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Summary

Since a few years, the European Commission has been engaged in vigorous promotion of alternatives to legislation within the broader agenda of better law-making. The belief is that self- and co-regulation could be successfully employed by the EU alongside the traditional Community Method to achieve better effectiveness, flexibility, expertise in regulation, and to integrate society at large, while at the same time simplifying law-making activities and legislation. Drawing on the Interinstitutional Agreement on Better Law-Making, policies and documents of the European Union institutions, this paper aims to address the degree of the conceptual integration of self- and co-regulation as a new European regulation mechanism into the EU legal framework.

The paper starts with a short outline of the evolution of the legal framework for self- and co-regulation in the EU law. It identifies which private practices qualify for the integration into the EU regulatory framework under the definitions provided by the IIA. The paper also seeks to clarify what role – alternative or complementary - self- and co-regulation as *alternatives* to regulation play with respect to the traditional EU legislation. In the end, the paper addresses the possible implications for the wider debate on the new modes of governance which the integration of self- and co-regulation into the EU regulatory framework might have.

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I. Introduction¹

In February 2000, President of the European Commission R. Prodi identified “the promotion of new forms of governance” as one of the four Commission’s strategic objectives.² Drawing on the effectiveness of the self- and co-regulation practices in the fields of social policy, technical standards, and professions privately generated rules were meant to stir the reform of the European governance making the institutions and policies operate more effectively³ without, however, “undermining the provisions of the Treaty or the prerogatives of the legislator”.⁴

The integration of the private instruments as alternatives to legislation into the Community legal framework is an important step towards their recognition. However, scholarly publications do not devote so much attention to self- and co-regulation in comparison to the other alternative – Open Method of Coordination. The aim of this paper is to contribute to the discussion on the consequences of the integration of these practices into the EU regulatory framework and to their implications for the debate on the new modes of governance.

The paper will proceed in six parts. After an introduction and a brief outline of evolution of the legal framework for self- and co-regulation (parts I-II), it will define which private practices are integrated into the EU legal framework under the definitions provided for by the IIA (part III). Part III will also clarify what role – alternative or complementary – self- and co-regulation play in relation to traditional EU regulation (part III.3). Part IV of the paper gives an overview of the practical reasons and legal principles encouraging the use of private rule-making practices. In the end, the paper addresses the possible implications for the wider debate on the new modes of governance which the integration of self- and co-regulation into the EU regulatory framework might have (part V).

II. The Evolution of the Legal Framework for Self- and Co-Regulation in the European Union Law

Following the call by the Lisbon European Council for changes in regulation through active involvement of the private sector and civil society and anticipation of new, more flexible methods of regulation,⁵ in 2001 the European Commission introduced the White Paper on

¹ I thank Prof. A. Peters for her constructive guidance and valuable comments on the earlier draft versions of this paper. The usual disclaimer applies.

² Opinion of the European Economic and Social Committee on “Simplification”, 26 March 2003 (2003/C 133/02), para 1.1.

³ Report on European Governance (2003-2004) (Commission staff working document), SEC(2004) 1153, 3.

⁴ Report from the Commission on European Governance. Luxembourg: Office for Official Publications of the European Communities, 2003, 21.

⁵ Presidency conclusions, Lisbon European Council, 23 and 24 March 2000, paras 10, 38-40; this call was expressed in rather vague terms and concentrated extensively on the application of an open method of coordination. It was later reinforced by the joint statement of Member States holding the presidencies of the EU urging to ensure the stronger consideration of non-legislative options (Advancing regulatory reform in Europe. A joint statement of the Irish, Dutch, Luxembourg, UK, Austrian and Finnish Presidencies of the European Union, 7 December 2004; Joint initiative on regulatory reform. Council of the European Union, 2 February 2004, 5894/04). The importance of the role of alternatives to regulation in the policy making was also endorsed in the joint UK, Austrian and Finnish Presidency discussion paper in December 2005, stressing that “early and effective consideration should always be given to alternative approaches to classic regulation, including new approach directives, co-regulation, self-regulation, social partners’ agreements, market-based instruments...” (emphasis added), see Advancing Better Regulation in Europe. A joint UK, Austrian and Finnish Presidency discussion paper. Council of the European Union, 29 November 2005, 15140/05, 8. See also

European Governance (White Paper) where it proposed to the Union to refresh the Community method by following a less top-down approach. The reform had to allow better use of the principles of subsidiarity and proportionality, “limiting legislation to its essential elements”.⁶

In the Commission’s opinion, the improvement of the effectiveness of the EU regulatory policies was primarily a question of a political will rather than a necessity to change the Treaties. The “*right combination*” or “*right mix*” of formal tools of legislation with the non-legislative acts to deliver policies could bring greater flexibility where possible and thereby contribute to “changing the way the Union works”.⁷

A year later, in June 2002, the Commission adopted the Action Plan proposing to choose the most appropriate instruments for regulation, including the more frequent use of alternatives to legislation, for the achievement of the objectives of the Treaty.⁸ More communications clarifying earlier objectives, intensifying work, reviewing and updating better regulation agenda soon followed. Many of them dedicated attention to the preference of alternatives to legislation.⁹ As summarized by L. Senden, the new agenda for the EU policy making was supposed to be built on two pillars – (1) the policy to reduce intensity and improve the quality of legislation; and (2) the diversification of instruments.¹⁰

The Treaties are silent on the possibility to use private instruments for the achievement of Community objectives (with the exception of Articles 138-139 in social policy field).¹¹ The EU has built its image of a strong and influential player possessing a legal system based on the binding and the supranational nature of legal acts. However, beyond the Treaties’ framework, self-regulation existed as a very old phenomenon of regulation. As A. McHarg concluded analysing the tendency of interaction between public and private instruments, “the historical trajectory is often from self-regulation to public regulation rather than *vice versa*”.¹² Self-regulation has been a regular means of governing internal affairs of many professions or industries in the Member States. For instance, “merchant and craft guilds – European “business units” of the Middle Ages sought to maintain an orderly way of life by regulating the conduct of members, providing for their social welfare and controlling the markets”.¹³ Sports were also renowned for their self-regulation practices. As Advocate General Alber observed

Opinion of the European Economic and Social Committee on Better lawmaking, INT/265, 28 September 2005, para 4.4.

⁶ European Governance, A White Paper, COM(2001) 428 final, 20, 32.

⁷ Ibid, 33.

⁸ Communication from the Commission - Action plan “Simplifying and improving the regulatory environment”, COM(2002) 278 final (Action Plan (2002)).

⁹ The 2002 Action plan was updated by the Communication from the Commission to the Council and the European Parliament - Better Regulation for Growth and Jobs in the European Union (COM(2005) 97 final) and the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - A strategic review of better regulation in the European Union (COM(2006) 689 final).

¹⁰ L. Senden (2005), 5-9.

¹¹ The Constitutional Treaty did not significantly alter the situation, and even the widely acclaimed Open Method of Coordination is only indirectly mentioned there, see more extensively D. Trubek/L. Trubek (2005), 354-355; H. Frykman/ U. Mörth (2004), 166.

¹² A. McHarg (2006), 79; See also P. Lindseth, arguing that “the shift toward self-regulation or privatization can be viewed from a strictly liberal perspective as a kind of restoration of a prior, ‘pre-public’ system of governance”, P. Lindseth (2006), 116-117; V. Haufler (2001), 15ff.

¹³ H.L.Pitt/ K.A.Groskaufmanis (1989-1990), 1576.

in case *Jyri Lehtonen*, “sportsmen traditionally create their own organisation in defining their sports, *rather than waiting* for the State to make rules”.¹⁴

The European Economic and Social Committee (EESC) as a spokesman of organized civil society persistently advocated for giving more consideration to the self- and co-regulation practices in the EU.¹⁵ The first largely acclaimed Community initiatives of co-regulation were concentrated mainly in two areas, i.e. harmonisation of technical standards with the so-called “New Approach” directives¹⁶ and, later, the voluntary environmental agreements.¹⁷ Co-regulation in those two fields together with the self- and co-regulation under the social dialogue Treaty provisions produced a web of successfully functioning rules. Lately European self- and co-regulation practices have expanded into other fields such as financial services, industry and consumers’ relations, advertising, e-commerce, Internet, corporate social responsibility.¹⁸ Most recently, discussions for launching or reinforcing European self-regulation initiatives include lobbying activities,¹⁹ fight against obesity or nutritional labelling²⁰ and other areas.

The proliferation of the soft law instruments beyond the legislative framework defined by the Treaties signalled that traditional legislative measures were often too complex and/or insufficient for the achievement of Community objectives or to bring changes into the practices and policy-making in the EU.²¹ The soft methods of regulation were tolerated, or even initiated and encouraged by the Commission and were developing alongside Community legal frame-

¹⁴ Opinion delivered on 22 June 1999 in the Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, para 69 (emphasis added).

¹⁵ Opinion of the Economic and Social Committee on “Simplifying rules in the single market (SMO)”, 19 October 2000 (2001/C 14/01), paras 2.5.7., 3.5.; The Current State of Co-Regulation and Self-Regulation in the Single Market, EESC pamphlet series, Brussels, March 2005, 8ff; Opinion of the European Economic and Social Committee on the Review of the Single Market, 17 January 2007 (2007/C 93/06), para 3.4.

¹⁶ The “Global Approach” to conformity assessment (1989) also belongs to same standards’ harmonisation group. For an analysis on “New Approach” history, development and legal evaluation see, e.g., Ch. Joerges/ H. Schepel/ E. Vos (1999), H. Schepel (2005).

¹⁷ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of 17 July 2002 on Environmental Agreements at Community Level within the Framework of the Action Plan on the “Simplification and Improvement of the Regulatory Environment, COM(2002) 412 final, 5: “In 1996, the Commission adopted a Communication to the Council and the European Parliament on environmental agreements. Environmental agreements were at that time a new policy instrument to supplement regulatory measures” (emphasis added).

¹⁸ For a broader account on examples of development of self- and co-regulation at European level see The Current State of Co-Regulation and Self-Regulation in the Single Market, EESC pamphlet series, Brussels, March 2005, 13-17.

¹⁹ Communication from the Commission - Follow-up to the Green Paper “European Transparency Initiative”, COM(2007) 127 final.

²⁰ In May 2007 the Commission adopted a White Paper (White Paper on a Strategy for Europe on Nutrition, Overweight and Obesity related health issues, COM(2007) 279 final), where following the responses given to its earlier Green Paper (Green Paper “Promoting healthy diets and physical activity: a European dimension for the prevention of overweight, obesity and chronic diseases”, COM(2005) 637 final) the priority tackling nutrition, overweight and obesity problems was given to self-regulatory actions, the progress of which will be reported in 2010.

²¹ See, e.g., the arguments concerning the necessity to use environmental agreements implementing Community directives in the preamble of the Commission Recommendation of 9 December 1996 concerning Environmental Agreements implementing Community directives (96/733/EC).

work.²² As Ulrika Mörth summarizes, the EU nowadays can be “described as a system of multi-level governance in which actors (private and public) and levels (national and regional) are strongly interdependent. The regulatory mode within this system is not necessarily formal legislation but rather soft regulation”.²³

These developments show that self-regulation practices were in principle not alien to Community policy making, though, in fact, for a long time there was neither a formalized nor a cross-sectoral approach towards them.²⁴ Another problem was that policy documents within the better regulation agenda lacked consistency in their proposals concerning the employment of alternative instruments: the proposed range of instruments as alternatives to legislation differed in separate documents, while self-regulation was not even included in some of them.²⁵ However, unregulated use of privately generated instruments creates a lot of legitimacy, coordination, and also effectiveness concerns.²⁶ For example, recently in the field of football, the Parliament called the Commission to draw up an action plan to specify conditions for legitimate and adequate use of self-regulation, which would better address transparency, good governance and combating violence concerns than before.²⁷ Proposing further measures for the promotion of “smoke-free Europe” initiative the Commission admitted in its Green Paper that the voluntary agreements have not been effective, although it did not exclude the use of a combination of voluntary and binding instruments to implement the initiative.²⁸

Amid historical practices of self-regulation in the Member States and on European level, the Commission was officially empowered to locate and examine the existing self-regulation practices that could be used for the achievement of the EU objectives only three years ago. In December 2003 the Interinstitutional Agreement on Better Law-Making (IIA) was signed between three key EU institutions – the Commission, the Council and the Parliament.

²² See, e.g., Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest, Article 1: “‘appropriate regulation’ shall mean any regulation, including self-regulation, in place in Member States as referred to by Directive 2003/6/EC.”; The Current State of Co-Regulation and Self-Regulation in the Single Market, EESC pamphlet series, Brussels, March 2005, 10.

²³ U. Mörth (2006), 128.

²⁴ Summary of the Hearing of the EESC on the Current status of co-regulation and self-regulation in the single market, R/CESE 1419/2004, 22 November 2004, 5.

²⁵ The White paper (2001) has not devoted attention to self-regulation; see also Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment (COM(2005) 535 final), where remarkably only a reference to co-regulation, but not to self-regulation was included in the discussion on the revision of regulatory approach (para 3d).

²⁶ For instance, the European Parliament feared that alternative practices might lead to “hidden parallel legislation by circumventing the legislative procedures established in the EC Treaty”, see European Parliament resolution on the Commission White Paper on European governance (COM(2001) 428 - C5-0454/2001 - 2001/2181(COS)), paras 34-37; see also Opinion of the Committee of the Regions on the White Paper on European governance, 13 March 2002 (2002/C 192/07), paras 3.1.-3.2., 3.6.

²⁷ See European Parliament Resolution of 29 March 2007 on the future of professional football in Europe, 29 March 2007, P6_TA-PROV(2007)0100.

²⁸ European Commission, Green Paper Towards a Europe free from tobacco smoke: policy options at EU level (2007), 17.

As the EESC later reported, the IIA established “a new approach to the legislative function among the institutions”²⁹ and opened a new chapter in the development of self- and co-regulation.³⁰ For the first time in the EU legal framework the Agreement introduced institutional compromise on definitions of self- and co-regulation, united conditions and limits for their use, established monitoring and reporting mechanisms and clarified the cooperation between institutions. These clarifications were believed to facilitate and increase the use of the alternatives to regulation and provide integrity with the legal framework of the Community,³¹ where the principle task of the Commission would be to disseminate positive practices of the use of private instruments to as many sectors as possible.³²

III. Self- and Co-Regulation in the European Union Vocabulary

Every study on self- and co-regulation activities and their legal status faces at least two big challenges: 1) there is no consensus on their definitions, and 2) it is difficult to draw a clear borderline between them. A myriad of definitions³³ and classifications³⁴ is available in scholarly articles and other publications. The traditions of using both methods of regulation, the government’s involvement, the scope of practices and their status vary throughout all Member States.³⁵ In a broad sense, self-regulation, i.e. regulation by governing oneself,³⁶ covers ex-

²⁹ Opinion of the European Economic and Social Committee on Better lawmaking, 28 September 2005 (2006/C 24/12), para 4.9.

³⁰ The Current State of Co-Regulation and Self-Regulation in the Single Market, EESC pamphlet series, Brussels, March 2005, 12.

³¹ See, e.g., Report from the Commission “Better lawmaking 2003” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (11th report), COM(2003) 770 final, 11.

³² Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment, COM(2005) 535 final, para 3 d).

³³ See, e.g., V. Haufler argues that “self-regulation occurs when those regulated ... design and enforce the rules themselves”, see V. Haufler (2001), 8; J. Black observes self-regulation from individual and collective perspectives as “disciplining of one’s own conduct by oneself ... and regulation by a collective group of the conduct of its members or others”, see J. Black (1996), 26; also J. Black (2001); co-regulation, in the opinion of F. Cafaggi, is “where private regulators have been called upon to take part in different stages of the regulatory process”, see F. Cafaggi, Rethinking private regulation (2006), 20; Ph. Eijlander defines co-regulation as “cooperation between the public and the private actors in the process of creating new rules”, Ph. Eijlander (2005), 3; for more examples of definitions see “Self and co-regulatory practices in the European Union” (2006), 9-10.

³⁴ See, e.g., F. Cafaggi who classifies the forms of coordination between public and private regulators into public regulation, co-regulation, delegated private regulation (based on a formal act, generally legislative), ex post recognized private regulation, and judicially defined acts of a regulatory body, in F. Cafaggi, Rethinking private regulation (2006), 24ff; Ph. Eijlander suggests three types of self-regulation: free or pure self-regulation; substitute or alternative self-regulation (when government watches the process to safeguard the public interest) and conditioned self-regulation (where self-regulation is subject to a type of government structuring or oversight), see Ph. Eijlander (2005), 4; J. Black spotlights four types of self-regulation: mandated, sanctioned, coerced, and voluntary, see J. Black (1996), 26-27; see also C. Scott’s proposal to distinguish delegation, observer, sanctioned, enforced self-regulation, co-regulation and meta-regulation, see C. Scott (2006), 136-140.

³⁵ See, e.g., “Self and co-regulatory practices in the European Union” (2006), 9-10; F. Cafaggi. Report: Intermediate Workshop – Rethinking Self-Regulatory modes and strategies in Europe, NEWGOV LTFIb/D7 (October 2005).

³⁶ Oxford English dictionary defines self-regulation as “Regulation, control, or direction by or of oneself (itself)”, accessible at http://dictionary.oed.com/cgi/entry/50219133?single=1&query_type=word&queryword=self-

tensive rule-making practices by private entities where co-operation with public authorities nowadays might range from no-involvement to maximum subordination. So it is arguably most practical to make a distinction and classify forms of self-regulation according to the intensity of a government's participation in it. At one end there is a classical private (often spontaneous, i.e. without government's direct or indirect intervention) self-regulation, or what Ph. Eijlander calls free or pure self-regulation.³⁷ At the opposite end of the intensity range we can find the most intensive form of the government's involvement in the private parties' self-regulation practices whereby state institutions impose an obligation on the bodies to "self-regulate". The latter is often called delegated³⁸ or mandated³⁹ self-regulation. In between of these two extremes, the degree, time and role of government's intervention differs and can result in "persuaded", "stimulated", "coerced", or in other form provoked self-regulation.

The government's involvement often washes out the authentic autonomous and spontaneous nature of self-regulation, therefore those forms of private and governmental co-operation that connect self-regulation with state authority and/or binding state-made legislation should be associated with co-regulation.⁴⁰

III.1. Definitions and Concepts Before the IIA

Before the IIA was signed in 2003, different Commission and European Economic and Social Committee's policy documents and other soft law instruments sketched various features of European self- and co-regulation, however, rather eclectically.⁴¹ In the White Paper the Commission concentrated its attention exceptionally on co-regulation, which "combines binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise".⁴² Self-regulation was mentioned only passingly and not included into the list of promoted policy tools.⁴³

The subsequent Action Plan and Commission reports devoted more attention to self-regulation which they described as a variety of "practices, common rules, codes of conduct and voluntary agreements which economic operators, social players, NGOs and organised groups establish on a voluntary basis in order to regulate and organise their activities".⁴⁴ The

regulation&first=1&max_to_show=10 (last consulted 2007-03-27); "Self-regulation – an organization's or industry's control, oversight, or direction of itself according to rules and standards that it establishes" (Black's Law Dictionary, Eighth Ed (Bryan A. Garner, editor in chief), St. Paul (Minn.): Thomson West, 2004.

³⁷ Ph. Eijlander (2005), 4.

³⁸ However, F.Cafaggi makes a distinction between delegated private regulation and co-regulation, see F. Cafaggi, *Rethinking private regulation* (2006), 21-24.

³⁹ J. Black (1996), 27.

⁴⁰ "Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties", July 2006, 9 (available at http://ec.europa.eu/consumers/overview/report_advertising_en.pdf, last accessed 2007-06-19).

⁴¹ For the most comprehensive description see, e.g., Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Environmental Agreements at Community Level within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, COM(2002) 412 final.

⁴² White Paper (2001), 21.

⁴³ The Commission undertook to promote "greater use of different policy tools, (regulations, "framework directives", guidelines and recommendations, co-regulatory mechanisms), White Paper (2001), 23.

⁴⁴ See Action Plan (2002), 11; Report from the Commission on European Governance. Luxembourg: Office for Official Publications of the European Communities, 2003, 21.

link between self-regulation and co-regulation has been drawn by the EESC, which observed that co-regulation combines “the elements of legislation” with self-regulation; the core function of a co-regulation mechanism is to combine an authority of a legislative act, merging legal certainty and predictability with expertise of parties recognized in the field and more flexible regime of self-regulation.⁴⁵ Self-regulation, unlike co-regulation, does not require a piece of legislation. The Commission, however, can play a certain role in respect of self-regulation by way of acknowledging voluntary agreements, when it needs to stimulate or monitor useful voluntary practices more closely.⁴⁶ Co-regulation from the perspective of European institutions was a matter of sharing the regulatory responsibilities between public authorities and private parties, instead of being a “mere coexistence of self-regulation and regulation”.⁴⁷ It brings “wider ownership of the policies”⁴⁸ by combining legislative practices with professional experience and encourages public-private partnership.

III.2. The IIA’s Contribution to the Conceptualization of the Self- and Co-Regulation

The widely acclaimed accomplishment of the IIA was the agreement on the definitions of self- and co-regulation achieved between three institutions for the first time.⁴⁹ According to paragraph 22 of the Agreement, self-regulation is “the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt *amongst themselves and for themselves* common guidelines at *European level* (particularly codes of practice or sectoral agreements)” (emphasis added). Co-regulation, according to the IIA, means “the mechanism whereby a *Community legislative act* entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations).”⁵⁰

As can be concluded from the IIA provisions the European Union institutions chose a *Community* legislative act (comparing to earlier use of ambiguous “regulatory actions” or “elements of legislation”) as a divide between self-regulation and co-regulation. The IIA retained the principle feature of self-regulation mentioned in all earlier documents that it concerns exclusively *private* voluntary practices, as self-regulation neither implements nor requires specific piece of legislation. Moreover, the IIA goes even further stating that self-regulation “does not imply that the Institutions have adopted any particular stance”.⁵¹

⁴⁵ Opinion of the European Economic and Social Committee on “Simplification”, 29 November 2001 (2002/C 48/28), para 4.3.3.

⁴⁶ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Environmental Agreements at Community Level within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, COM(2002) 412 final, 7-8.

⁴⁷ Opinion of the European Economic and Social Committee on “Simplification”, 29 November 2001 (2002/C 48/28), para 4.3.3.

⁴⁸ White Paper (2001), 21.

⁴⁹ Report from the Commission “Better lawmaking 2003” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (11th report), COM(2003) 770 final, 8; The Current State of Co-Regulation and Self-Regulation in the Single Market, EESC pamphlet series, Brussels, March 2005, 12.

⁵⁰ Para 18 of the IIA (emphasis added); This definition has been already contemplated in the Report from the Commission on European Governance. Luxembourg: Office for Official Publications of the European Communities, 2003, 21.

⁵¹ However, the Agreement does not rule out a possibility for the Commission to legislate in the same area, especially when the aims intended were not achieved, or at the request of a legislator, see, e.g., the IIA, para 23.

Co-regulation, on the contrary, is a mechanism of rule-making that is based on the Community legislative act which “entrusts” the achievement of the defined objectives to private parties.⁵² Thus it is a type of a “mixed public-private” act,⁵³ which combines legislative authority with self-regulatory type of action.⁵⁴ Arguably, the IIA does not exclude the possibility of a co-regulatory delegation to other forms of contribution from bodies representing civil society that are not collective self-regulation of industry or profession in their nature (e.g., adoption of a unilateral policy on the company’s corporate social responsibility).⁵⁵ However, the definition of self-regulation in the IIA requests collective rather than individual regulatory exercises.

It would be wrong to conclude that the initiative to pursue co-regulation rests solely with the Commission. Co-regulation should not be understood as a typical *ex ante* formalized “top-down” method of transfer of regulatory powers onto private parties.⁵⁶ Thus the IIA in principle does not rule out a possibility for two scenarios of co-regulation: *ex ante* (when Community legislative act initiates private measures) and *ex post* co-regulation (when the Commission responds to business initiatives and instead of introducing legally binding regulation legally enframes the existing initiative).⁵⁷ The “legal guarantees”⁵⁸ provided by the legislative act could be offered by way of *ex post* acknowledgement of conformity of existing private instrument with legal requirements.

The fact that co-regulation must be targeted at the achievement of objectives defined by the legislative authority makes the functioning of co-regulatory mechanism dependent on the legislative actions of the EU institutions whereas self-regulation is a private sector instrument “usually initiated by stakeholders” (emphasis added).⁵⁹ Thus the main problem with the definitions provided by the IIA is that they leave in a “no-man’s-land” those practices of self-

⁵² Para 18 of the IIA.

⁵³ A. Peters/I. Pagotto (2006), 19.

⁵⁴ This is also a definition of co-regulation used by the European Parliament, see, e.g., European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM(2005)0646 – C6-0443/2005 – 2005/0260(COD)), Amendment 78: “‘co-regulation’ means a form of regulation based on cooperation between public authorities and self-regulating bodies”.

⁵⁵ Ph. Eijlander (2005), 6; Report of the Working Group “Better Regulation” (Group 2c), May 2001, 6.

⁵⁶ For top-down approach, see, e.g., L. Senden (2005), 12.

⁵⁷ For example, in Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Environmental Agreements at Community Level within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment (COM(2002) 412 final) it has been stated that “Co-regulation is usually initiated by the Commission, either on its own initiative or in response to voluntary action on the part of industry” (p. 8, emphasis added). See also The Current State of Co-Regulation and Self-Regulation in the Single Market, EESC pamphlet series, Brussels, March 2005, 21; F. Cafaggi, New Modes of Regulation in Europe (2006), xxv.

⁵⁸ “Co-regulation can therefore offer the advantages of environmental agreements with the legal guarantees provided through a legislative approach”, see Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Environmental Agreements at Community Level within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, COM(2002) 412 final, 8.

⁵⁹ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Environmental Agreements at Community Level within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, COM(2002) 412 final, 7; Report from the Commission on European Governance. Luxembourg: Office for Official Publications of the European Communities, 2003, 21; Action Plan (2002), 11-13.

regulation that are not directly assigned by a legislative act⁶⁰ to private bodies, but were encouraged, persuaded or their adoption was guided by the Commission through soft instruments,⁶¹ often under the threat of legislation.⁶² In the latter cases these practices lose their autonomous nature and spontaneity indispensable for self-regulation. However, following the definition of co-regulation, which requires a *Community legislative* act, it is difficult to qualify them as co-regulation.⁶³

There are also other variations in definitions comparing the IIA with the earlier EU policy documents or prevalent national and global practices. The first and foremost significant difference is that the IIA has “Europeanized” self-regulation introducing a requirement to pursue a European dimension of regulation, whereas the definition of co-regulation is “communitarized” as it links Community legislative acts with private parties’ measures, bypassing Member States’ co-regulatory activities. Yet, these peculiarities are nowhere explained in greater detail. It is, therefore, difficult to assert with certainty what coverage of regulation satisfies the “European level” condition. For example: Is a voluntary agreement between two producers from different Member States sufficiently European, or should the majority of the parties operating in the field *and* from the majority of Member States participate? Only lately the European Commission matter-of-factly indicated that the EU dimension involves “more than one Member State”.⁶⁴ However, it did not clarify how this corresponds with the requirement of representativeness, sectoral and geographical cover imposed on self-regulatory practices by the IIA.⁶⁵

⁶⁰ “Legislative acts (regulations, directives and decisions without addressee) emanate from the legislator and establish general obligations and rights. When the legislator adopts a recommendation, the latter still emanates from the legislator, a legal authority, but does not create rights and obligations. It is therefore not a legislative act but a legal act.”, see Annex 1 of the Commission staff working paper - Annex to the report from the Commission “Better lawmaking 2006” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (14th report), SEC(2007) 737 final.

⁶¹ For instance, in the field of networks and information security the Commission invited private sector to develop security standards and disseminate best practices (see Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions - A strategy for a Secure Information Society - “Dialogue, partnership and empowerment”, COM(2006) 251). In the Annex to Better lawmaking 2006 report (SEC(2007) 737) the Commission admitted that sometimes it acts “as an honest broker”, giving example of “the European Charter for the Development and the Take-up of Film Online” initiated by Commissioner Viviane Reding, which was endorsed by business leaders on May 23, 2006 and is expected to boost in the future a broader Content Online policy for the Information Society (see for more detailed account at http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm#charter (2007-06-22)).

⁶² This might be the case with “self-regulation that is not quite as purely autonomous as this wording [of the IIA] implies and yet has none of the characteristics required for a system to qualify as CoRegulation”, see “Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties”, July 2006, 9 (available at http://ec.europa.eu/consumers/overview/report_advertising_en.pdf, last accessed 2007-06-19).

⁶³ However, recently the Commission acknowledged that it “directly set co-regulatory frameworks through various means, including communications, recommendations and letters of acknowledgment (emphasis added)”, see Commission staff working paper - Annex to the report from the Commission “Better lawmaking 2006” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (14th report), SEC(2007) 737 final.

⁶⁴ Report from the Commission “Better Lawmaking 2006” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality, COM(2007) 286 final, 5.

⁶⁵ Para 23 of the IIA.

It is also unclear from these definitions and generally from the context of the IIA whether private regulation at Member States level and especially self- and co-regulation encouraged, initiated or delegated by the Member States themselves fall under the IIA, as the part of the IIA dealing with alternative mechanisms has not a single reference to Member States' measures. Nevertheless, there are many examples where the institutions opted for the promotion of such practices both before and after the IIA.⁶⁶ Moreover, the Parliament even proposed to insert the following explanation of co-regulation in the Directive, which clearly departs from the concepts entrenched in the IIA: “[c]o-regulation gives, in its minimal form, a “legal link” between self-regulation and the national legislator in accordance with the legal traditions of the Member States”.⁶⁷ As the Commission summarized recently in its “Better lawmaking 2006”

⁶⁶ Quite a few directives leave at Member States' discretion the right to choose self- or co-regulation for their implementation, see, e.g., Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, where Article 37 under the heading “Codes of Conduct at Community level” provides that the Member States shall “in cooperation with the Commission, take accompanying measures to encourage the drawing up at Community level, particularly by professional bodies, organisations and associations, of codes of conduct aimed at facilitating the provision of services or the establishment of a provider in another Member State, in conformity with Community law”, whereas para 115 of the Preamble states that “Codes of conduct at Community level are intended to set minimum standards of conduct and are complementary to Member States' legal requirements”; Directive 2006/66/EC of 6 September 2006 on batteries and accumulators and waste batteries and accumulators provides that “Member States may transpose the provisions set out in Articles 8, 15 and 20 by means of agreements between the competent authorities and economic operators concerned” (Article 27); Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse) allows Member States “to choose the most appropriate way to regulate persons producing or disseminating research concerning financial instruments or issuers of financial instruments or persons producing or disseminating other information recommending or suggesting investment strategy, including appropriate mechanisms for self-regulation, which should be notified to the Commission” (para 22 of the Preamble). See also Parliament's proposal for implementing measures of Directive on television broadcasting services: “Member States shall encourage *self- and/or* co-regulatory regimes *at national level* in the fields coordinated by this Directive” (emphasis original) (Amendment 91, European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM(2005)0646 – C6-0443/2005 – 2005/0260(COD)). Another Parliament's proposal concerned the inclusion in the preamble of the draft Directive of the following statement: “Member States should, in accordance with their different legal traditions, recognise the role which effective self-regulation can play as a complement to the legislation and judicial and/or administrative mechanisms in place and its useful contribution to the achievement of the objectives of this Directive” (European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM(2005)0646 – C6-0443/2005 – 2005/0260(COD)). See also Report from the Commission “Better Lawmaking 2006” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality COM(2007)286 final, 5.

In the opinion of Cafaggi two schemes might satisfy EU requirements: Private regulation at EU level pursued under the conferral or recognition of regulatory power to private parties and private regulation at Member States level promoted by the European legislation, soft law or policy documents, see F. Cafaggi, *New Modes of Regulation in Europe* (2006), xxi.

⁶⁷ Amendment 36, European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM(2005)0646 – C6-0443/2005 – 2005/0260(COD)) (emphasis added). See also Amendment 37: “The generic term “co-regulation” covers regulatory instruments which are based on cooperation between State bodies and self-regulating bodies, and vary widely in terms of their designations and structures at national level”.

report, “[i]n addition to EU-wide codes of conduct, voluntary agreements and charters, the Union continued to experiment with the transposition of EC directives through co-regulation at Member State level, in particular in environmental matters”.⁶⁸ These diverse trends might endanger the emerging system of alternative mechanisms created by the IIA. In addition, it is not evident from the text of the IIA, whether its requirements apply to the Member States’ self- and co-regulation practices.

The second variation introduced by the IIA definitions on self- and co-regulation practices is a narrow list of the private parties eligible to participate in these forms of regulation. Arguably, no more than four forms of functional or formal organization - economic operators, the social partners, non-governmental organisations, and associations - can be qualified as rule-makers of these types. Such market participants as customers, local communities, or other diverse organized interest groups are excluded or left in the grey area (unless they can prove to be social partners or economic operators).

In the case of co-regulation, the IIA also additionally requires of these parties to be recognised in the field. This complicates the fulfilment of the requirement as it is not clear who (most likely - the Commission) and, especially, under what conditions is going to verify the required recognition in the field.

As can be seen from the analysis above, the European Union institutions established definitions of self- and co-regulation that tend to divert from self-regulatory practices, available in the Member States or on a global scale.⁶⁹ Moreover, taking into account the definitions of self- and co-regulation, just a limited segment out of the entire spectrum of co-regulation and self-regulation practices might be potentially included into the legal framework of the EU. It embraces the forms of private practices which pertain to a particular organisational level (four forms of entities) and which pursue a certain intensity of action and collaboration (collective in nature and European coverage for self-regulation or recognition in the field for co-regulation). This excludes a number of individual, local, sectoral and regional practices from the European better regulation agenda, as well as creates uncertainty concerning the integration of private regulation taking place at Member States level of initiative.

III.3. Self- and Co-Regulation: Alternatives or Supplements to Legislation?

Another important notion used by the Union institutions in association with the self- and co-regulation is the notion of instruments and methods *alternative* to legislation.

In the process of improving regulation and policy making in the EU, the choice of instruments arguably plays one of the central roles as it involves, among other things, a search for what has been called “new modes of governance” for the EU.⁷⁰ It has been argued that the modern discussion on governance does not seek to oppose public and private regulation or treat them as alternatives any more. The policy making choice should rather benefit from their qualitative mix.⁷¹

⁶⁸ Commission staff working paper - Annex to the report from the Commission “Better lawmaking 2006” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (14th report), SEC(2007) 737 final (emphasis added).

⁶⁹ Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties, July 2006, 8 (available at http://ec.europa.eu/consumers/overview/report_advertising_en.pdf, last access 2007-06-19).

⁷⁰ L. Senden (2005), 8.

⁷¹ G.F. Schuppert (2003), 393.

Drawing on the White Paper, the Mandelkern Report in 2001 pointed out that the excessive use of traditional regulation undermines its credibility and effectiveness, therefore, it is not necessarily the best method of problem solving.⁷² When the decision is taken to intervene with regulation, regulatory efforts should be directed at the choice of instruments, which alongside legislation could include the “alternatives to regulation”.⁷³ The latter were defined as “alternatives to pure, traditional, legislation-based regulation such as self-regulation, co-regulation, and so on”, e.g., “do nothing”, incentive mechanisms, contractual policies, mutual recognition and other mechanisms.⁷⁴ As these voluntary private instruments were not defined in the Treaty, the Commission also began referring to them as “alternatives to legislation”,⁷⁵ or “alternative instruments”,⁷⁶ whereas the IIA termed them “alternative methods of regulation” and “alternative regulation mechanisms”.⁷⁷

The 2002 Action Plan, introducing a strategy for coordinated actions regarding the simplification of the regulatory environment,⁷⁸ listed under the notion of “alternatives to legislation” such tools as co-regulation, self-regulation, voluntary sectoral agreements, open coordination method, financial interventions, and information campaigns. In the Commission’s opinion, any of them could contribute to the simplification of Community lawmaking activities and legislation.⁷⁹

However, within the agenda of choice of instruments the Commission, other European institutions and bodies have gradually limited the use of term “alternatives to regulation” to mainly three forms of regulation (after the “do-nothing” option is rejected): self-regulation, co-regulation and open method of coordination.⁸⁰ The Interinstitutional Agreement was devoted solely to self- and co-regulation.⁸¹

⁷² Mandelkern Group on Better Regulation, Final Report, 13 November 2001 (hereinafter - Mandelkern Report (2001)), 13, available at http://ec.europa.eu/governance/impact/docs/key_docs/mandelkern_report_en.pdf.

⁷³ This notion is also used by the EESC, see, e.g., Opinion of the European Economic and Social Committee on “Simplification”, 29 November 2001 (2002/C 48/28), para 1.5.

⁷⁴ Mandelkern Report (2001), 81 (Annex D), 15-16.

⁷⁵ See, e.g., Action plan (2002), 11.

⁷⁶ Report from the Commission “Better lawmaking 2003” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (11th report), COM(2003) 770 final, 8.

⁷⁷ Para 16.

⁷⁸ Action plan (2002), 3.

⁷⁹ Ibid, 11.

⁸⁰ See, e.g., Report from the Commission on European Governance (2003): “There are several tools which, in specific circumstances, can be used to achieve the objectives of the Treaty while simplifying lawmaking activities and legislation itself (co-regulation, self-regulation, open coordination method)”; Opinion of the European Economic and Social Committee on “Simplification” (2002/C 48/28), para 4.1.: “Regulation may take one of three forms: — statutory regulation; — co-regulation; — self-regulation”; Communication from the Commission to the Council and the European Parliament. Better Regulation for Growth and Jobs in the European Union, COM(2005) 97 final, 14 (Annex 1): “Instruments which provide an alternative approach to legislation, such as co-regulation and self-regulation, have to be considered when assessing options”; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - A strategic review of better regulation in the European Union, COM(2006) 689 final, 8: “The option of no EU action together with alternatives to legally binding legislation (self- and co-regulation) is routinely examined”.

⁸¹ However, see the Impact Assessment Guidelines which suggest assessing wide scope of measures before deciding on legislative intervention, see Annexes to Impact Assessment Guidelines, 15 June 2005, SEC(2005) 791, 13-17.

On the basis of the aforementioned documents, alternatives to legislation in the Community framework can be defined as instruments that entirely or in part are generated by other means than the Community's legislation system and do not follow the Community method.⁸² The key question with the choice of *alternatives* to legislation is whether the function of self- and co-regulation is to replace or merely to complement traditional legislation. This issue is closely linked to the novelty of instruments and new modes of governance.

To sum up from the concepts of the self- and co-regulation discussed above, these mechanisms cannot be measured by a single standard due to the complex nature of their enactment and operation. Linda Senden claims that "...co-regulation can thus be seen rather as a complement to legislation than as an alternative to this. Finally, it can also be said to situate itself somewhere between legislation on the one hand and "pure" self-regulation on the other, by constituting in fact some form of "conditioned self-regulation",⁸³ whereas "the use of self-regulation can also more readily be considered to be an alternative to the use of legislation, which is not to say at the same time that it can be seen as being detached from the law."⁸⁴

It is possible to agree with such a conclusion, but only in part. Co-regulation in principle is a mechanism used to employ private instruments to complement and to complete a legislative act. Private rules cannot entirely replace it,⁸⁵ as a statutory rule (e.g., directive) should state "essential aspects of legislation": the objectives, basic rights, means of implementation, enforcement and monitoring mechanisms.⁸⁶ However, even in case of co-regulation privately generated instruments do replace the rules of a formally binding norm that would have been adopted were alternative instruments not chosen.⁸⁷

On the other hand, the Commission and other institutions try to disassociate themselves from self-regulation by declaring in the IIA that "this type of voluntary initiative does not imply that the Institutions have adopted any particular stance."⁸⁸ This implies that in principle self-regulation which evolves in the absence of Treaty provisions or institutional actions might serve as a regulatory *alternative* to legislation, especially when it serves pre-law function⁸⁹ and at least until the Commission decides to interfere with a legal act.⁹⁰ Therefore, self- and

⁸² J. Scott/D.Trubek (2002), 1.

⁸³ L. Senden (2005), 12.

⁸⁴ Ibid.

⁸⁵ See, e.g., White Paper (2001): "implementing measures may be prepared within the **framework of co-regulation**" (first emphasis added, second is original), 21.

⁸⁶ Action Plan (2002), 13; White Paper (2001), 21.

⁸⁷ See, e.g., Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment (COM(2005) 535 final), 7-8: "Standardisation by independent bodies is an example of a well recognised 'co-regulation' instrument. It is actively supported by the Commission as an alternative or complement to legislation" (emphasis added).

⁸⁸ Para 22.

⁸⁹ See more extensively A. Peters/ I. Pagotto (2006), 22-23.

⁹⁰ As can be seen from several documents the Community institutions also do not deny a possibility that private instruments generated under self- and co-regulation mechanisms can replace statutory rules. See, e.g., the argument for the use of environmental agreements in the preamble of the Commission Recommendation of 9 December 1996 concerning Environmental Agreements implementing Community directives (Text with EEA relevance) (96/733/EC): "Whereas Environmental Agreements might in certain circumstances complement legislation or replace otherwise more detailed legislation when they are used as a means for implementing certain provisions of directives" (emphasis added). Opinion of the European Economic and Social Committee on the "Communication from the Commission to the Council, the European Parliament, the European

co-regulation instruments are alternatives to legislation to a lesser or greater degree as they serve as functional equivalents to it.

However, it is important to note that the functional replacement of a legislative act does not create a situation, where self- and co-regulation instruments could be treated as independent of legislation or self-sufficient. In the case of co-regulation the enactment of private instrument or its *ex-post* recognition depends entirely on an act of legislation. The use of self-regulation for the Community purposes depends entirely on the Commission's approval/acknowledgement of its suitability to European needs and consistency with the EU law and other IIA requirements. It is also mistaken to assert that self-regulation takes place in a legal vacuum, for, as a general rule, criminal, administrative or other statutory rules establish limits to freedom of contract and other forms of self-regulation.⁹¹ These rules cannot be altered with a self-regulatory instrument.

The conclusion concerning the promotion of the use of alternatives to regulation is twofold. On the one hand, self- and co-regulation constitute a method/mechanism of rule-making that is alternative to traditional Community method and the rules created by which can replace the rules that would have been enacted under the Community method. On the other hand, self- and co-regulation instruments can be used only within the limits and under conditions defined by Community institutions and therefore their "alternativism" is subordinated to Community method and law, giving preference to traditional hierarchy and final authority of European institutions. Thus they are alternatives to the way legislation is made but the use of them is dependent on the close legislator's confinement.

IV. Reasons for the Employment of Self- and Co-Regulation

IV.1. Practical Motives Encouraging Self- and Co-Regulation

The Mandelkern Report indicated four main misuses of the traditional regulation:⁹²

- 1) the excessively lengthy regulatory processes that cannot cope with the speed of technological development;

Economic and Social Committee and the Committee of the Regions: Updating and simplifying the Community acquis" (COM(2003) 71 final), 31 March 2004 (2004/C 112/02), para 5.3: "In a democratic political framework, private regulation must generally further develop or apply public regulation, even replacing it in some areas, including unwritten rules originating in common law or rules of procedure which the legislator and public authority wish, explicitly or implicitly, to ensure are respected, e.g., the ethical codes of certain professions" (emphasis added). This opinion is also supported by the presentation of self- and co-regulation on the EU self- and co-regulation PRISM database, maintained by Single Market Observatory at the EESC, see at http://eesc.europa.eu/smo/prism/regulation/synopsis/index_en.asp (last visited 2007-03-20). However, see for consistent "supplementary" opinion of the Parliament, for instance, in European Parliament resolution on a strategy for the simplification of the regulatory environment (2006/2006(INI)) P6_TA(2006)0205, para 23.

⁹¹ In fact, there are many facets of public and private law interactions that leave no doubt that self-regulation is constantly subject to certain public law constraints, see, e.g., P. Lindseth (2006), 117; T. Prosser (2006), 251ff.

⁹² Mandelkern Report (2001), 14; see also criteria for legislative proposals in the Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment (COM(2005) 535 final), 5 July 2006 (2006/C 309/04), para 2.1.

- 2) high cost of drafting and/or implementing of legislation that might be disproportionate to the benefit the legislation is expected to bring;
- 3) suppressing the sense of responsibility or civic sense with excessive intervention into internal organization of economic and social actors;
- 4) loss of credibility of regulatory processes in cases of inappropriate implementation.

The very notion of “alternatives to legislation” implies that these instruments should help Community institutions to cure, at least in part, the shortcomings and deficiencies inherent to traditional statutory rule-making. Effectiveness, flexibility and faster achievements, responsibility sharing, cost-efficiency and other practical reasons are most often mentioned both by supporters and opponents among the benefits of private regulation.⁹³ It has been established for some time already that in certain fields the trend towards global regulation and especially transnational standardization has placed private actors in the centre of rule-making due to parties’ expertise, resources and infrastructure.⁹⁴

The EU preferences were hardly different. It is evident from the White Paper that in promoting the greater need to combine different policy instruments the Commission was largely driven by the demand for the **effective decision-making**.⁹⁵ The output legitimacy has a very strong and to a certain degree pioneering role in the promotion of alternative instruments within the better lawmaking initiative.⁹⁶

In the Commission’s opinion, the success of the essential Community’s commitment to foster growth and jobs depends on the ability to strike a balance between the policy agenda and the economy of cost of regulation.⁹⁷ **Cost-efficiency** has been included among the primary reasons invoked by the Community institutions to justify the recourse to alternative regulatory instruments.⁹⁸ Even the often cautious about the use of private measures European Parliament

⁹³ “Self and co-regulatory practices in the European Union” (2006), 18-19; W. Mattli (2003), 212-217; A. Ogus (1995); Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Environmental Agreements at Community Level within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, COM(2002) 412 final, 5.

⁹⁴ W. Mattli comments that transnational technical standard setting teaches us that international private sector actors may be capable to replace intergovernmental institutions established by states to correct market failures, see W. Mattli (2003), 215, 224-225.

⁹⁵ White Paper (2001), 21: “Under the following conditions the Commission will consider the use of co-regulation where it will be an effective way of achieving EU objectives (emphasis added)”; see also Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment, COM(2005) 535 final.

⁹⁶ H. Frykman/ U. Mörth (2004), 166.

⁹⁷ Communication from the Commission to the Council and the European Parliament. Better Regulation for Growth and Jobs in the European Union, COM(2005) 97 final, 4.

⁹⁸ See, e.g., Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment (COM(2005) 535 final), 7: “Co-regulation can in certain cases be a more cost efficient and expedient method for addressing certain policy objectives than the classical legislative tools”; Opinion of the European Economic and Social Committee on the “Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Updating and simplifying the Community acquis” (COM(2003) 71 final), 31 March 2004 (2004/C 112/02), para 3.5.2: “The Committee is in favour of cost-benefit analyses as well as evaluating legislative projects from the point of view of proportionality and subsidiarity”; Preamble of the Commission Recommendation of 9 December 1996 concerning Environmental Agreements implementing Community directives (96/733/EC): “Whereas agreements between public au-

consented to a Directive foreseeing self-regulation among implementing measures. The Parliament agreed that priority to self-regulation should be given in those cases where among other things “such action is likely to deliver the policy objectives ... in a less costly manner than mandatory requirements”.⁹⁹ The use of alternative instruments also contributes to saving legislators’ and even courts’ time as it enables them to concentrate on the quality of essentials of legislation leaving the technical and other details to professionals in the field.¹⁰⁰

However, the assessment of costs and speed of legislation does not represent the ultimate tool to measure the suitability of the regulatory instrument as the costs cannot always prevail over implementation of human rights, health, safety, or environmental goals pursued by regulation.¹⁰¹ Therefore the effectiveness and cost-efficiency requirements shall be reconciled with the other concerns.

It is also widely believed that rules enacted by and for economic actors, which do not require complex institutional and procedural mechanisms, bring **flexibility, better adaptation** and **quicker professional reaction** to the changing market conditions or affected parties’ needs than traditional European or national governance could provide.¹⁰²

The **involvement of civil society**, the social partners or organized groups of public such as NGOs, into shaping and delivering of the EU policy brings the European Union and its institutions “closer to citizens” and thereby helps to mitigate democratic deficit.¹⁰³ The alternatives to legislation are considered as perfect tools to reach the “wider ownership” of policies which should also **increase compliance** through **responsibility sharing**.¹⁰⁴

thorities and industry (‘Environmental Agreements’) are a policy instrument which can cost-effectively contribute to achieving environmental objectives by encouraging a pro-active approach from industry....”.

⁹⁹ See, e.g., Directive 2005/32/EC of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products and amending Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC of the European Parliament and of the Council, paras 16-17 of the Preamble.

¹⁰⁰ White Paper (2001), 23; The Current State of Co-Regulation and Self-Regulation in the Single Market, EESC pamphlet series, Brussels, March 2005, 22.

¹⁰¹ Opinion of the European Economic and Social Committee on the “Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Updating and simplifying the Community acquis” (COM(2003) 71 final), 31 March 2004 (2004/C 112/02), paras 3.5.3.-3.5.4.; Opinion of the European Economic and Social Committee on Better lawmaking, 28 September 2005 (2006/C 24/12), para 4.7; W. Mattli (2003), 224-225.

¹⁰² The Current State of Co-Regulation and Self-Regulation in the Single Market, EESC pamphlet series, Brussels, March 2005, 22; see also the Directive 2005/32/EC of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products and amending Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC of the European Parliament and of the Council, para 17 of the Preamble: “Self-regulation ... allows for flexible and appropriate adaptation to technological options and market sensitivities.” In a recent proposal concerning regulation of distribution of online copyright fees the Commission argued that rigid binding instrument enacted by the legislator might stifle the development of this fast evolving market, see Paul Meller, EU Reconsiders Online Copyright Law. European Parliament is pushing for changes in how musicians collect online copyright fees, IDG News Service, 2007-03-13 (available at <http://www.pcworld.com/article/id,129798-pg,1/article.html>, last consulted 2007-05-01).

¹⁰³ White Paper (2001), 3, 8.

¹⁰⁴ White Paper (2001), 21; In the opinion of the EESC such co-responsibility makes economic and social stakeholders into “full partners in the process of European integration”, see The Current State of Co-Regulation and Self-Regulation in the Single Market, EESC pamphlet series, Brussels, March 2005, 22, and the Opinion of the European Economic and Social Committee on Better lawmaking, 28 September 2005 (2006/C 24/12), para 4.5; The opinion of the Parliament: “Measures aimed at achieving public interest objectives in the emerging audiovisual media services sector will be more effective if they are taken with the active support of the service providers themselves”, see European Parliament legislative resolution on the proposal for a direc-

Self-regulation can also serve as a platform for Europe's role in regulation of globalising business.¹⁰⁵ By adapting and modernising the EU governance, the Commission hopes to contribute innovatively to the **new forms of global governance**, and first of all add to the developments in the WTO.¹⁰⁶

IV.2. Legal Principles Encouraging Self-and Co-regulation

The legislative activity of the European Union is based on the principles of subsidiarity and proportionality that are closely interlinked with the agenda of the improvement of regulatory environment. Article 5 of the Treaty establishing the European Community defines both of these principles, whereas a Protocol on the application of the principles of subsidiarity and proportionality to the Treaty of Amsterdam sets the criteria for applying them. According to the Protocol “the form of Community action shall be as simple as possible”.

The principle of subsidiarity provides guidance for drawing a boundary between the Community's and Member States' actions aiming at the achievement of Community's objectives. It involves the satisfaction of necessity and value added tests,¹⁰⁷ the application of which should attribute only those actions to the Union's competence that are necessary and effective.¹⁰⁸ A proposal for regulation shall also include the assessment on “whether regulatory intervention is needed”.¹⁰⁹

The principle of proportionality affects the form, the degree and the intensity of Community intervention with appropriate regulation. The chosen means should satisfy effectiveness and efficiency tests¹¹⁰ and should equip the Community with the simplest possible instruments for the attainment of its objectives.¹¹¹

The principles of subsidiarity and proportionality give the core guidelines in the simplification and improvement of the Community legislation. It is on the basis of application of these principles that alternative means of regulation come into play as complementary less restrictive means of regulation for the achievement of the Union's objectives.¹¹² The principles of subsidiarity and proportionality are reinforced through the principle of good governance based on openness, participation, accountability, effectiveness and coherence.¹¹³

tive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, 13 December 2006, P6_TA-PROV(2006)0559; A. Ougus (1995), 102.

¹⁰⁵ Opinion of the European Economic and Social Committee on Better lawmaking, 28 September 2005 (2006/C 24/12), para 4.6; F Cafaggi, *New Modes of Regulation in Europe* (2006), xxiii.

¹⁰⁶ A White Paper (2001), 26-27; Report from the Commission on European governance, COM (2002) 705, 26.

¹⁰⁷ Report from the Commission “Better lawmaking 2003” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (11th report), COM(2003) 770 final, 16, para 3.1.a.

¹⁰⁸ Report from the Commission “Better Lawmaking 2004” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (12th report), COM(2005) 98 final, 2.

¹⁰⁹ White Paper (2001), 20.

¹¹⁰ Report from the Commission “Better lawmaking 2003” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (11th report), COM(2003) 770 final, 16-17, para 3.1.a.

¹¹¹ Case C-310/04, *Spain v Council*, Judgment of 7 September 2006, paras 97-99.

¹¹² However, see J. Ziller, who argues against application of the principle of subsidiarity in favour of self-regulation, as “there is not such a thing as horizontal subsidiarity in EC law”, see J. Ziller (2006), 156.

¹¹³ White Paper (2001), 10.

With the better regulation agenda the application of principles of subsidiarity and proportionality were reinforced by the introduction of the new Impact Assessment system the aim of which is to evaluate economic, social and other consequences of a proposed action.¹¹⁴ The weight of the alternative instruments increased as the Impact Assessment Guidelines require to give “careful consideration ... in all impact assessments to alternatives to “traditional” forms of regulation.”¹¹⁵

The IIA incorporates these principles, and directs the use of alternative instruments “in suitable cases, or where the Treaty does not specifically require the use of a legal instrument”.¹¹⁶ It could be expected that self- and co-regulation are going to challenge the application of the subsidiarity and proportionality, as the EU institutions and in particular the Commission will have a more complex and a broader task as it would be obliged to compare and to measure impact and to justify choice of preferences from much broader scope of measures than before.

Although it has not been fully clarified by the EU institutions yet, the principle of subsidiarity should play a key role when the choice has to be made between the legislation, including mixed instruments (e.g., involving co-regulation) and self-regulation, especially in areas where the Community has not yet legislated.¹¹⁷ Accordingly, the principle of proportionality will directly guide a choice between co-regulation and more intensive forms of legislative action (e.g., directive or regulation), as the Commission must first of all look for the lightest possible degree of intervention.¹¹⁸

a) Subsidiarity and Proportionality in Support of Alternative Instruments

The preference to lighter instruments was demonstrated in the case with the pre-packaging sizes rules.¹¹⁹ The Commission aimed to simplify the EU legislation by setting down nominal quantities. After series of analyses, studies and public consultations with stakeholders it examined the desirability of deregulation of pre-packaging sizes for certain products, which was based on mandatory and optional sizes aimed at enhancing consumer protection and market transparency. Having assessed different policy alternatives, the Commission preferred free sizes and voluntary standardisation to fixed sizes, with the exception for certain sectors.¹²⁰ The Commission also rejected the majority of the proposals submitted by the Parliament who

¹¹⁴ See Communication from the Commission on Impact Assessment, COM(2002) 276 final, 14-15; paras 28-29 of the IIA; see Communication from the Commission to the Council and the European Parliament - Better Regulation for Growth and Jobs in the European Union, COM(2005) 97 final, 5, 13; it should be remembered that as a general rule only major legislative proposals should undergo impact assessment, see “Common Approach to Impact Assessment”, Council of the European Union, 14901/05, 25 November 2005, para 3; European Commission. Impact Assessment Guidelines, 15 June 2005 with March 2006 update, SEC(2005) 791.

¹¹⁵ Annexes to Impact Assessment Guidelines, 15 June 2005, SEC(2005) 791, 13. As Commission acknowledged, there is an increasing number of cases where impact assessment has contributed to the changes in the nature of intervention and instruments, see Report from the Commission “Better Lawmaking 2006” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality, COM(2007) 286 final, 4.

¹¹⁶ Paras 12, 16.

¹¹⁷ For examples see parts 2a-2b.

¹¹⁸ For examples see part 2a.

¹¹⁹ Report from the Commission “Better lawmaking 2003” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (11th report), COM(2003) 770 final, 20.

¹²⁰ Ibid.

argued against complete deregulation, favouring mandatory sizes in certain sectors in order to increase protection of consumers and SME's interests.¹²¹

Another example concerns the acknowledgement of self-regulatory mechanisms in the field of securities sector. In 2004, the Commission proposed to take action at the EU level to improve clearing and settlement securities transactions and announced its intention to propose a framework directive for that purpose. However, in 2006 after the impact assessment and the signature by the main industry associations of a "European Code of Conduct for clearing and settlement", the Commission expressed its satisfaction with industry's initiative and decided that legislative intervention was not necessary.¹²²

In its latest strategic review on Better Regulation, the Commission reports that as a result of impact assessment some planned measures in biomass, the urban environment, and copyright in the online music sectors have been significantly adjusted as binding measures were not necessary.¹²³ The newest proposals for voluntary measures include the suggestion for a new, more structured framework for lobbying activities based on a voluntary registration system and a common code of conduct¹²⁴ or continuing support of self-regulation of professions.¹²⁵

Applying the principle of proportionality the Commission substantiated the choice of a European level regulation combining directive and instruments of co-regulation in the field of audiovisual services undertaking to revise the "Television Without Frontiers" directive in the end of 2005. Co-regulation, and upon Parliament's proposal also self-regulation, have been chosen as the lightest forms of intervention bearing in mind the need to harmonise minimum rules for non-linear services, ensure legal certainty in the market and preserve competition.¹²⁶ Co-regulation in the form of codes of conduct concluded between professionals at Commu-

¹²¹ COM(2006) 171 final; Commission staff working paper - Annex to the report from the Commission "Better Lawmaking 2006" pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (14th report), COM(2007) 286 final.

¹²² See Communication from the Commission to the Council and the European Parliament. Clearing and Settlement in the European Union – The way forward, COM(2004) 312 final; Commission staff working paper - Annex to the report from the Commission "Better Lawmaking 2006" pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (14th report), COM(2007) 286 final, para 2.1.4; Commission Staff Working Document. Single Market in Financial Services Progress Report 2006, SEC (2007) 263, 4.

¹²³ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - A strategic review of better regulation in the European Union, COM(2006) 689 final, 8.

¹²⁴ Green Paper - European transparency initiative, COM(2006) 194 final; Communication from the Commission - Follow-up to the Green Paper "European Transparency Initiative", COM(2007) 127 final.

¹²⁵ Para F of the Preamble, para 7 of the European Parliament resolution on follow-up to the report on Competition in Professional Services, P6_TA(2006)0418.

¹²⁶ Commission Staff Working Document, SEC(2006) 737; Annex to the Report from the Commission "Better Lawmaking 2005" pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (13th Report), COM(2006) 289 final; Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, COM(2005) 646 final; see also Amendment 91, European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM(2005)0646 – C6-0443/2005 – 2005/0260(COD)).

nity level is also encouraged removing the barriers for the services in the internal market.¹²⁷ The recommendation of European Parliament and Council on the protection of minors and human dignity and on the right of reply also contributes to the development of the codes of conduct and exchange of best practices, in order, for instance, to harmonise measures to avoid potentially harmful content.¹²⁸

In the fight against unfair commercial practices, the conclusion was reached that the rules should be harmonised at European level due to considerable fragmentation of national practices and the need to eliminate barriers that national laws pose to the internal market, as well as provide a high common level of consumer protection.¹²⁹ In the Extended Impact Assessment the Commission concluded that a combination of a framework directive and co-regulation that include a possibility for groups or associations to establish voluntary codes of conduct would better achieve Community objectives.¹³⁰

b) Subsidiarity and Proportionality in Support of a Binding Community Action

The chemicals and the pedestrian safety regulation exemplify situations where voluntary actions were found inadequate. The reform of the regulation of registration, evaluation, authorisation and restriction of chemicals, in the Commission's view, is a matter of public policy and consequently the legislator's domain as the objective in this domain could not be achieved efficiently through the simplest form of intervention and any lighter instrument.¹³¹ The reform of regulation was needed due to widespread consensus that existing legislation could not respond efficiently to public concerns over the potential impact of chemicals on health and the environment. The Commission opted for the strongest instrument – regulation, justifying its choice by the technical complexity of the matter under regulation, the need to prevent distortion of competition and to create a system of regulation that would be easy to implement by the Member States and monitor by the Commission. On the ground of these considerations and costs and impact assessment the Commission rejected the use of alternative instruments such as self- or co-regulation.¹³²

Defending a proposal concerning the protection of pedestrians and cyclists from road accidents the Commission suggested relying on alternative actions, i.e. the commitments of Euro-

¹²⁷ Article 37, paras 113-115 of the Preamble, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

¹²⁸ Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audio-visual and on-line information services industry (2006/952/EC), para II.1.

¹²⁹ See Extensive Impact Assessment, SEC(2003) 724, 6; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), para 23 of the Preamble.

¹³⁰ SEC(2003) 724; Report from the Commission "Better lawmaking 2003" pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (11th report), COM(2003) 770 final, 22.

¹³¹ Report from the Commission "Better lawmaking 2003" pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (11th report), COM(2003) 770 final, 22-23.

¹³² Ibid, 23; See also Commission Staff Working Paper. Regulation of the European Parliament and the Council concerning the Registration, Evaluation, Authorisation and Restrictions of Chemicals (Reach), Establishing a European Chemicals Agency and Amending Directive 199/45/EC and Regulation (EC), Extended Impact Assessment, SEC(2003) 1171, 5.

pean, Japanese and Korean automobile manufactures.¹³³ However, the Parliament decided that the protection of the Union's citizens requires broader and more intensive legislator's intervention and could not be entrusted to third parties. In the Parliament's opinion the voluntary agreement signed by the car industry had to yield ground to the harmonisation through legislative measures.¹³⁴ The Commission subsequently adopted a directive, but at the same time encouraged industry to propose alternative measures for improving safety which might lead in the future to the revision of the provisions of the directive.¹³⁵

In one of the latest proposals, the parliamentarians opposed the Commission's suggestion to regulate distribution of online copyright fees with the instruments of the soft law arguing that such important interests as the need to ensure competition while simultaneously guaranteeing cultural diversity and protection of interests of weaker parties should be safeguarded only by law.¹³⁶ The Commission rejected voluntary measures (self-regulation) for a regulation imposing a ban on trading cat and dog fur, as they have proven useless in preventing the fraudulent labelling and illicit trade.¹³⁷ In another notable case the industry representatives - the European Fruit Juice Association - themselves sought for the EU legislation on a fruit juice norm, as a voluntary code of practice agreed between the members of Association upon implementation of Council Directive 2001/112 was found insufficient to ensure fair competition.¹³⁸

c) Self- and Co-Regulation as the Application of the European Fundamental Rights

The European fundamental rights might also contribute to the encouragement and defence of self-regulatory actions. As has been argued by Advocates General in several cases before the ECJ the self-regulation of sports is in principle guaranteed by the right of association.¹³⁹ In the case *Jyri Lehtonen* Advocate General Alber, building on the respect for the freedom of association as a principle of the Community law and Article 11 of the European Convention on Human Rights, submitted that the demand for sporting rules is protected by the Commu-

¹³³ Proposal for a Directive of the European Parliament and of the Council relating to the protection of pedestrians and other vulnerable road users in the event of a collision with a motor vehicle and amending Directive 70/156/EC, COM(2003)67 final.

¹³⁴ Report from the Commission "Better lawmaking 2003" pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (11th report), COM(2003) 770 final, 26-27.

¹³⁵ Para 10 of the Preamble, Article 5 of Directive 2003/102/EC of the European Parliament and of the Council of 17 November 2003 relating to the protection of pedestrians and other vulnerable road users before and in the event of a collision with a motor vehicle and amending Council Directive 70/156/EEC.

¹³⁶ P. Meller, EU Reconsiders Online Copyright Law. European Parliament is pushing for changes in how musicians collect online copyright fees. IDG News Service, 2007-03-13 (available at <http://www.pcworld.com/article/id,129798-pg,1/article.html> (last accessed 2007-05-01))

¹³⁷ Proposal for a Regulation of the European Parliament and of the Council banning the placing on the market and the import of or export from the Community of cat and dog fur and products containing such fur, COM(2006) 684 final, 8-9.

¹³⁸ Report from the Commission "Better Lawmaking 2006" pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality, COM(2007) 286 final, 5 and footnote 19.

¹³⁹ Opinion of Advocate General Cosmas, delivered on 18 March 1999 in the joint cases *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo* (C-51/96) and *François Pacquée* (C-191/97), para 27.

nity law.¹⁴⁰ In addition, according to Alber, “the *organisational authority* of sporting associations is in itself a public interest deserving of protection”.¹⁴¹

Moreover, in another case Advocate General Cosmas argued that “any decision by sporting institutions which has as its exclusive aim or objective the promotion of the social dimension of sport, over and above any intention of an economic nature, is in principle justified, even where it entails a restriction on Community freedoms. This is dictated by the need to guarantee sport’s right of self-regulation”.¹⁴²

However, sports might embody the case were historical practices of self-regulation come under the shadow of Commission’s supervision which would bring to an end the wide discretionary powers of sports’ self-regulatory bodies. Recently, the European Parliament expressed its concern over legal uncertainty of football regulation that leads to the ill-defined boundaries of autonomy of self-regulating bodies and application of the Community law and called football governing bodies to “better define and coordinate their competences, responsibilities, functions and decision-making procedures in order to increase their democracy, transparency and legitimacy” whilst the Commission should provide “guidance on which legitimate and adequate self-regulation is supported”.¹⁴³ However, the Parliament stressed that the appropriate legal framework should respect “the fundamental principles of specificity of professional football, autonomy of its bodies and subsidiarity”.¹⁴⁴

V. The Implications of the Conceptualization of Self- and Co-Regulation for the New Modes of Governance Debate

The Union was clearly driven by the aspiration to become more innovative with softer instruments when the agenda for better law-making was introduced. The IIA was launched as a first collective initiative to regulate self- and co-regulation on a European level and was largely determined by the need to integrate private practices into the Community’s legal framework. Arguably, the integration of self- and co-regulation into the institutional practices with the adoption of the IIA transferred these alternative instruments to a new level of their development. However, many concerns over the legitimacy of their use have been neither solved nor clarified with the new Agreement for several reasons.

First of all, given that the objective of better regulation agenda was to preserve the existing Treaties’ provisions and legislator’s competence, the foundations of the regulatory framework for the self- and co-regulation within the European Union were build on predominantly soft law documents the legitimacy of which is in itself debated (i.e. the White Paper, the Action Plan, communications, reports, resolutions, guidelines and other soft documents). The ill-

¹⁴⁰ Opinion of Advocate General Alber delivered on 22 June 1999, Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, para 69.

¹⁴¹ Para 70 (emphasis added).

¹⁴² Opinion of the Advocate General Cosmas delivered on 18 March 1999 in the joint cases *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96)* and *François Pacquée (C-191/97)*, para 87.

¹⁴³ European Parliament, Resolution of 29 March 2007 on the future of professional football in Europe, P6_TA-PROV(2007)0100, para 11.

¹⁴⁴ *Ibid*, para F in the Preamble.

defined status of the IIA in the EU legal system¹⁴⁵ does not contribute to the sound regulation of these instruments.

Second, a right to select the instruments of self-regulation for the attainment of the Community objectives in the areas not covered by the Treaties¹⁴⁶ vested with the Commission leads to the expansion of its competence and influence at the expense of a role of the Parliament¹⁴⁷ and might pose new challenges to the EU regulatory framework creating new problems instead of solving the old ones. The IIA and the White Paper itself is considered by some critics as a “more or less conscious attempt by the Commission at bypassing the constraints of the EU system of legal bases”¹⁴⁸ and therefore does not in theory eliminate concerns over legitimacy of soft integration.¹⁴⁹ According to the Commission’s data, by 2003 a large part of the stakeholders were in favour of assessing all policy instruments, including new alternatives, on an equal footing, whereas “the institutional players (the European Parliament in particular) are more reticent and consider that further examination is required.”¹⁵⁰ Thus it is not surprising that the promotion campaign directed towards the use of alternatives to regulation never ends and is more relevant for the persuasion of the EU institutions, especially the Parliament, than for the encouragement of civil society.

Alternatively, the integration has contributed to the fragmentation of the regulation of private practices, as the IIA was not meant to cover existing self- and co-regulation practices, such as those elaborated by social partners under Articles 138-139 of the Treaty or “New Approach” regulation.¹⁵¹ The IIA aimed at regulating and mapping *new* initiatives of self- and co-

¹⁴⁵ See generally, e.g., W. Hummer (2007), 57-67.

¹⁴⁶ Article 22 of the IIA.

¹⁴⁷ A. Héritier (2001). As can be seen from numerous documents, the European Parliament feels bypassed in the process of selection and preference of new instruments to legislative acts and generally in the process of simplification. The European Parliament supports simplification process with a condition that it must be based on the full involvement of the Parliament in the interinstitutional debate (i.e. that the Commission should *always consult* it upon selection of self-regulation) and as co-legislator, whereas the use of alternative regulatory methods should not diminish Parliament’s right to object to their use, nor should the Commission be able to override Parliament’s opposition to any voluntary practice, see European Parliament resolution on the Commission communication on simplifying and improving the Community’s regulatory activity (P5_TA(2004)0155, paras 5-9) and European Parliament resolution on a strategy for the simplification of the regulatory environment (P6_TA(2006)0205, paras 1, 23). The Parliament also requested the Commission by the latter resolution to assess and report on the compatibility of current standardisation practices (!) with the IIA requirements (para 24). See also European Parliament resolution on the Commission White Paper on European governance (COM(2001) 428 - C5-0454/2001 - 2001/2181(COS)), paras 2, 34, 37. Remarkably, the Parliament has consented to the IIA making two statements, that it: “1. ... must undertake not to accept the adoption of legislative acts which require the application of implementing measures adopted under the co-regulation mechanism where those acts do not explicitly include the provisions relating to verification and to a call-back mechanism provided for in point 18 of the Agreement; 2. Reserves the right ... to bring an action before the Court of Justice against any legal rule adopted under the self-regulation procedure which might encroach upon the prerogatives of the legislative authority and, hence, call Parliament’s prerogatives into question”, see European Parliament decision on the conclusion of the interinstitutional agreement on Better Law-Making between the European Parliament, the Council and the Commission, P5_TA(2003)0426.

¹⁴⁸ J. Ziller (2006), 156-157.

¹⁴⁹ See, e.g., S. Smismans (2004), 11.

¹⁵⁰ Key messages from the public consultation drawn from the Annex 1 of the Report from the Commission on European Governance, 2003, Luxembourg: Office for Official Publications of the European Communities, 36.

¹⁵¹ Action plan (2002), 12; Presentation of Mitek-Petersen, the European Commission, in: Summary of the Hearing of the EESC on the Current Status of Co-regulation and Self-regulation in the Single Market, R/CESE 1419/2004, 22 Nov 2004, 5; see also Report from the Commission “Better lawmaking 2003” pursuant to Ar-

regulation. The wording of the IIA divides the European self- and co-regulation practices at least into four major groups. The measures agreed between private parties on the basis of Treaty provisions or Community soft law before the IIA came into force constitute first group. The second group covers the instruments that will be verified and acknowledged by the Commission and other institutions as compatible with the IIA. The third group consists of the measures that in the opinion of the Commission do not fall under the IIA and/or do not comply with the requirements established by the IIA, or have other deficiencies.¹⁵² This group of discarded practices should include instruments and practices that do not satisfy both formal (European coverage, organizational form of a rule-maker) and/or material requirements. These practices will function outside the Community's legal framework, however, it is not clear whether the Commission would be entitled to undertake any measures in respect of them.¹⁵³

The fourth group might emerge out of the “grey area” of the third group measures that literally do not fall under the definitions established by the IIA, but which, however, have been already put into circulation by the EU institutions after the IIA (i.e. co-regulation induced by the Community soft law act, self- and co-regulation encouraged by Member States, etc.). In the latter case it is not clear whether measures originating from the Member States' initiative should comply with the IIA requirements. In addition, these recent developments in the EU show that the fast proliferation and expansion of self- and co-regulatory practices is not entirely dependent on formal texts. Thus there is no direct causal link between formal “constitutionalization” and self-regulation on European level. Such scenario nevertheless contributes to increasing the gap between “law in action” and “law in books”. The exclusion of alternative instruments from the Constitutional treaty threatens efforts to build their legitimacy on soft law documents and political consensus¹⁵⁴ as they are formally left outside the legal framework, as well as “outside the formal constitutionalization process”¹⁵⁵. This, in the opinion of Ulrika Mörth, could create “a wider gap between two parallel systems in the EU – government and governance”.¹⁵⁶

Self-regulation could help Community to solve several old problems: bring decisions closer to organized civil society, increase respect for diversity, and reduce the intensity and complexity of Community legislation. The European institutions might certainly benefit from using self-regulation to foster European integration, especially in the areas that have not been subject to Community control yet, or where Community has no competence under the Treaties.¹⁵⁷ This might result in the administration by the Commission of “new territories” as, for example the tendency for creeping regulation over sports shows. The IIA might encourage the Commission and other institutions to use European level self- and co-regulation in situations, where it is otherwise difficult to fight the Member States' (or even business') resistance for regula-

title 9 of the Protocol on the application of the principles of subsidiarity and proportionality (11th report), COM(2003) 770 final, 39 footnote.

¹⁵² As was admitted by the representatives of the Commission the IIA also raises certain concerns for *ex post* co-regulation as the Commission has problems with the formalization and recognition of the existing voluntary agreements under the IIA in certain cases, see Summary of the Hearing of the EESC on the Current status of co-regulation and self-regulation in the single market, R/CESE 1419/2004, 22 November 2004, 6.

¹⁵³ See for suggestions, e.g., F. Cafaggi, *New Modes of Regulation in Europe* (2006), xxiv.

¹⁵⁴ For the objections to these efforts see, e.g., J. Ziller (2006), 158-159.

¹⁵⁵ U. Mörth. *Soft law and global democracy*, in: Djelic, Marie-Laure (eds.), *Transnational governance: institutional dynamics of regulation*, Cambridge: Cambridge University Press, 2006, 133.

¹⁵⁶ *Ibid.*

¹⁵⁷ The IIA, para 22; F Cafaggi, *New Modes of Regulation in Europe* (2006), xxiii-xxiv; E. Steyger (1993), 183.

tion.¹⁵⁸ These voluntary instruments could also mitigate subsidiarity and proportionality violation claims, while the powers vested by the IIA in the Parliament would allow to safeguard the principle of democracy. Another positive outcome is that direct dialogue between the Community and private parties would infuse more direct democracy into policy making, but at the same time might eliminate Member States from decision-making.¹⁵⁹

However, the vocabulary of “alternativization” of the private means did not launch a horizontal system of co-existence between privately generated rules and traditional legislation. The Union’s drive for supremacy and uniformity is safeguarded subjecting the autonomy of self-regulatory bodies to a very complex regulation of its operation conditions and a list of precluded areas.¹⁶⁰ It seems that the EU is going to prevent the diffuse of Community Method and control the emergence of self- and co-regulation through their unique European conceptualization and integration by way of subordination.¹⁶¹

VI. Conclusions

Having examined the conceptual integration of the alternative mechanisms as new modes of governance into the EU legal framework, it is difficult to conclude that the IIA removed all uncertainties and will definitely contribute to the facilitation of their greater use. More time has to pass before the evaluation could be made on the efficiency of impact assessment and success of alternatives. However, it is already evident that the EU institutions continue employing multiple definitions and concepts of self- and co-regulation beyond the IIA confines. Though some policy documents consider these new alternatives as replacement of legislation, it can be seen from the positions of the Community institutions that the actual purpose of using them within Community framework is to merely complement and subject to the authority of legislator.¹⁶²

In addition, the conceptualization of self- and co-regulation in the IIA shows an intention of the EU institutions to reduce the number of practices that could be employed for the Union’s

¹⁵⁸ E. Steyger (1993), 183.

¹⁵⁹ F. Cafaggi, *New Modes of Regulation in Europe* (2006). Nevertheless, as above examples show the EU documents encourage the use by the Member State’s of self- and co-regulatory measures.

¹⁶⁰ The requirements established for the use of self- and co-regulation by various documents could be grouped as following: 1) Contribution to the attainment of the Treaty objectives and compliance with the Community law, especially competition rules (for co-regulation the legislature establishes the essential framework of regulation: objectives, basic rights, conditions for monitoring compliance, etc.); 2) Added value for general interest; 3) Quality of the participants: The participants must be representative, accountable, organized and capable of following open procedures in formulating and applying agreed rules; 4) Transparency: The rules produced by the process of self- and co-regulation must be public and accessible; 5) Follow-up mechanisms for monitoring the application and enforcement; 6) Precluded areas: self- and co-regulation cannot challenge fundamental rights or major political choices, and should not be used where the uniform application of rules is required in the Community. See paras 17-23 of the IIA; also White paper (2001), 21; Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on Environmental Agreements at Community Level within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, COM(2002) 412 final, 10-12.

¹⁶¹ See F. Cafaggi, who argues that the novelty about the involvement of private actors in the regulatory process is “the integrated nature of the new regulatory models”, F. Cafaggi, *Rethinking Private Regulation* (2006), 2.

¹⁶² Opinion of the European Economic and Social Committee on “Simplification” (2002/C 48/28): “4.2. All three forms [statutory regulation, co-regulation and self-regulation] may co-exist in the same market and it is probably more meaningful to view co-regulation and self-regulation as complementary approaches rather than as alternatives to statutory regulation” (emphasis added).

purposes.¹⁶³ This is particularly alarming since today there emerge concerns of the shortage of European-wide bodies pursuing self-regulation.¹⁶⁴ The “Europeanization” and “Communitarization” of private practices might threaten the very idea of new modes of governance as non-hierarchical and distant from states and government.¹⁶⁵ At the same time, it is questionable whether the increased use of these new alternative regulatory methods as well as their legitimation through the soft law instruments do not compromise the European understanding of democracy, legitimacy, and supremacy of the EU law.

Drawing on findings of this paper, in our future research we intend to examine the conditions and limits imposed on the use of self- and co-regulation by the IIA and various other documents seeking to verify whether a better regulation strategy leads to a shared governance design or continues giving preference to traditional hierarchy and final authority of European institutions.¹⁶⁶

¹⁶³ C. Scott (2002), 69.

¹⁶⁴ See information available at <http://www.euractiv.com/en/pa/alternative-regulation/article-117444#links> (last consulted 2007-05-01).

¹⁶⁵ M. Rhodes, The Scientific Objectives of the NEWGOV Project. A Revised Framework. Paper presented at the opening session, 20 May 2005, 12.

¹⁶⁶ J. Scott/D. Trubek (2002), 17-18.

VII. Bibliography

- Black, Julia, Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World, *Current Legal Problems* 54 (2001)
- Black, Julia, Constitutionalising Self-Regulation (1996) 59 *MLR* 24
- Cafaggi, Fabrizio (ed.), *New Modes of Regulation in Europe: Critical Rethinking of the Recent European Paths*, in: F. Cafaggi (ed.), *Reframing self-regulation in European private law*. The Hague: Kluwer Law International 2006
- Cafaggi, Fabrizio, Rethinking Private Regulation in the European Regulatory Space, *EUI Working Paper, Law*, No. 2006/13
- The Current State of Co-Regulation and Self-Regulation in the Single Market, EESC pamphlet series, Brussels, March 2005
- Eijlander, Philip, Possibilities and Constraints in the Use of Self-Regulation and Co-Regulation in Legislative Policy: Experiences in the Netherlands - Lessons to Be Learned for the EU?, Vol. 9.1, *Electronic Journal of Comparative Law* (January 2005), <http://www.ejcl.org/91/art91-1.html>.
- Frykman, Henrik/ Mörth, Ulrika, Soft Law and Three Notions of Democracy: The Case of the EU, in: Mörth, Ulrika (ed.), *Soft Law in Governance and Regulation, An interdisciplinary Analysis*, Cheltenham 2004
- Héritier, Adrienne, The White Paper on European Governance: A Response to Shifting Weights in Interinstitutional Decision-Making. A paper-contribution to the Jean Monnet Working Paper No.6/01 in the Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance (2001), <http://www.jeanmonnetprogram.org/papers/01/011301.html>
- Hummer, Waldemar (2007) From ‘Interinstitutional Agreements’ to ‘Interinstitutional Agencies/Offices’? *European Law Journal* 13 (1), 47–74
- Haufler, Virginia, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy*, Washington 2001
- Joerges, Christian/Schepel, Harm/Vos, Ellen, The Law’s Problems with the Involvement of Non-Governmental Actors in Europe’s Legislative Processes: The Case of Standardisation under the ‘New Approach’, *EUI Working Paper, Law*, No. 99/9.
- Lindseth, Peter L., Agents Without Principals? Delegation in an Age of Diffuse and Fragmented Governance, in: F. Cafaggi (ed.), *Reframing self-regulation in European private law*. The Hague: Kluwer Law International, 2006
- Mattli, Walter, Public and Private Governance in Setting International Standards, in: Kahler, Miles/Lake, David A., *Governance in a Global Economy*, Princeton, Oxford 2003
- McHarg, Aileen, The Constitutional Dimension of Self regulation, in: F. Cafaggi (ed.), *Reframing self-regulation in European private law*, The Hague: Kluwer Law International 2006
- Mörth, Ulrika, Soft law and global democracy, in: Djelic, Marie-Laure (eds.), *Transnational governance: institutional dynamics of regulation*, Cambridge: Cambridge University Press 2006
- Ogus, Anthony, Rethinking Self-Regulation, *Oxford Journal of Legal Studies* 15 (1995)
- Peters, Anne/Pagotto, Isabella. Soft Law as a New Mode of Governance: A Legal Perspective, *NEWGOV* 04/D11 (2006)

- Pitt, Harvey L./Groskaufmanis, Karl A., *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, *The Georgetown Law Journal* 78 (1989-1990)
- Prosser, Tony, *Self-Regulation, Politics and Law: The Example of the Media*, in: F. Cafaggi (ed.), *Reframing self-regulation in European private law*, The Hague: Kluwer Law International 2006
- Rhodes, M, *The Scientific Objectives of the NEWGOV Project. A Revised Framework*. Paper presented at the opening session, 20 May 2005
- Schepel, Harm, *The Constitution of Private Governance. Product Standards in the regulation of Integrated Markets*, Oxford: Hart Publishing 2005
- Schuppert, Gunnar Folke, *Staatswissenschaft*. Baden-Baden: Nomos Verlagsgesellschaft, 2003
- Scott, Colin, *Self-regulation and the Meta-Regulatory State*, in: F. Cafaggi (ed.), *Reframing self-regulation in European private law*, The Hague: Kluwer Law International 2006
- Scott, Colin, *The Governance of the European Union: The Potential for Multi-Level Control*, *European Law Journal* 8 (2002), 59-79
- Scott, Joanne/Trubek, David M., *Mind the Gap: Law and New Approaches to Governance in the European Union*, *European Law Journal* 8 (2002), 1-18.
- “Self and co-regulatory practices in the European Union”, October 2006 (available at http://europa.eu.staging.entri.ccc.eu.int/enterprise/regulation/better_regulation/docs/simplification/Final-report-SCR2.pdf)
- Smismans, Stijn, *The EU’s Schizophrenic Constitutional Debate: Vertical and Horizontal Decentralism in European Governance*, *EUI Working Papers RSCAS No. 2004/32*
- Steyger, Elies, *European Community Law and the Self-Regulatory Capacity of Society*. *Journal of Common Market Studies*, Vol 31, No 2, June 1993
- Trubek, David M./Trubek, Louise G., *Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination*, *European Law Journal* 11 (2005)
- Ziller, Jacques, *Constitutional Boundaries to Self-Regulation: A Comparative Appraisal*, in: F. Cafaggi (ed.), *Reframing self-regulation in European private law*. The Hague: Kluwer Law International, 2006