firm contracting at the European level. The combination between legislation and self-regulation, and within the former between mandatory and enabling rules are different. Yet a general approach to the use of self-regulation in ECL is possible and desirable. The main focus of the essay is related to the consumer law but some references will also be made to the role of *lex mercatoria* on the formation of European Contract Law. By choosing consumer contract law I take the hard case to analyse both the potential for self-regulation as a descriptive and normative standpoint.

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 suggested promoting the use of EU-wide standard terms and conditions.¹¹ Such a measure is definitely related to the development of a CFR. It can operate at the European level in the framework of a multilevel system. The Commission has however subsequently modified its initial position, rejecting the idea of

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 cases agreements or concerted practices to use STC may be incompatible with the competition rules". See *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*), p. 7.

¹⁰ For an historical account until contemporary times see **F. GALGANO**, *La globalizzazione nello specchio del diritto*, Bologna, Mulino, 2005, p.93 ff.

¹¹ See the Communication from the Commission to the European Parliament and the Council – A more coherent European Contract Law, an Action Plan, COM (2003), 68, final, part. 81-88. See also *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." , cit., *supra* note 10, p. 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.; **H. COLLINS**, 'The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher's Stone', *ERCL*, 2006, 2, 213.

operating as a facilitator hosting a website for the presentation of EU-wide standard terms and conditions.¹²

It is useful to distinguish an institutional set of functions from a substantive one performed by SR.

From an institutional perspective SR can complement :

(1) legislative functions by contributing to the definition of contractual terms, code of conducts, framework contracts;

(2) Regulatory functions by defining (a) sector specific guidelines or, more specifically in the area of information regulation, (b) by introducing cognitive intermediaries;¹³

(3) Interpretive functions by offering guidelines to individual firms when they contract with other firms or consumers;

(4) Monitoring functions of European Contract Law by verifying correct implementation of EU law at MS level;

(5) Enforcement by defining sanctions to their members in case of violations.

From a substantive perspective it can contribute to the creation of SCF according to different models and to their correct administration, to produce codes of conducts that affect (1) the content of contract, (2) the bargaining procedures, ensuring compliance with EU legislation, and (3) more in general economic activities of the regulated. For example they can impose mandatory licensing for certain activities, quality control for other activities, *i.e.* certification.¹⁴

Private bodies define SCF concerning their members, often firms, but also standard contract forms between their members (firms or professionals) and third parties (consumers, investors, clients). Therefore they would produce both contract rules in BtoB and BtoC relationships. Then implementation can occur at national level either through national self-

¹² See U. BERNITZ, 'The Commission's Communication and standard contract terms', in S. VOGENAUER and S. WEATHERILL, *The Harmonisation of European Contract Law*, cit., *supra* note 12, pp. 185-ff, part. 189.

¹³ 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, p. 267.

¹⁴ See for example in the sports domain the regulations enacted by FIFA concerning mandatory licensing of agents for football players.

regulatory systems or directly through enterprises applying the framework contract to specific transactions. The Commission in this context is seen as a ‘facilitator’ of self-regulated production of contracts standard terms.¹⁵

B. 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 banking, 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 consumers.¹⁶

SR in the field of consumer law can support regulatory functions, pursued by legislation, 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 comparability either by imposing obligations directly on undertakings or by promoting self-regulation as a response to high research costs.¹⁷ 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. 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

¹⁵ See *ECL and the revision of the acquis*: “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.”, *supra* note 10, p. 6

¹⁶ 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.

¹⁷ See for example Art 21 and 22, Universal service directive 2002/22. In particular, Article 22 imposes on national regulatory authorities the obligation to ensure that undertakings ‘publish comparable, adequate and up-to-date information for end-users on the quality of their services’. However, national regulatory authorities can use different organizational models to ensure such achievement, among which certainly self-regulatory arrangements.

mandatory rules.¹⁸ But what is the current balance between mandatory and enabling rules in European contract consumer law?¹⁹

From a substantive viewpoint, the key strategic question relates to the distinction between mandatory and enabling rules. Harmonisation of mandatory rules should differ functionally from harmonisation of enabling rules. It is debatable whether similar rationales for harmonisation can be used in relation to the two sets of rules. As to the former, the main institutional consequence of harmonisation at European level may be the decrease of MS' power; as to the latter, harmonisation reduces private parties' ability to choose, primarily in the realm of freedom of contract.

Therefore in order to ensure consumer protection, interpreted as a means to expand consumers' choices and thus consumers' freedom of contract, divergent strategies may be defined as to mandatory and enabling rules. But the matter is further complicated by potential different legislative choices. A principle-based legislation concerning mandatory rules would permit higher level of differentiation than a rule-based legislation. Even within the realm of mandatory rules the form of the provision may affect the level of differentiation across Member States.²⁰

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.²¹ In the future, it is likely that European consumer legislation and more in general European Contract Law will encompass both mandatory and enabling rules. A new culture concerning the harmonising role of enabling rules is developing although not always institutionally perceived.

¹⁸ 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, p. 586 ff.

¹⁹ See **S. GRUNDMANN** *et al.*, *Party autonomy*, *supra* note 14.

²⁰ This level of complexity is not quite captured by the Green Paper on the review of the consumer *acquis* which on the one suggests the move to a more principle-based legislation and on the other seems to favour a move towards total harmonisation. See *Green paper on consumer acquis*, *supra* note 9, p. 6 and 10

²¹ 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.

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.²² 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 SCF. 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.

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: (1) public interest representation organizations, such as ombudsman, and (2) public regulators (i.e Independent Regulatory Agencies, IRAs, or governmental departments).²³ 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. In the field of competition negotiations between national authorities and trade associations used to take place in many countries. In some notification was mandatory in other it was just an informal practice. Regulation 1/2003 has modified the system and now ex ante control is not allowed. This is not to say that informal consultations do not still take place.

But standardisation is not the only form of SR affecting ECL. In specific regulated sectors different forms have been employed. Master Agreements among banking associations

²² For a general and relevant scholarly contribution on these questions see H. Collins, *Regulating contracts*, *supra* note 2.

²³ For example in Sweden the Consumer Agency headed by the Consumer Ombudsman has been very active in negotiating standard contracts with the business community, *infra* note 38.

have contributed significantly to the development of European contract banking law in both the field of BtoC and BtoB relationships.²⁴

Beyond standardisation SR can provide general rules as it is the case for codes of conducts. In the field of professional associations individual contracts between clients and professionals are drafted in compliance with the rules defined by the codes. Rules about Contracts for professional services are therefore mainly defined by self-regulatory or co-regulatory arrangements.

Outside the field of ECL, 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.²⁵ This role has been strongly reduced in the final version of the directive, while being much wider and better articulated in the initial proposal.²⁶ 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.²⁷

Certainly the modes of self-regulation play a very important role to 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 thus be devised.

²⁴ European Central Bank, *Guideline of The European Central Bank* of 21 December 2006 on the management of the foreign reserve assets of the European Central Bank by the national central banks and the legal documentation for operations involving such assets (ECB/2006/28), OJ 2007/C 17/02.

²⁵ 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. It should be underlined that the directive should in principle not apply to contract law. While it provides relevant examples of the use of self-regulation in the area of consumer law I will not examine the directive and its implementation given the focus on self-regulation and European contract law.

²⁶ On the Proposal see the contributions in **H. COLLINS** (ed.) *The forthcoming Ec Directive on unfair commercial practices*, The Hague, Kluwer international, 2004; **G. HOWELLS, H. MICKLITZ, T. WILHELMSSON**, *European Trading Law*, Aldershot, Ashgate, 2006

²⁷ See art 6.2 (b), i and ii, Dir Directive 2005/29, *supra* note 26.

C. The different models of private and self regulation in European contract law and their 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 private rule making activities can take place:

- creation of SCF, or
- broader engagements aimed at defining a complex set of rules associated with consumer transactions or other firms such as codes of conduct
- 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 such as master agreements and framework contracts.

When the contractual model is employed, the parties design a contract to regulate conducts 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 then to be implemented by individual contracts. The regulatory chain can be very long.

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. In BtoB relationships this often occurs both in relation to the supply chain for subcontractors or in relation to the end consumers in distribution contracts. 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 them.²⁸

²⁸ Adjustments may be required in the area of *causal/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. See **F. CAFAGGI**, *Regulatory contracts, Codes of conducts, reasonable reliance and third parties*, unpublished manuscript.

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?²⁹

Third parties beneficiary contracts can provide only a partial solution to the problem. The consumer can be considered the beneficiary of these regulatory contract and enforce them if one of the party does not comply. 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.³⁰ Similar problems may arise when SCF are employed along the chain. SCF involving the whole production chain may imply the necessity of alternative means of enforcement. It may be difficult for the consumer to enforce an obligation contained in the contract between supplier and distributor. These limitations are not limited to SR. To the contrary a good SR design can contribute to improve legal limitations concerning the use of functionally correlated contracts.

The complexity of these regulatory arrangements may require a stronger and broader set of devices than those currently provided by national contract laws. 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

²⁹ 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.

³⁰ See **F. CAFAGGI**, *Regulatory contracts*, cit., *supra* note 29.

apparatus or delegate this function to an independent body unlike the contractual system which will generally refer to a public judge or an arbitrator.³¹

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. 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 BtoB 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 individual 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.³²

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.³³ 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 in ECL has taken different forms. Worth mentioning are co-regulation and delegated self-regulation:

³¹ For example the management systems built around international framework agreement concerning corporate social responsibility. See **F. CAFAGGI**, *Regulatory contracts*, cit., *supra* note 29.

³² See **F. CAFAGGI**, *The regulatory function of customs and usages in European Contract Law*, unpublished manuscript.

³³ See **F. CAFAGGI**, 'Rethinking Self-regulation', in **F. CAFAGGI**, *Reframing self-regulation*, cit., *supra* note 17.

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*;³⁴

b) when there is a formal delegation by a legislative or administrative act without direct intervention of a public authority.³⁵ Delegation can concern one organisation or identify bargaining actors.³⁶

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.

³⁴ A recent example concerns German legislation see EG-Verbraucherschutz-Durchsetzungsgesetz 20.12.2006 implementing Regulation 2006/2004. See in part. Article 1 § 7 Beauftragung dritter. In relation to Sweden, *infra* note 40.

³⁵ For example a clear relation between the use of expertise and co-regulation is expressed in the European Commission, *European Governance - A 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.”

³⁶ A recent example concerning delegation to a ‘framework contract’ to be signed by trade and consumer associations draws from the Italian experience. D.L 223/2006 (Decreto Bersani), Article 7, n. 5, 6 where it is stated:

“5. L’Associazione bancaria italiana e le associazioni dei consumatori rappresentative a livello nazionale, ai sensi dell’articolo 137 del Codice del consumo di cui al decreto legislativo 6 settembre 2005, n. 206, definiscono entro tre mesi dalla data di entrata in vigore del presente decreto, le regole generali di riconduzione ad equità dei contratti di mutuo in essere mediante in particolare la determinazione della misura massima dell’importo della penale dovuta per il caso di estinzione anticipata e parziale del mutuo. 6. In caso di mancato raggiungimento dell’accordo di cui al comma 5, la misura della penale idonea alla riconduzione di equità è stabilita dalla Banca d’Italia e costituisce norma imperativa ai sensi dell’Article 1419, secondo comma, del codice civile ai fini della rinegoziazione dei contratti di mutuo in essere.” The legislator delegates to private organisation the definition of a procedure to renegotiate checking account contracts and defines last resort solution if the agreement does not take place within three months, empowering the public regulator.

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.³⁷

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.)

³⁷ 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=&hiliting=yes (last visited July 7, 2006).

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

	One-sided (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 consumer (or other trade) associations	Among trade, consumer associations and public actors

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, including business to business. 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, *i.e.* 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 it 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 or a contract of adhesion.³⁸ 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 but also how these differences may play out in competition and contract law.

Most of the organizations that produce standard contract terms and forms have a non profit form. However, this should lead not to the conclusion that they pursue charitable goals.

³⁸ The regulatory contract has a double identity. On the one hand, it is a contract in relation to the parties who signed, binding them in their relationship with other parties. On the other, it can be defined as a unilateral act towards external parties, or as a contract of adhesion, depending on its features.

They are typically mutual and they supply these forms to their members, which are for profit enterprises. 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 to distinguish among private rule makers supplying standard contract forms, is related to the distinction between mutual and public interest organizations. The former pursuing exclusively the interests of its members, the latter aiming at public interests.

The real difference among private rule makers might be between independent and not independent organizations.³⁹ There are some organizations that are independent from both suppliers and consumers that produce SCF. They generally operate in the international market. If we were to make a distinction between different regulations concerning standard forms this distinction, more than 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 SCF 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).⁴⁰

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

³⁹ See F. CAFAGGI, *Private organizations and transnational contract law*, unpublished manuscript.

⁴⁰ See F. CAFAGGI, *Private organizations*, cit., *supra* note 40.

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.

D. Contract standardisation and the nature of SCF: Coupling competition and contract law controls

SR and more generally private rule making encounter limits based on:

(1) competition law and policy, related to questions of both *whether* and *how* to regulate, and

(2) contract law, mainly related to the mode of standardisation and the content of contract clauses, particularly unfairness.

Competition law addresses a broad range of regulatory activities performed by private regulators, through the use of contract and organisational laws. The forms may vary when there is pure self-regulation, delegated self-regulation or co-regulation.⁴¹ Unfairness analysis under contract law also differs if standardisation is purely private or is mandated by a public authority.

I would like to focus specifically on the limits on standardisation as a form of self-regulation. Standardisation and differentiation of contracts represent one feature of self-regulation of contract law worth focusing upon.⁴² Trade and professional associations generally operate as contract *standardisers* but there are other forms of governance concerning standard contract terms which are less one-sided. Examples within SCF range from stock exchanges to sports associations. At the international level the different organisations of Chambers of Commerce define SCF. In the latter case the role of contractual or organizational arrangements is to govern differentiation of contractual terms in ways

⁴¹ These different forms 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 level, in the latter 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.

⁴² See E. HONDIUS, 'Self-regulation in consumer matters', cit., *supra* note 17, p. 237 ff.; J. CALAIS AULOY and F. STEINMEZ, *Droit de la consommation*, 6^o ed, *Precis*, Dalloz, 2003.

compatible with the functioning of industry. In addition to drafting contract forms they can issue guidelines concerning principles or general rules that ought to be implemented in drafting SCF. Negotiated private regulation operates also as a revision mechanism when clauses in SCF, previously held legitimate, are considered void due to new legislative intervention.

At transnational level the problem is concerned with the governance of *lex mercatoria* and the different models of self-regulation.⁴³ 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.⁴⁴

The incentives to standardise may exist independently from anticompetitive goals. The problem thus is to distinguish between competitive and anticompetitive standardisation. The proposed criterion is the incompleteness of standardisation: to be compatible with competition, standardisation of contracts should not be complete.⁴⁵

⁴³ 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., *supra* note 13, p. 191.

⁴⁴ 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, 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.

⁴⁵ 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

Differentiation of SCF may produce positive effects. It promotes competition among firms and it enhances freedom of consumers' choice.⁴⁶ Differentiation can also produce negative effects by increasing consumers' research costs and decreasing contracts and products comparability.

There are limits to standardisation in the interest of consumers and that of competitors. 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 or private regulators have to control the content of contracts and their compliance with 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.⁴⁷ On the other hand there might be abusive standardisation, unlawful under the Unfair Contract Terms Directive, but compatible with competition law.⁴⁸ As we shall see abusive standardisation is different from anticompetitive and has a different meaning under competition and consumer contract law.

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, Article 3 §

soddisfatta affinché la standardizzazione possa essere compatibile con un equilibrio non collusivo è che essa non sia completa'.

⁴⁶ It should be pointed out again that contracts' differentiation in services contracts implies product differentiation.

⁴⁷ 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. See also, **N. AVERITT** and **R. LANDE**, 'Consumer sovereignty: A unified Theory of Antitrust and Consumer Protection Law', 65 *Antitrust L.J.* 713 (1996); **F. GOMEZ**, 'EC Consumer Protection Law and EC Competition Law: How related are they? A Law and Economics perspective', InDret Working Paper, 2003, available at www.indret.com; **F. GOMEZ**, 'European Contract Law and Economic Welfare: A View from Law and Economics', InDret working paper, 2007, available at www.indret.com.

⁴⁸ 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.

2, individually negotiated terms fall outside the scope of the directive and judges can test unfairness only using general contract law.⁴⁹ When terms have not been individually negotiated they are subject to scrutiny under the unfair contract terms directive. A standard contract term is considered unfair if, contrary to the requirement of good faith, it causes a significant unbalance in the parties' rights and obligations.⁵⁰ The good faith requirement has been differently interpreted in MS according to their national traditions.⁵¹ The ECJ has explicitly recognised the importance of national laws for the evaluation of unfairness.⁵² The unfair contract clause is not binding on the consumer.⁵³

No specific rules are provided in the Directive to distinguish between individual and collective negotiations. The specific reference to individual negotiation implies that collectively negotiated SCF fall within the scope of the Directive, since the directive is aimed at conferring rights upon individual consumers. Thus bilateral or multilaterally negotiated SCF, as defined above, should be subject to judicial scrutiny to test their compliance with rules concerning unfair contract terms. The legal effect of collective negotiation is not to deprive individual consumers of their individual rights if the terms negotiated by consumer associations are unfair. This interpretation, while increasing the level of individual consumer protection, weakens the strength of collective negotiations. It is worth suggesting that a different interpretation of fairness may be introduced if the clause not being individually negotiated has been collectively negotiated.

⁴⁹ On the debatable rationale see **S. WEATHERILL**, *Consumer law and policy*, Cheltenham, Edward Elgar, 2005, p. 118

⁵⁰ See ECJ, C-240/98 to 244/98 *Oceano Grupo Editorial SA/Rocio Marciano Quintero*, [2000] ECR I-4941, par. 24: "where a jurisdiction clause is included without being individually negotiated in a contract between a consumer and a seller or supplier within the meaning of the Directive and where it confers exclusive jurisdiction on a court in the territorial jurisdiction in which the seller or the supplier has his principal place of business, it must be regarded as unfair within the meaning of article 3 of the directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties rights and obligations arising under the contract, to the detriment of the consumer."

⁵¹ See *EC Consumer law compendium - Comparative analysis* (edited by **H. SCHULTE -NOLKE**, in collaboration with **C. TWIGG-FLESSNER** and **M. EBBERS**), december 12th 2006 available at http://www.eu-consumer-law.org/study_en.cfm, part p.324-415

⁵² See ECJ, C-237/02, *Freiburger Kommunalbauten and Hofstetter*, [2004] ECR I-3403, par. 19 and 21. Par. 19 "in referring to concepts of good faith and significant imbalance between the rights and the obligations of the parties, Article 3 of the Directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated" and par. 21 "As to the question whether a particular term is, or is not, unfair, Article 4 of the directive provides that the answer should be reached taking into account the nature of the goods and services for which the contract was concluded and by referring at the time of conclusion of the contract to all the circumstances attending the conclusion of the contract. It should be pointed out in that respect that the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law."

⁵³ The ECJ has held that national courts can assess of its own motion whether the contractual term is unfair. See ECJ, C-168/05 *Elisa Maria Mostaza Claro v. Centro Movil Milenium*, [2006], OJ C 326, 30.12.2006; and also **N. REICH**, 'More clarity after "Claro"?', *ERCL*, 2007, 1, 41.

In competition law, negotiated SCF have not been treated much differently from unilaterally defined standard contract forms.⁵⁴ While collectively negotiated SCF 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 imply some changes in current European law.⁵⁵

Proposals for reform, though in a different domain, have been advanced by the Green Paper on the *Acquis Communautaire*.⁵⁶ In particular it is worth mentioning three aspects (1) the scope of application of the EU rules on unfair contract terms, (2) the list of unfair terms, and (3) the scope of unfairness test.

In relation to the scope of application one of the three options is to apply the unfair contract terms to individually negotiated terms while no specific indications are provided for collectively negotiated terms.⁵⁷ As to the fairness test, one of the options is to extend fairness evaluation to the main subject matter of the contract and to price adequacy.⁵⁸

The more general question raised by the Green Paper on the *Acquis Communautaire* concerns the opportunity to introduce at the EU level a general duty to good faith and fair dealing in consumer law.⁵⁹ Here the question is related to the interpretation that such a clause would have if SCF are negotiated between trade and consumer associations. But also to the effect that negotiations among associations over SCF may have on the fairness of individual clauses.

⁵⁴ See below text and footnotes.

⁵⁵ See below the conclusions par. IV.

⁵⁶ See *Green paper on consumer acquis*, cit., *supra* note 9.

⁵⁷ See *Green Paper on consumer acquis*, *supra* note 9, par. 4.4. p. 18

⁵⁸ See *Green Paper on consumer acquis*, *supra* note 9, par. 4.6, p. 19

⁵⁹ See *Green Paper on consumer acquis*, *supra* note 9, par. 4.3 p. 17. On the role of general clauses and standards in European contract law see **S. GRUNDMANN** and **D. MAZEAUD**, (eds.), *General Clauses and standards in European Contract Law: comparative law, EC law and contract law codification*, The Hague, Kluwer Law International, 2006.

E. The competition law limits to using self-regulation in European contract law

The relationship between competition and consumer law has been the recent focus of scholarly debate, echoed by institutional interventions.⁶⁰ 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.⁶¹ 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?⁶²

It should be pointed out at the outset that in MS there are very different traditions concerning the role of trade associations, consumer associations and public authorities for the creation of contract law rules, SCF 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 public entities, Ombudsmen and Consumer Agencies, in other MS they are more powerful because entrusted of public functions.⁶³ Finally in a third group of MS bilateral negotiations are more common and the public authority intervenes, if at

⁶⁰ See **A. ALBOR LORENS**, 'Consumer Law, Competition law and the Europeanization of private law', in **F. CAFAGGI**, *Reframing self-regulation*, cit., *supra* note 17, p. 245 ff.; **T. WILHELMSSON**, 'Cooperation and competition regarding standard contract terms in consumer contracts', 17 *European Business Law Review*(2006) 49; J. Stuyck, 'EC Competition law after modernisation: More than ever in the interest of consumers', *Journal of Consumer Policy* [2005] 1; **G. HOWELLS** and **S. WEATHERILL**, cit., *supra* note 19, p. 517 ff.; **N. REICH**, 'The "Courage" doctrine: encouraging or discouraging compensation for antitrust injuries?', 42 *Common Market Law Review* (2005) 35.

⁶¹ 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 ECJ, C-295/04, *Manfredi v. Lloyd Adriatico and others*, 13 July 2006, (nyr).

⁶² 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.

⁶³ See **E. HONDIUS**, 'Self-regulation in consumer matters', cit., *supra* note 17, pp. 237-ff, part. 239.

all, only *ex post*.⁶⁴ In a multilevel system the institutional design related to the use of SR should be able to incorporate these different traditions.

As described elsewhere the concept of private regulation goes beyond pure self-regulation.⁶⁵ Thus not only pure forms of self-regulation but also delegated self-regulation and co-regulation translating into drafting of standard contract forms will be considered to examine competition law controls.⁶⁶

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.⁶⁷ 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 SCF, except for cases in which these agreements are imposed by law featuring mandated or delegated self-regulation.

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

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. In certain areas, for example insurance, European Regulations with block exemptions have been enacted so as to permit

⁶⁴ See supra note 38 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.

⁶⁵ See **F. CAFAGGI**, 'Rethinking self-regulation', cit., supra note 34.

⁶⁶ I will particularly concentrate on contract standardisation but refer to many other forms of private regulations that private bodies engage. For example the imposition of mandatory licensing by private regulators examined under a competition law perspective by European Courts. See CFI, T-193/02 *Piau v. Commission* paragraphs 100 and 101. Para 101 states : " The actual principle of the license , which is required by FIFA and is a condition for carrying on the occupation of players' agent, constitutes a barrier to access to that economic activity and therefore necessarily affects competition. It can therefore be accepted only in so far as the conditions set out in Article 81(3) EC are satisfied with the result that the amended regulations might enjoy an exemption on the basis of this provision if it were established that they contribute to promoting economic progress, allow consumers a fair share of the resulting benefit , do not impose restrictions which are not indispensable to the attainment of these objectives, and do not eliminate competition."

⁶⁷ See in particular *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*, OJ [2001] C3/2.

contract standardisation.⁶⁸ 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.⁶⁹ This distinction is less relevant in relation to industry-provided services as the banking and insurance sectors show.⁷⁰

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

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

How are self-regulatory arrangements framed for the purpose of competition law scrutiny?⁷¹ There is a relative symmetry between SR arrangements and the different typologies considered by competition law as the following table shows.

⁶⁸ In the insurance sector see Reg 358/2003, 27 february 2003 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 **T. WILHELMSSON**, 'Cooperation and competition', cit., *supra* note 61, 63 ff.

⁶⁹ 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. According to the case law of ECJ the proper practice of the profession may require regulations that produce anticompetitive effects. See ECJ, C-309/99 Wouters [2002] ECR I-1577, § 110. For a wider examination see Communication from the Commission, *Report on Competition in professional services*, Brussels, 9.2.2004, COM (2004) 83 final.

⁷⁰ Some specificities are however significant. See in the sector of insurance the block exemption regulation 358/2003, cit., *supra* note 69.

⁷¹ Within this frame I shall consider not only standard forms but also codes of conducts and governing rules of trade associations that can affect drafting of standard contract terms employed by members in their contractual relationships. The constitution of a trade association, its governing rules have been considered decisions of associations of undertakings for the purpose of the application of Article 81. See Commission Decision in Aspa, JO [1970] L148; and Nuovo Cegam Commission Decision 30 March 1984, OJ [1984] L99.

Table 3

	Single-stakeholder	Dual-stakeholder	Multi-stakeholder
Contractual SR Agreements (Art. 81)	Contracts only among firms	Bilateral contracts between associations. <i>I.e.</i> between trade and consumer (or other trade) associations	Multilateral contracts. 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			

As the table shows the different models of SR examined above are well reflected in the competition law regime.⁷² 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.⁷³ However, these differences are not such 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 in competition law while the association of undertakings can be related to the organizational model.⁷⁴ 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.⁷⁵ We can therefore distinguish between contractual and organizational self-regulatory arrangements in competition law as well.

⁷² See the tables 1 and 2 above.

⁷³ 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.

⁷⁴ The organizational model from a private law perspective can employ different forms beyond association, such as foundations, companies, cooperatives.

⁷⁵ For a broader examination see **F. CAFAGGI**, 'Rethinking self-regulation', cit., *supra* note 34.

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 Article 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 Article 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 and its activity. In simple words, what is decisive to define the threshold for the application of competition law? Who they are, or what they do?⁷⁶

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 of which interests they are meant to represent. The difference between the private or public nature of the regulatory body is crucial for the purpose of state action defence. But, even when the regulator is clearly private, the applicability of competition law may be questioned if there has been delegation or ex post approval by a public entity of the regulatory activity performed by the private regulator. The inapplicability of competition law provisions, due to the public nature of the regulator, may bring about a control under the

⁷⁶ According to the case law the fact that an association with regulatory functions consist of members other than 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.

principles related to the four freedoms.⁷⁷ Though not necessarily alternative instruments often the boundary between private and public has been associated to that of competition and freedoms.⁷⁸ Competition law control and “four freedoms” based control can complement each other in relation to private regulation. In terms of the applicability of the relevant treaty provisions, it should be noted that the free movement of workers and the freedom of establishment/to provide services clearly have “horizontal direct effect”,⁷⁹ so that private regulation can be voided and private entities can incur civil liability for restricting these freedoms. With respect to the free movement of goods and the free movement of capital, the situation is not entirely clear, in the absence of a direct judicial pronouncement from the ECJ.⁸⁰ Many Article 28 cases have demonstrated a willingness on the Court’s part to interfere with decisions made by private actors, albeit always with some linkage to “state action”, either in the form of legislation *allowing* a restrictive decision to be taken or the public powers of a professional association that took a restrictive decision.⁸¹

Let us first examine the criteria to define the public/private nature of the regulatory body.

⁷⁷ Such was the situation in ECJ, C-94 and C-202/04, *Cipolla*, judgment of 5 December 2006 (n/r), where, in connection to the joint fixing of out-of-court legal fee levels by the Italian Bar and Ministry of Justice, it was submitted (and accepted by the ECJ) that Article 49 could be used to hold a practice lawful under Article 81 unlawful: see paras 54-70 of the Judgment.

⁷⁸ This was evident from the earliest case law of the ECJ on competition. In ECJ, C-56 and 58/64, *Consten and Grundig v. Commission*, [1966] ECR Eng. Spec. Ed. 299, the Court stated, at p. 340, “an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental object[ives] of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between states, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article [81(1)] is designed to pursue this aim”

⁷⁹ See, e.g. ECJ, C-281/98, *Angonese v. Cassa di Risparmio di Bolzano* [2000] ECR I-4319 (Article 39-free movement of workers) and ECJ, *Wouters*, cit., *supra* note 70 (Article 49-freedom to provide services). See P. Craig and G. de Burca, *EU law: Text, Cases and Materials*, 3rd ed., Oxford, OUP, 2003, p. 771

⁸⁰ For Article 28 and the free movement of goods, see the following footnote. Article 56 (free movement of capital) definitely has “vertical” direct effect, at least since ECJ, C-163, 165 and 250/94, *Sanz de Lera* [1995] ECR I-4821. In ECJ, C-464/98, *Stefan* [2001] ECR I-173, the Court ruled, albeit indirectly, on the lawfulness of an individual mortgage, in the context of finding a national law contrary to Article 56. Arguing in favour of horizontal direct effect for this provision: P. Craig and G. De Búrca, *EU law*, cit., *supra* note 80, p. 682; less directly: P. Usher, *The Law of Money and Financial Services in the European Community*, Oxford, OUP, 1994, p. 27.

⁸¹ Article 28 has been applied in many intellectual property cases, wherein the ECJ did not allow the IPR holder to use his IPR to restrict the free movement in the Community of goods that were previously lawfully marketed in a Member State (“exhaustion of rights doctrine”). See, e.g. ECJ, C-15/74, *Centrafarm* [1974] ECR 1147. In such cases, national law, in the form of a public act, provides the *right* for the IPR holder to restrict free movement. What the Court condemned, however, was the *exercise* of such a right, as a private act. Similarly, in cases such ECJ, C-266/87, *R v. Pharmaceutical Society, ex parte API* [1989] ECR 1295, associations that are private in their composition have been subject to Article 28 on the basis of having some public law powers.

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 more likely to be held compatible with competition law.⁸² A frequent example is setting tariffs. In case of delegation to private bodies the rule defined does not lose its legislative character if two requirements are met (a) the explicit considerations of public interest (b) the expertise based nature of the deliberative body. If they do not occur the private body is exercising rule making power subject to competition law scrutiny unless it is subject to ex post approval by the State.⁸³ From a normative perspective the path along the public/private nature of the participants to 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.

Let us now move to an analysis of the differences among private participants. How does the composition of the rule-making body impact on the applicability of competition law, whether it is a formal organisation or a group of parties engaged in a contractual relationship? 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.* associations composed by both undertakings and consumers’, it is clear that the latter should require a different approach when internal power’s 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 among different private associations does not play any meaningful role but the presence of signatories, such as

⁸² See ECJ, 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 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.”

Compare with ECJ, C-35/96 *Commission v. Italy* [1998] ECR I-3851 § 60.

⁸³ See ECJ, C-35/99, *Criminal Proceedings Against Manuele Arduino* [2002] ECR I-1529 para 36-37,38-39

consumer associations, may be revealing of public interest. In this case it should affect not the applicability of competition law but the nature of the applicable test.

A more difficult question concerns organizations and agreements where the State or a public agency is directly represented in the regulatory body. We call these bodies as hybrids. Here the divide between pure self-regulation and delegated private regulation becomes blurred. 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 Article 81.⁸⁴

Anticipating the conclusion: the question of whether and how competition law is applicable to standardisation of contract forms should be dealt using a different approach from that currently employed by Commission and ECJ. The scrutiny should address the rationale for public participation into the self-regulatory arrangement in order to evaluate whether the public interest, represented by public actor's intervention, (1) justifies the limits to competition introduced by standardization, (2) should bring about modifications for the test used to analyse anticompetitiveness or (3) should permit exemption.⁸⁵

F. Applicability of competition law to codes of conduct and other self-regulatory arrangements influencing the formation of European contract law

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, and delegated self-regulation or co-regulation.

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.⁸⁶ Do EU institutions have different criteria according

⁸⁴ For a notable (and somewhat controversial) recent case, see ECJ, *Arduino*, cit., *supra* note 84, 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.

⁸⁵ This is also explicit in the reasoning of the Advocate General in the case cited previously.

⁸⁶ For a taxonomy see F. CAFAGGI, 'Rethinking self-regulation', cit., *supra* note 34.

to the regulatory model employed in each sector to decide whether and how competition law is applicable?⁸⁷ When do self-regulatory arrangements become state measures and the state action defence becomes applicable?

Two hypotheses should be distinguished: one where it is possible to decide whether the regulator is public or private, the other where the private regulator acts within delegation by a public entity or its activity is subject to ex post approval. For example whether (1) the principles concerning SCF are ex ante defined by the legislator or by the public regulator and then specified by the private regulator, or (2) when the latter is given the power to directly draft SCF but they have to be approved by a public entity before becoming effective.

The two major sets of cases concern the breach of competition law provisions by undertakings (Articles 81, 82 and 86) on the one hand, and the breach of the same provisions read together with Article 3 § 1 (g) and Article 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 Articles 81 and 82 to private regulator, to 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 private regulator should only be used as a proxy for defining the relevant features of the activity and its potential effect on competition.⁸⁸

⁸⁷ 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.

⁸⁸ 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.

The question of applicability of competition law is partly related to the legal form of the regulator and partly to the regulatory strategy. When the public-private nature of the regulator is at stake an analysis of the nature of the association of undertakings is needed. In particular, the issue is: when does a professional body or a trade association, engaging in delegated self-regulation or co-regulation, act as an association of undertakings for the purpose of article 81 EC Treaty?⁸⁹ An association of undertakings does not have to engage in economic activity itself in order to be subject to Art 81.⁹⁰ The criterion is that its action should affect the economic sphere.⁹¹ Private rule making can therefore be considered an economic activity for the purpose of competition law.⁹²

Competition law is applicable only if the private regulator can be considered an association of undertakings for the purpose of Article 81 or a dominant undertaking for the purpose of Article 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 Article 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?

⁸⁹ In relation to professional bodies the *Report on Competition in professional services*, cit., *supra* note 70, summarised the current law in the following way:

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

§ 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.

§ 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.”

⁹⁰ ECJ, Joined Cases C-209/78 to 215/78 and C-218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125, par. 87 and 88; and ECJ, 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, par. 19 and 20.

⁹¹ See ECJ, *Wouters*, cit., *supra* note 70, par. 63.

⁹² A further distinction can be drawn between private rule making that has only internal effects and private rule making that has external effects. In relation to sport associations a difference between freedom of internal organisation and private rule making with external effects has been made (case *Bosman*, par., 81 and case *Deliege*, par. 47).

b) Does the composition of its membership play a significant role? In particular, how does the distinction between associations of experts and association for interest representation play out?⁹³

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.

- i. Is it relevant that the association is itself qualified as an undertaking?
- ii. Is it relevant that the association is a for profit or non profit organization?
- iii. 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? Whether the nominees, even if appointed by public entities, represent specific private interests or the public interests?⁹⁴

The answers provided by ECJ can be summarised as follows. Professional associations can be controlled by competition law for their economic activity but not for their deontological activity, insofar as the specific deontological measures are necessary for the proper conduct of the relevant profession.⁹⁵ The association does not have to carry out economic activity itself to be subject to competition law scrutiny.⁹⁶

As to the distinction between pure self-regulation, delegated regulation and co-regulation in relation to competition law, ECJ has developed taxonomy of different possible roles of public authorities in relation to agreements and decisions of associations, most of

⁹³ The role of this 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.

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

⁹⁵ See e.g. ECJ, *Wouters*, cit., *supra* note 70. In its recent judgment in ECJ, C-519/04, *Meca-Medina and Majcen v. Commission* [2006] ECR I-6991, the ECJ was faced with a claim by two Olympic swimmers, found guilty of doping by the International Swimming Association (FINA) to the effect that the permitted levels of illicit substances were fixed by the International Olympic Committee (IOC) at a deliberately low level for anticompetitive purposes. Overruling the relevant part of the previous judgment of the Court of First Instance (CFI), the ECJ found that the restrictions imposed by disciplinary sports rules must be limited to what is necessary to ensure the proper conduct of the competitive sport. In doing so, it rejected the idea, endorsed previously by the CFI, that the disciplinary rules in sport can be more-or-less automatically excluded from the scope of the competition rules and opted, instead, in favour of a case-by-case analysis. See par. 45-48 of the Judgment.

⁹⁶ See e.g. AG opinion, *Wouters*, [2002] ECR I-1577, at para 77.

them related to the role of SR.⁹⁷ 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.⁹⁸ Private 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.⁹⁹ An association of undertakings, which has been delegated regulatory power, has to comply with competition law rules.¹⁰⁰ 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. The applicability of article 81 and 82 can only be excluded if the association is a public authority and does not exercise economic activity.¹⁰¹ Such a development has broadened the scope of economic activity and has widened the definition of undertaking and associations of undertakings.¹⁰² Article 10 in conjunction with Articles 81 and 82 of EC Treaty limits delegability of rule making powers,

⁹⁷ European Courts have also addressed the more general question concerning the legitimacy of private rule making power and the boundaries to be drawn between public and private regulation. For a narrow perspective see CFI, *Piau*, cit., *supra* note 67, par. 77-78: “The very principle of regulation of an economic activity concerning neither the specific nature of sport nor the freedom of internal organisation of sport associations by a private law body, like FIFA, which has not been delegated any such power by a public authority, cannot from the outset be regarded as compatible with Community law, in particular with regard to respect for civil and economic liberties. In principle such regulation which constitutes policing of economic activities and touches on fundamental freedoms, falls within the competence of the public authorities.”

⁹⁸ The general proposition was laid down by the ECJ in C-13/77, *INNO v. ATAB* [1977] ECR 2115. For the present purposes, 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 85 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).

⁹⁹ See ECJ, *Van Eycke*, cit. *supra* note 99, par. 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 *Sparbankerna*, Case *Sveriges Trähusfabrikers Riksförbund*, and Case *Branchföreningen Svenska Värmepumpföreningen*, cit., *supra* note 48.

¹⁰⁰ See ECJ, C-250/2003, *Mauri*, Order of the Court, 17 february 2005. *Mauri* has reduced the availability of State action defence.

¹⁰¹ See ECJ, *Wouters*, cit., *supra* note 70, par. 56.

¹⁰² See ECJ, *Bundesanstalt*, cit., *supra* note 83.

including drafting of SFC, to private organisations by States and other rule making public authorities.¹⁰³ When the principles set out in the delegating Act violate competition law, national competition authorities and Courts can dis-apply the delegating Act and scrutinise the activity of the delegate.¹⁰⁴ The crucial question is the level of discretion the delegatee enjoys when exercising the delegated power to define SCF. The higher the level of the discretion in setting tariffs or determining other potentially anticompetitive clauses the more likely the scrutiny of competition law.

In sum: when competition law is not applicable alternative control can be exercised under the four freedoms.¹⁰⁵ Regulation by hybrids can be scrutinized according to the subject matter in relation to the different principles and if it amounts to an obstacle the regulation can be voided. It is well known that different principles apply to freedom of goods, services and capitals. In the former the distinction between public and private entities still plays an important role, although the application of Article 28 of the Treaty has, arguably, been applied effectively to private organisations, while Article 56 may also be found to have the same effect.¹⁰⁶ In relation to freedom of services and establishment, the applicability to private organisations has been admitted explicitly by the ECJ.¹⁰⁷ A full account of the control over private regulation under the four freedoms is however beyond the scope of this essay.

G. 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.

¹⁰³ See ECJ, *Van Eycke*, cit., *supra* note 99.

¹⁰⁴ See ECJ, C-198/01 *Consorzio Industrie fiammiferi (CIF)*, 9th September 2003, ECR I, and C-250/2003, par. 50 and ff., and ECJ, *Mauri*, cit., *supra* note 101. On the subject J. Szoboszlai, 'Delegation of State regulatory powers', cit., *supra* note 88, p. 73 ff. part., 79

¹⁰⁵ In terms of public bodies, the ECJ has explicitly stated, in ECJ, *INNO*, cit., *supra* note 99, at par. 35: "A national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between Member States will generally be incompatible with Articles [28] and [29], which prohibit quantitative restrictions on imports and exports and all measures having equivalent effect."

Equally, the possibility of concurrent and alternative application of Articles 49 and 81 was allowed by the Court in ECJ, *Wouters*, cit., *supra* note 70, and more recently in ECJ, *Cipolla*, cit., *supra* note 78, esp. par. 58-70.

¹⁰⁶ It is not clear yet whether the Court would apply Art 56 to strike down a "purely private" act, *i.e.* whether it would allow avoidance and/or other remedies in the absence of a question concerning the validity of a public act.

¹⁰⁷ ECJ, *Wouters*, cit., *supra* note 70.

The Commission considers contractual terms and SCF as an agreement or decision of undertakings within Article 81 § 1.¹⁰⁸ The ECJ confirms such a view.¹⁰⁹ Within agreements, not only binding contracts between different categories of firms but also unilateral acts (*i.e.* codes of conduct) enacted by firms of the same sector can be scrutinized.¹¹⁰ 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.¹¹¹

Agreements are generally made among firms.¹¹² But agreements concerning unfair contract terms can take place among undertakings and consumers, therein endorsing the dual-stakeholder pattern. The participation in the agreement of a consumer association or its consent does not however alter the applicable test. In the absence of a direct precedent on this specific point,¹¹³ we can reach the conclusion that, according to current interpretation, collectively negotiated agreements would be subject to the same scrutiny as unilateral acts

¹⁰⁸ 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; ECJ, C-2777/87 *Sandoz Prodotti Farmaceutici SPA v. Commission* [1990] ECR I-45.

¹⁰⁹ ECJ, *Sandoz*, *cit.*, *supra* note 109.

¹¹⁰ The distinction between what has or has not been accepted by distributors may be vital in these cases. Contrast, for example ECJ, *Sandoz*, *cit.*, *supra* note 109, 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 Bayer 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 (T-41/96 [2000] ECR II-3383) and the ECJ (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 Bayer 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-à-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 CFI, T-65/98, *Van den Bergh Foods Ltd v Commission*, [2003] ECR II-4653).

¹¹¹ **P. FATTORI** e **M. TODINO**, *La disciplina della concorrenza in Italia*, Bologna, 2004, p. 55-56 and the caselaw cited in the previous note.

¹¹² 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": ECJ, C-41/90, *Höfner and Elser v. Macroton GmbH* [1991] ECR I-1979, § 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.

¹¹³ Although there have been notable cases concerning groups of purchasers, such as ECJ, C-250/92, *Gøttrup-Klim e.a. Grovvarforeninger v Dansk Landbrugs Grovvarereselskab 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.

unless this negotiation reflects public interest concerns that may trigger exemption (or even downright exclusion from the scope of Article 81 altogether).¹¹⁴

The problem of standardisation is well known. To the extent that SCF 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?¹¹⁵ Economic theory has provided useful insights on the degree and the content of standardisation compatible with competition law.¹¹⁶ 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.¹¹⁷ The Commission also considers recommendations concerning the adoption of SCF to be decisions of associations of undertakings under Article 81 § 1.¹¹⁸

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 Article 81, I will not focus on this distinction.¹¹⁹ One distinction that may be

¹¹⁴ REIMS II OJ [1999] L275/17. ECJ, *Gøttrup-Klim*, cit., *supra* note 114, 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.

¹¹⁵ 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 **T. WILHELMSSON**, ‘Cooperation and competition’, cit., *supra* note 61, p. 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.

¹¹⁶ See **M. GRILLO** and **M. POLO**, ‘La standardizzazione dei contratti bancari’, cit., *supra* note 46.

¹¹⁷ See Commission Decision, *Nuovo CEGAM*, cit., *supra* note 72. 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, p. 97-98.

¹¹⁸ See, e.g. *Publishers' Association (Net Book Agreements)*, OJ [1989] L22/12.

¹¹⁹ Compare for example *ASPA with Nuovo Cegam*, cit., *supra* note 72. In the former, the constitution of an association was qualified as a decision, while in the latter it was qualified as an agreement. See ECJ,C-123/83,

quite relevant is that between conduct scrutinised under Article 81 and conduct scrutinised under Article 82. For example, Article 82 is of little help when one deals with price-fixing (or fixing of other trade terms) *as such*, as that article looks at whether the prices or conditions - howsoever determined - are abusive.¹²⁰ Similarly, Article 81 may be less useful than Article 82 when one deals with conduct that consists of simple discrimination between categories of consumers, with no adverse impact on the process of competition.¹²¹ In the latter scenario, an argument could, perhaps, be made to the effect that Article 82 scrutiny of such conduct may approach the fairness standard adopted under Directive 93/13.

Under article 81 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.¹²²

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

BNIC v. Clair [1985] ECR 391, § 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 fact that those groups meet within an organization such as the board does not remove their agreement from the scope of Article [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 above. 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.

¹²⁰ For example, under Article 82(a), by “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions”. Price-fixing can be caught by Article 82 when it is used to damage the competitors of the dominant undertaking(s).

¹²¹ For example, in *1998 World Cup*, OJ [2000] L5/55, the Commission found that the French Organisation Committee, formed by the French Football Association for the purposes of distributing tickets to the 1998 World Cup, had abused its dominant position by making it excessively difficult for consumers who are not French residents to buy tickets. Contrary to the submissions of the Committee, the Commission found that there can be an abuse even in the absence of an effect on the structure of competition in the relevant market. See recitals 99-100 to the decision.

¹²² Proofs of these criteria may be found in Commission Regulation (EC) 358/2003 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”), 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.”

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 or when they offer absolute territorial protection to distributors.¹²³

Non binding yet price-related recommendations concerning contract clauses are scrutinised under article 81; if they affect competition, they are generally found to be unlawful.¹²⁴

¹²³ See ECJ, *BNIC*, cit., *supra* note 120, par. 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 ECJ, C-234/83, *SA Binon & Cie v. SA Agence et Messageries de la Presse* [1985] ECR 2015, § 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 ECJ, 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”, par. 37. See also CFI, *Piau*, cit., *supra* note 67, par. 93 examining a regulation enacted by FIFA concerning agents and players where the standard contract form between the two should include a clause that states that 5% of the players’ salary would be due if parties do not reach an agreement: “the provisions on the content of the contract between the agent and the player under which the contract in writing must set out the criteria and details of the agent’s remuneration and cannot have a term longer than two years although that term is renewable do not reveal any interference with competition. The limitation of the duration of contracts to two years which does not preclude the renewal of the commitment, seems likely to encourage the fluidity of the market and, as a result, competition”. 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 ECJ, *Wouters*, cit., *supra* note 70. 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, ‘Article 81 and Public Policy’, cit., *supra* note 115. For Swedish case law see *infra* note 38.

¹²⁴ ECJ, *IAZ*, cit., *supra* note 91, par. 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 Article 81 § 1 can be a very tricky question, as was evidenced in the Bayer case (n. 76 above), as well the seminal judgment of the ECJ in C-89, C-104 and C-114/85, *Ahlström Oy v. Commission* (Woodpulp) [1988] ECR 5193.

Binding but non-price related decisions are generally considered less strictly.¹²⁵ The category more likely to be held compatible with competition law is that of non binding and non price-related SCF.¹²⁶

Thus the test for binding and non binding recommendations tends to be different, the former stricter, the latter lighter,¹²⁷ not least due to the significant reduction in the evidentiary burden effectively borne by the competition authority in the former case. It is clear, however, that non-binding decisions and agreements can be unlawful under Article 81.¹²⁸ Thus, the position with regard to Article 81 may be summarised as in the following table:

¹²⁵ 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 Article 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*, cit., *supra* note 124, points 46-47.

¹²⁶ The prime example of this phenomenon may be found in Recital 14 and Articles 1(1)(c) and 5 of the Insurance Block Exemption, cit., *supra* note 123. 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 *Branchföreningen Svenska Värmepumpföreningen* and Case *Sveriges Trähusfabrikers Riksförbund*, cit., *supra* note 48.

¹²⁷ **P. FATTORI** e **M. TODINO**, *La disciplina della concorrenza*, cit., *supra* note 112. 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.

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 CFI, 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 ECJ, C-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, p. 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.

¹²⁸ See ECJ, *IAZ*, cit., *supra* note 91, par. 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.

Table 4

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

National competition law authorities have developed different criteria concerning the test of compatibility of SCF 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 of agreements or decisions affected by considerations of fairness? Do competition and contract law overlap in this respect?

Contract fairness in standard contract terms affects *how* standardisation can occur more than *what* can be standardised. 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 agreements.¹²⁹ Fairness affects primarily modes of standardisation. A standardised contract clause may be allowed or forbidden according to its fairness *i.e.* depending whether it creates an unbalance of rights and obligations and violates the good faith principle (Article 3, Directive 93/13 EC).¹³⁰

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? Article 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 notes 126 and 128.

¹²⁹ 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.

¹³⁰ See O. Troiano, 'Buona fede e contratti standard: riflessioni sull'impiego della clausola generale nel diritto privato comunitario', *Contratti*, 2/2006, p. 191, where it is affirmed that the national courts evaluating the relationship between the principle of good faith and the existence of an unbalance of rights and obligations provide three possible solutions: "Un primo gruppo di sentenze decide sulla vessatorietà di una clausola senza nemmeno menzionare nel loro testo il principio di buona fede. Queste sentenze decidono la fattispecie controversa applicando il test del significativo squilibrio. Un secondo gruppo di sentenze richiama inizialmente

It is very rare that fairness, as defined by directive 93/13 and national laws, 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.¹³¹

Firstly, Regulation 358/2003, where exemption is conditional upon the absence of a significant imbalance between rights and obligations arising from the contract.¹³² 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.¹³³ This is so, to a large extent, due to the fact that one of the four requirements for exemption under Article 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.

in motivazione il principio della buona fede ed il criterio del significativo squilibrio, ma, quando poi si passa a ragionare sulla fattispecie, l'iter logico seguito dal giudice si sviluppa tutto sul criterio del significativo squilibrio e l'iniziale richiamo alla buona fede si perde per strada. Infine, un terzo gruppo di sentenze fa riferimento all'elenco delle clausole grigie per giudicare vessatorie quelle ivi contemplate e considera (talvolta) il solo criterio del significativo squilibrio, ma non la buona fede.”

Moreover, in the *EC Consumer Law Compendium*, cit., *supra* note 52, p. 366, the Authors affirm that “the relationship of the principle of good faith to the criterion of “imbalance” remains unclear. The wording of the Directive suggests that a clause is unfair only if it causes an imbalance *and* this imbalance is furthermore contrary to the principle of good faith. Following this reading, a clause can therefore cause an imbalance without at the same time being contrary to good faith. Others however assume that any clause which generates a significant imbalance is always (automatically) contrary to the principle of good faith. It is ultimately worth considering whether the criteria “significant imbalance” and “good faith” are to be understood as alternatives in the sense that the two criteria operate independently of one another, so that a clause is unfair if it results in a significant imbalance, *or* if it is contrary to the requirement of good faith. In view of these multifarious interpretation possibilities it is not surprising that the member states have constructed their general clauses very differently.”

¹³¹ One 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 Article 82 and the contractual stipulation of *unfair*. See Case Drn. 760/94 *Ånge Elverk*, a case concerning Abuse of Dominance.

¹³² See recital 15, Reg 358/2003, cit., *supra* note 69.

¹³³ See for example, Reg. 358/2003, cit., *supra* note 69, at Art 6 Agreements not covered by the exemption; Article 6 § 1 (e) allow the insurer to modify the term of the policy without the express consent of the policy holder; Article 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.

Secondly case-law at ECJ level and national level consider fairness aspects; even if no explicit references to fairness occur, often the same clauses considered unfair are objectionable from a competition law perspective.¹³⁴

An open question concerns the influence of the institutional framework on the degree of overlap between competition and contract law. While functionally distinct, these two limits can certainly influence each other. We can distinguish between the different timing of control in competition and contract law. *Ex ante* competition control is exceptional and more so after Regulation 1/2003.¹³⁵ It normally occurs only when informally the Commission or a national authority is asked to give an opinion on the SCF. When only *ex ante* competition law control was available because the individual MS had chosen judicial *ex post* control and rejected *ex ante* administrative control in contract law it may have happened that the Competition authorities were influenced also by fairness consideration. On the contrary, when two different institutions control *ex ante* the potential anticompetitive nature and the potential unfairness, it is more likely that the two tests are kept separate and independent. Now that *ex ante* control has been abolished no institutional overlap can occur. Therefore competition law and contract law control can bring about different results if the substantive tests concerning anti-competitiveness and fairness are kept functionally separate though coordinated.

¹³⁴ 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 Article 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.

¹³⁵ Under Article 1 of the Regulation, the whole of Article 81 (including its third paragraph) is applicable "no prior decision to that effect being required". Thus, formal *ex ante* scrutiny under Article 81, found in the old regulation-Council Regulation (EEC) 17/62, First Regulation implementing Articles 85 and 86 of the Treaty, OJ Eng. Spec. Ed. [1959-1962] 87 was abolished. Informal guidance may still be sought from the Commission in cases raising new issues: see Recital 38 to the Regulation and Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)[2004]C101/6. In terms of remaining *ex ante* scrutiny, one example is still found, at the time of writing, under Italian competition law: Law Number 287 of 10 October 1990 (as amended)-the text of the law is available at the web site of the *Autorità Garante della concorrenza e del mercato*: www.agcm.it. There is a notification/exemption procedure, set out in Articles 4 and 13 of the law. And it applies to scrutiny under Italian competition law. The notification/exemption system could prove problematic in cases where both Italian and Community competition law are applicable, as Regulation 1/2003 obliges national competition authorities and courts to apply Community law concurrently in such cases: see Article 3 of the regulation.

III. Standard setting, self-regulation and European contract law: Some preliminary conclusions

The space of private autonomy, occupied by collective entities that define SCF 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 SCF. We have recalled the distinction between purely private self-regulation, delegated private regulation and co-regulation.¹³⁶

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.¹³⁷ 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

¹³⁶ See above par. B.

¹³⁷ An interesting example in area of financial markets is provided by Stock exchanges. Stock exchanges are private regulators that exercise rule making powers in relation to listed companies. Within the European framework there are different ways in which the stock exchanges can act as self regulators. Firstly, they can regulate the way in which they are governed and managed. This is mainly done by the articles of association of the stock exchange. However they often elaborate other sets of rules complementing the articles of association or the legal provisions and which are devoted to regulate in more detail specific aspects of the internal governance. Some examples are the rules of conduct of the personnel, personal dealing rules, whistleblower policies (see for example, the scheme established by Euronext: <http://www.euronext.com/editorial/wide/editorial-2002-EN.html>, or the dispositions of the Corporate Governance Code of the Italian Stock Exchange: http://www.borsaitaliana.it/chisiamo/ufficiostampa/comunicatistampa/2006/codiceautodisciplina.en_pdf.htm). Apart from the governance regulation, the stock exchanges also regulate, in a different degree according to the jurisdiction, the markets they operate. In this sense we can distinguish different instruments of regulation whose purpose is to regulate the relations of the stock exchange with its members, the listed firms and the investors. They internally establish the requisites to become a member of the exchange, how to be listed on it... (For example in the case of the Madrid Stock Exchange in relation to the conditions to become a member of the Madrid stock exchange <http://www.bolsamadrid.es/ing/contenido.asp?menu=1&enlace=/ing/miembros/Becomingamember.pdf>). Sometimes, when the stock market is operated by different merged stock exchanges, a holding company establishes a common set of rules which must be observed by each of the stock exchanges under that operating structure (see for example the Euronext Rulebook: <http://www.euronext.com/fic/000/019/401/194016.pdf>) In some cases the stock exchange complements this self regulation by the voluntary adoption of a given corporate governance code already existing which the listed firms operating in the exchange shall follow (this is the case of the London Stock Exchange with the adoption of the City Code on Corporate Governance: http://www.fsa.gov.uk/pubs/ukla/lr_comcode2003.pdf). Finally, another way in which the Stock Exchanges can regulate the markets is by establishing standard contract terms. This is very common in the derivatives markets, in which the stock exchange regulates the terms of the relation between the member of the market and the investor aiming to buy or sell a future or and option (an example of these type of contracts for the Spanish Derivatives Market: www.meff.com/docs/Contrato.doc). For an overview see **F. CAFAGGI**, *Rethinking self-regulation*, cit., *supra* note 17.

participation of IRAs or governmental actors is relatively frequent in the definition of SCF, thereby determining co-regulatory arrangements.

Currently, the differences between purely privately negotiated agreements among associations of undertakings and agreements simply favoured, 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.¹³⁸

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 policy.¹³⁹ 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 with limited law making power. Unlike national systems, where co-regulation can affect the mandatory nature of a contract rule by transforming it into an enabling one, the European legislation in contract law has so far not used this approach extensively.¹⁴⁰

¹³⁸ On these questions see **F. CAFAGGI**, *Reframing self-regulation*, cit., *supra* note 17.

¹³⁹ On the role of good faith in European standard form contract law, see **H. MICKLITZ**, *The politics of judicial cooperation*, cit., *supra* note 130. More in general on general clauses and standards see **S. GRUNDMAN** and **D. MAZEAUD**, *General Clauses and standards*, cit., *supra* note 60, part p.141 ff.

¹⁴⁰ 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**,

We have seen that different self-regulatory models are used to concur to the creation of European Contract Law: contractual and organizational.¹⁴¹ 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 SCF 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 SCF ensures that self-regulation is directed at enhancing freedom of choice and therefore freedom of contracts of consumers.¹⁴²

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 favour 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 SCF. The competition control used to differentiate very strongly the test for applicability of Article 81 between pure self-regulation and delegated private regulation, qualifying the latter state actions and subjecting them to the state action defence. 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

'Tenancy law and European Contract Law', comparative report in the framework of the Tenancy law Project, European University Institute, available at <http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/tenancyLaw.shtml> (last visit 28 September 2006).

¹⁴¹ See above par. III.

¹⁴² But see on these questions **T. WILHELMSSON**, 'Cooperation and competition', cit., *supra* note 61.

case law show that stricter tests will be applied to delegation in order to broaden the domain of competition law control to drafting SCF.¹⁴³

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. 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 SCF provided sector by sector can reduce undertakings and consumers' search costs without decreasing competition. General guidelines at EU level should be provided to define SCF 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.

¹⁴³ See ECJ, *Arduino*, cit., *supra* note 84, and ECJ, *CIF*, cit., *supra* note 105.

IV. Some (modest) proposals

State monopolies on rule-making 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 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 even 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 part 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.¹⁴⁴ Promotion of co-regulation should favour the birth and consolidation of independent regulatory private organizations without penalising current for profit 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 and should be limited by both 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. Contract law focuses on how standardisation should occur to preserve fairness.

¹⁴⁴ On these questions see **F. CAFAGGI**, 'New modes of governance' , cit., *supra* note 6

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.

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 multi-stakeholder contractual arrangements and organizations. The higher the number of participants with conflicting divergent interests the lower the probability of conflict of interest. Or at least the lower the probability that such conflict will remain hidden.

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 Europeanisation of private law, they clearly have to operate in a coordinated dimension and to 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 takes 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 a transnational dimension and represent competing legal cultures. Their legal status as well as 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.