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Self- and Co-Regulation Instruments in the EU Legal Framework: Limits and Conditions of Use

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Summary

The European Commission has been busy lately promoting new 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 effectiveness, flexibility, expertise, and to integrate society at large, while at the same time simplifying Community legislation.

The paper inquires into the limits and conditions imposed on the use of self- and co-regulation by the Interinstitutional Agreement on Better Law-Making, various documents of the European Union institutions and other sources. The content of five main procedural and substantive conditions – compliance with Community law, added value for the general interest, transparency, representativeness and monitoring – is explored in detail along with the precluded areas of their use. In addition, the paper briefly analyses how the integration into the EU legal framework of self- and co-regulation as new European regulation mechanisms reflects and at the same time challenges the institutional balance of the European Union and whether these new modes of governance could lead to shared governance in the EU.

Drawing on the analysis of the requirements imposed on alternative instruments and precluded areas of their application the conclusion is drawn that the European Commission, with the support or request from other institutions (primarily the European Parliament), has added too much classical law and hierarchical governance flavour, which greatly affects the nature of self- and co-regulation. These criteria limit the number of private rule-making practices that can be employed by the European institutions for the Union purposes. The application of these conditions without distinction to both self- and co-regulation as well as their subordination to the Union's hierarchical structure threatens to deprive self-regulation practices of their exclusive and much sought-after features such as flexibility, cost-efficiency or better and faster adaptation.

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I. Introduction¹

The Interinstitutional Agreement on Better-Lawmaking (IIA),² signed between three EU institutions, not only defined self- and co-regulation for the first time, but more importantly – it set common criteria and established limits for their use within the European Union legal framework. However, as has already become quite clear from the analysis of the definitions of self- and co-regulation,³ the European Union chose to Europeanize and communitarize concepts of alternative practices to legislation and thereby limit the number of available instruments.⁴

Drawing on findings of our earlier paper,⁵ we intend to examine the criteria 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 ultimate authority of the European institutions.

The analysis is divided into three parts. The major part of the paper (part II) is devoted to the examination of the content of the substantial and procedural conditions of self- and co-regulation and areas precluded for their use, the list of which was compiled in the IIA and elaborated in various documents. In other two parts, the paper briefly analyses how the integration into the EU legal framework of self- and co-regulation as new European regulation mechanisms reflects and challenges the institutional balance of the European Union (part III), and whether these might lead to shared governance in the EU (part IV). The conclusions are drawn in part V.

II. Conditions and limits of the use of self- and co-regulation instruments in the EU law

The possibility to use alternative methods of regulation - self and co-regulation - within the Community legal framework has been promoted by the Commission only with a condition that new instruments and private parties participating in their creation will satisfy certain substantial and procedural conditions. Although the Treaties are by and large silent on the use of self- and co-regulation,⁶ the private regulatory practices are increasingly emerging and developing outside the Community legal framework. Despite this legal “ignorance”, it would be wrong to conclude that the self-regulation process of national, European, or even international dimensions is self-contained, as it must comply with various national statutory rules, as well as certain Community law provisions.⁷ However, for a long time the conditions for use of self- and co-regulation have not been elaborated in a coherent manner, but rather as sector specific requirements⁸ and predominantly in soft law documents, the legitimacy of which was

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 European Parliament, Council, Commission. Interinstitutional Agreement on Better Law-making (2003/C 321/01).

³ See E. Svilpaite (2007).

⁴ Scott (2002), 69.

⁵ E. Svilpaite (2007).

⁶ The major exception is Articles 138-139 of the Treaty providing for public-private partnership in social policy-making field.

⁷ E. Steyger (1993), 175; P. Lindseth (2006), 117; T. Prosser (2006), 251ff.

⁸ The conditions for the use of national and European level environmental agreements were set in the Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM(96) 561 final; later Communication on Environmental Agreements (2002) concentrated exceptionally on measures at Community level. The Commission requires voluntary environmental

questionable in itself.⁹ The White Paper on European Governance was among the first policy papers elaborating a common list of criteria for the use of co-regulation.¹⁰

Thus, among other reasons, the preparation of the IIA was largely driven by a need to have common definitions and a comprehensive set of criteria to enable the integration of these practices into the wider EU legislative framework. It seems that the European institutions tried to find a common ground between different requirements scattered in various documents while drafting the IIA. However, the result is far from satisfactory. First of all, the Agreement does not give any details over the content of each individual requirement imposed on the use of self- and co-regulation. Moreover, contrary to the practice concerning environmental agreements, the IIA does not provide an indicative list of provisions that must be included into the voluntary instruments (e.g., clear definition of objectives and division of duties, dispute resolution, duration of a measure and unilateral termination, ect.).¹¹ Taking into regard that the IIA applies only to those self- and co-regulatory measures that have been adopted after the IIA's coming into force,¹² the conditions elaborated by the various predominantly soft-law documents should still guide earlier practices or the practices that do not fall within the scope of application of the IIA. However, there is some uncertainty in this matter as well. Recently, the European Parliament has stressed that *any* use of alternatives *must* comply with the IIA and requested the Commission to report how standardization meets the requirements of the Agreement.¹³ It is also unclear whether all criteria should be applied equally to self- and co-regulation practices,¹⁴ as the provisions of the IIA lack conciseness and precision.¹⁵

Drawing on the provisions of the IIA, and also on the White Paper, and the 2002 Action Plan, the following main conditions should be satisfied by the instruments alternative to the EU legislation:

1) Compliance with the Community law, especially with competition rules;

on measures at Community level. The Commission requires voluntary environmental agreements to satisfy the following criteria: compatibility with Community law (including international obligations), judicial control of compliance, cost-effectiveness of administration, added value, representativeness, quantified and staged objectives, transparency and the involvement of civil society, monitoring and reporting, sustainability, incentive compatibility.

⁹ L. Senden (2005), 16, 20-21.

¹⁰ White Paper (2001), 21; the White Paper only randomly mentions self-regulation.

¹¹ Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM(96) 561 final; G. Van Calster/K. Deketelaere (2001), 209-210.

¹² See references in our previous paper E. Svilpaite (2007).

¹³ European Parliament resolution on a strategy for the simplification of the regulatory environment, P6_TA(2006)0205, para 23.

¹⁴ For instance, see for the opposite suggestion the 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/2002/0412 final (Communication on Environmental Agreements (2002)), 3: "The assessment criteria and procedural requirements for handling environmental agreements will depend in part on the source of the initiative", indicating further that agreements may be spontaneously initiated by stakeholders, stimulated by the threat to legislate, or directly initiated by the Commission.

¹⁵ For example, paragraph 17 of the IIA enumerates four main conditions applicable both to self- and co-regulation, however, under paragraph 23 the Commission is expected to notify the European Parliament and the Council of self-regulatory practices satisfying three of those conditions.

- 2) **Precluded areas:** self- and co-regulation cannot be used where fundamental rights or important political options are at stake, or where the uniform application of rules is required in the Community;
- 3) **Added value for general interest:** alternatives may only be used where they do business more than usual and serve the general interest;
- 4) **Representativeness and other qualities of the participants:** The participants must be representative, accountable, organized and capable of following open procedures in formulating and applying agreed rules;
- 5) **Transparency:** The rules produced by the process of self- and co-regulation must be public and accessible, so that also the implementation process would be easy to monitor;
- 6) **Follow-up mechanisms** for monitoring the implementation and enforcement.

Although at first glance, both self- and co-regulation to a lesser or greater extent have to satisfy each of these conditions, there are at least three significant elements distinguishing co-regulation from self-regulation: (1) the formal entrenchment of the basic conditions combining two documents (co-regulation combines a Community legislative act and a voluntary private act, where the legislature establishes the essential framework of regulation: objectives, basic rights, enforcement and appeal mechanisms, conditions for monitoring compliance), (2) active role of the European Parliament and the Council in preventive examination of a draft voluntary document, and (3) a more sophisticated formalized implementation monitoring. In the following parts the content of these conditions is going to be examined in greater detail.

II.1. Compliance with Community law

The primary duty of the Commission under the IIA is to ensure that “any use of co-regulation or self-regulation is always consistent with Community law”.¹⁶ The Mandelkern report insisted that co-regulation is subordinated both to the Community rules and to the Community’s legislative authority stating that „[c]o-regulation does not mean that the responsibility for the rules being implemented is shared. The primacy of the public authority remains intact“.¹⁷

This requirement distinguishes self-regulation from co-regulation. Co-regulation is based on a Community legislative act thus, even *ex-post* co-regulation must take place within the area of Community competence. Self-regulation might regulate fields that are not covered by the Treaties, as usually self-regulation goes beyond legal requirements and sets voluntary standards in the areas where governmental action has not taken place.¹⁸ Therefore, naturally the Commission’s scrutiny for the compatibility of self- or co-regulation with the Treaties is going to be different.

Alternative instruments should comply with both general and sector specific rules. This, first of all, means that self- and co-regulation cannot be used where the Treaty provisions specifically require the use of a particular legal instrument.¹⁹ In addition, the compliance requirement shall cover at least three groups of instruments: (1) compliance with legal principles and provisions contained in the Treaties and binding legislation; (2) compliance with the soft law; and (3) compliance with the international obligations.

¹⁶ Para 17, emphasis added.

¹⁷ Mandelkern Group on Better Regulation. Final Report, 13 November 2001, para 2.2.3.2.a.

¹⁸ F. Cafaggi, *New Modes of Regulation in Europe* (2006), xxv; V. Haufler (2001), 8; see also synopsis available at http://www.eesc.europa.eu/smo/prism/regulation/synopsis/index_en.asp (consulted 2007-07-25).

¹⁹ Para 16 of the IIA; Communication on Environmental Agreements (2002), 9.

a) Compliance with the Treaties and other binding legislation

It is evident that co-regulation measures must comply with the Community law as they are themselves based on a legislative act. The IIA directly requires agreements between social partners to comply with Articles 138-139 of the Treaty.²⁰ The rules on internal market, including four basic freedoms,²¹ employment and social policy,²² non-discrimination²³ are the most often listed among the Treaty provisions and principles that should be complied with by the self- and co-regulatory instruments.²⁴ However, in all documents the special reminder is formulated concerning the conformity of alternative instruments with competition law.²⁵

Sports self-regulation presents, perhaps, a benchmark case for creeping “communitarization” of self-regulatory practices from the perspective of competition law.²⁶ Having tolerated regulatory activities by sport authorities for some time, the European institutions have finally agreed on the division of sports self-regulation into two parts: the rules for the governance of the game, and the rules that have economic or commercial impact.²⁷ The European competition authorities, the ECJ and, recently, the European Parliament²⁸ clearly and firmly asserted that the economic or commercial aspects of professional sports are subject to EU law, especially the competition rules and four basic freedoms.²⁹ According to the opinion of Advocate General Cosmas in joint cases *Christelle Delière*, the right of association that guarantees self-regulation “cannot be so absolute as to afford them [sports federations] complete immunity from Community law, thereby creating gaps in the Community legal order.”³⁰

²⁰ Para 19.

²¹ See, e.g., para 17 of the IIA; Committee on Culture and Education, Report on the future of professional football in Europe (Rapporteur Ivo Belet) (2006/2130(INI)), 34; J. Ziller (2006), 156; See also case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, Judgment of the Court of 13 April 2000 on the application of principles of freedom of movement for persons and freedom to provide services to self-regulation of sports, para 35. See also Hans-Bredow-Institut for Media Research (2006), 166, for further case law references.

²² Committee on Culture and Education, Report on the future of professional football in Europe (Rapporteur Ivo Belet) (2006/2130(INI)), 34; E. Steyger (1993), 175.

²³ The Advocate General expressed his view on limits of self-regulation, stating that “sporting institutions have the power to promote a sport in a manner which they consider to be most consistent with their objectives, provided that their choices do not give rise to discrimination or conceal the pursuit of economic interests”, see Opinion of Advocate General Cosmas 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 87. See also Committee on Culture and Education, Report on the future of professional football in Europe (Rapporteur Ivo Belet) (2006/2130(INI)), 34; R. Parrish (2003), 85ff for further references to case law.

²⁴ For an overview of compliance with internal market rules of environmental agreements see G. Van Calster/K. Dekelaere (2001), 210-214.

²⁵ See, e.g., para 17 of the IIA; White Paper (2001), 21; Communication on Environmental Agreements (2002), 9; E. Steyger (1993), 173-175.

²⁶ R. Parrish (2003), 63, 132.

²⁷ M. James/ S. Gardiner/ J. O’Leary/ R. Welch (2005), 154; R. Parrish (2003), 149ff.

²⁸ See, e.g., European Parliament Resolution of 29 March 2007 on the future of professional football in Europe, P6_TA-PROV(2007)0100, para E of the Preamble.

²⁹ See generally R. Parrish (2003), esp. 81ff.

³⁰ Opinion 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.

The important question is, however, which Community rules and to what extent apply in respect of self-regulation undertaken in a field not covered by the Treaties (such as e.g. sports). Self-regulation in these areas creates the situation of legal uncertainty, for it is not clear (as was questioned by the European Parliament scrutinizing self-governance of professional football) to what extent self-regulatory bodies are “bound, when exercising their right to self-regulation and performing their regulatory function, by certain principles of Community law such as free movement, non-discrimination and competition rules”.³¹

The explicitly enacted requirement to comply with the competition rules might also influence the development of the rules of liability of private rule-making parties acting under the endorsement of Community and/or State authorities and of the so called “state action” defence.³² In one of his latest publications, F. Cafaggi recorded in the practice of the European Court of Justice (ECJ) the declining tolerance for private parties actions sheltered behind state authority. In his opinion the “‘state action defence’ has been narrowed and the scrutiny of regulations distorting competition enacted by professional associations on the basis of delegation of power by public entities is now much broader”.³³

The emphasis on compliance with competition law by both co- and self-regulatory instruments can be treated as de facto recognition of the non-transferability of public authority to private parties and the elimination of a possibility to be exempted from competition rules upon the fact of performing public functions.³⁴ Moreover, as self- and co-regulation practices under the IIA are subject to the European Commission’s final scrutiny and affirmative actions concerning their compliance with the Community law,³⁵ it could be also concluded that the delegation of rule-making powers from the EU institutions does not take place when the Commission chooses to use alternative instruments. However, if the Commission together with the Parliament and the Council are responsible for the early “negative clearance” of the private measures concerning their compatibility with the Community law, private stakeholders might reasonably expect to be exempted from the responsibility for anticompetitive effects, if their regulatory efforts, acknowledged by the Commission and other institutions, would be later qualified by the ECJ as anticompetitive.³⁶ It is, therefore, especially remarkable from this perspective that the compliance with competition law applies equally to co-regulation measures, which might be interpreted as a direct transfer by the Community authorities the power to make rules, though within the confines of a legislative act, including

³¹ European Parliament Resolution of 29 March 2007 on the future of professional football in Europe, P6_TA-PROV(2007)0100, para I of the Preamble.

³² For a comprehensive account on that see F. Cafaggi, *Rethinking Private Regulation* (2006), 31-35; H. Schepel (2002).

³³ F. Cafaggi, *Rethinking Private Regulation* (2006), 34.

³⁴ For a broader account on the treatment of delegation of state regulatory powers in the ECJ practice see, e.g., J. Szoboszlai (2006), 75-78, H. Schepel (2002), esp. 36-38; D. Chalmers, et al (2006), 1119-1121; F. Cafaggi, *Rethinking Private Regulation* (2006), 31-34; Hans-Bredow-Institut for Media Research (2006), 167-173.

³⁵ As in the case of co-regulation the Commission verifies the compliance with Community law of draft voluntary agreements forming co-regulation and forward them to other legislative institutions that have a right of call-back; in the case of self-regulation the Commission should also formally notify the legislating authorities of the conformity of selected practices, although the sequence of the actions and their impact on the use of those practices is not very clear from the IIA (see paras 20 and 23 of the IIA).

³⁶ In this respect the relevant practice would be the Comfort Letters that were issued by the Commission to the undertakings concerning (non)application of Article 81 to their agreements. These documents were not binding, however they were not completely without legal effect, see more extensively, e.g., R. Whish (2001), 265; on the recent changes in this practice see D. Chalmers, et al (2006), 958-962.

active supervision of the results. In addition, the satisfaction of a procedural public interest test by private measures is considered by H. Schepel sufficient for the exemption from the application of competition rules.³⁷ All these conditions imposed by the IIA on the use of alternatives to legislation and determined by the intentions to secure the EU institutional balance, might lead to the disputes to what extent the entrustment to attain legislative objectives (and add value for the general interest) and verification of voluntary agreements concerning their conformity with competition law relieve a private party engaged in regulation from the responsibility.³⁸

In addition to compliance with the competition and other Treaty provisions, co-regulation measures must observe the boundaries established by the master legislative act, which shall determine the “possible extent” of co-regulation, i.e. objects, basic rights, measures for non-compliance, supervision of application, etc. Secondary law might also provide for special rules which shall be observed by self- and co-regulation measures in individual sectors.³⁹ In this regard, the Communication on Environmental Agreements explicitly requires to safeguard policy consistency between different measures and incentives (e.g. taxes, national legislation, etc.) existing in the field of regulation.⁴⁰

For the successful integration of self- and co-regulation into the Community framework it is equally important to stress that alternative instruments shall also fulfil the IIA requirements. Although the language of the commitments entrenched by the IIA leaves no doubts concerning its mandatory status,⁴¹ its status remains ambivalent under the EC law.⁴² Therefore, the ECJ will have to decide to what extent Member States and private parties are *bound* to follow these rules when facilitating or engaging in self- and co-regulation practices on the European level.

b) Compliance with soft law

The soft law is the Achilles heel of the legal framework for self- and co-regulation. As has already been mentioned, the majority of the documents introducing alternative methods of regulation, establishing conditions and limits for their use are soft law instruments. Many soft law instruments such as communications or reports explain the content of the conditions es-

³⁷ H. Schepel (2002), esp. 50-51; Hans-Bredow-Institut for Media Research (2006), 173.

³⁸ In respect of the State induced private regulation F. Cafaggi argues that “only when the adoption of the anti-competitive rules has been imposed by the Act conferring the regulatory power can the undertakings avoid penalties for past conduct. When the adoption was merely encouraged or facilitated, private regulators may be sanctioned when they engage in anticompetitive regulatory practices”, see F. Cafaggi, *Rethinking Private Regulation* (2006), 35. See also H. Schepel (2002), 50; J. Szoboszlai (2006), 81-82.

³⁹ For example, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market requires that codes of conduct at Community level, the conclusion of which could be encouraged by Member States, should comply with legally binding rules of professional ethics and conduct in the Member States (para 113 of the Preamble); Commission Recommendation of 9 December 1996 concerning Environmental Agreements implementing Community directives (96/733/EC, para 2.3.b.) recommends that agreements between public authorities and the economic sector would require the participating companies to ensure information transparency following Council Directive 90/313/EEC on the freedom of access to information on the environment.

⁴⁰ Communication on Environmental Agreements (2002), 12.

⁴¹ See L. Senden’s arguments on that in L. Senden (2005), 22.

⁴² See more extensively W. Hummer (2007), 57-67.

established by the IIA or even introduce additional requirements.⁴³ For instance, the requirement to comply with the competition rules also includes various guidelines, such as guidelines on state aid or horizontal cooperation agreements.⁴⁴

c) Compliance with the international obligations

In a broad sense, compliance with the Community law includes a duty to comply with the Community's international obligations. International trade agreements and the WTO provisions are most often referred to in this context.⁴⁵ For example, the Commission stressed the need to check that environmental agreements comply with the WTO rules or UNECE Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention).⁴⁶

The implementation of international obligations (e.g. arising from multilateral environmental agreements) is also an area where the Commission sees limitations over the use of alternative instruments. In the opinion of the Commission, the private parties cannot be alone responsible for the fulfilment of the Community's international duties, as this might raise concerns over the compliance control and similar issues.⁴⁷

II.2. Precluded areas

The White Paper, various reports and policy documents,⁴⁸ and subsequently the IIA excluded three areas from the field of self- and co-regulation: where (1) fundamental rights, or (2) important political options might be endangered, or (3) situations where the rules must be applied in a uniform fashion in all Member States.⁴⁹

As F. Cafaggi observes, two of these conditions, i.e. elimination of alternatives from the human rights field and request for uniform application of community rules, "appear problematic both from a positive and normative standpoint".⁵⁰ Moreover, these restrictions on certain policy areas have not applied in Commission's earlier practices.⁵¹ The application of these rules without distinction to the self- and co-regulation measures is also surprising as co-regulation is directly dependent and shaped by a legislative act, whereas their implementation has to be monitored more closely than self-regulation, thus there is a minor risk of flaws and inconsistent regulation.

⁴³ For instance, the IIA does not mention the compliance with international treaties; it does not establish the criteria to measure representativeness, transparency or added value of the self- and co-regulation; Communication on Environmental Agreements (2002) requires environmental agreements to have quantified and staged objectives (see p. 11).

⁴⁴ Opinion of the Economic and Social Committee on the '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' (2003/C 61/23), paras 2.15-2.16. G. Van Calster/K. Deketelaere (2001), 214-216.

⁴⁵ The Current State of Co-Regulation and Self-Regulation in the Single Market (2005), 19.

⁴⁶ Communication on Environmental Agreements (2002), 10; G. Van Calster/K. Deketelaere (2001), 216-217.

⁴⁷ Communication on Environmental Agreements at Community (2002), 9-10.

⁴⁸ For example, Mandelkern Report (2001), para 2.2.3.2 (b).

⁴⁹ Para 17 of the IIA.

⁵⁰ F. Cafaggi, *New Modes of Regulation in Europe* (2006), xviii-xix; also see C. Scott (2002), 69.

⁵¹ C. Scott (2002), 69.

a) Human rights

The European institutions and bodies have spoken in favour of the legislative framework in the areas affecting health, safety and services of general interest, as “co-regulation and self-regulation – even if backed up by sanctions – can prove inadequate in the absence of legislative provisions”.⁵² The European Parliament often advocates for harmonized measures in the fields affecting citizens’ rights and opts for traditional legislation. For example, looking for a degree of intervention on the Union level to safeguard pedestrian protection in road accidents, the European Parliament asked the Commission to change its proposal based on the voluntary commitment of the cars industry to legislative regulation, stating among other reasons the need to guarantee fair competition between manufactures (to prevent marketing of lower standard vehicles) and ensure free movement of goods.⁵³ The Parliament considered important to safeguard the protection of the citizens with harmonised rules on legislative level and not to entrust it to the third parties.

However, the explicit presumption that alternative instruments might endanger the protection of human rights does not make a lot of sense as many rules directly or indirectly interfere with human rights or have to find a balance between conflicting rights. For instance, self-regulation in such classical fields as sports or professions imposes many restrictions on rights of the regulatees. Such unconditional prohibition seems to be particularly disproportional in case of co-regulation, as the legislative act should define the boundaries of private measure, including rights and duties of co-regulator and affected third parties. Moreover, the Commission (also potentially – the Parliament and the Council) is going to scrutinise draft agreements concerning their compliance with the Community law, thereby in principle voluntary agreements could intrude in human rights only to the extent and within the limits set by a legislative act.⁵⁴

F. Cafaggi, instead of ruling out a co-regulation method as such, proposes tailoring the institutional design capable to resolve a potential conflict between fundamental rights appropriately.⁵⁵ Besides, it would be more feasible to construe the protection of human rights as potential boundaries of self-regulation rather than as a forbidden ground.⁵⁶ The difference has to be made between a rejection of alternative instruments as such in areas affecting the protection of human rights and a rejection of alternative instruments based on a comparative impact assessment concluding that the legislation could guarantee better protection or balance between conflicting rights in a particular case. In this perspective, human rights exception under the IIA should be construed as an evaluation of the degree of the efficiency of the protection rather than rejection of alternatives *in toto*, as many self-regulatory measures, proposed by the Commission to the Parliament and the Council, are already intruding into the field of fundamental rights and compromising their protection.⁵⁷ For example, amid fears for safety, privacy preservation and security, the Commission maintains soft regulation approach in the use of RFID (radio frequency identification) tags, because hard legislation might stop the poten-

⁵² See, e.g., The Current State of Co-Regulation and Self-Regulation in the Single Market (2005), 7, 23.

⁵³ 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.

⁵⁴ Para 21 of the IIA; White Paper (2001), 21.

⁵⁵ F. Cafaggi, *New Modes of Regulation in Europe* (2006), xviii-xix.

⁵⁶ J. Ziller (2006), 153-155.

⁵⁷ See also C. Scott’s suggestion that this precondition has not been applied in those domains where new instruments have been already successfully applied, C. Scott (2002), 69.

tially valuable application of the technology in health care, transportation or other fields.⁵⁸ Moreover, self- and co-regulation are being chosen by the EU institutions even in those situations where the main aim of the regulation is to guarantee the protection of certain rights such as, for instance, the protection of minors and human dignity in the European audiovisual services industry.⁵⁹

b) Uniform application of the Community rules

The successful functioning of the “New Approach” directives is perhaps the best answer to the concerns over the threat that alternative instruments might allegedly pose to the uniform application of the European rules.⁶⁰ The Commission also admitted that European regulatory agencies “will also contribute to a more uniform application of rules throughout the Community” in certain sectors.⁶¹ The process of simplification promotes the use of directives over regulations, under recommendation to use the latter only “for action which must be applied in a uniform manner in the Member States”.⁶² Thus new modes of governance are not going to compete with regulations in better law-making reform, so the whole idea of using *alternatives* to legislation is the completion and even substitution of directives. And if directive can substitute a regulation, so could do alternative methods of regulation. Meanwhile, any choice to adopt a directive or choose other instruments already contains a risk of its inconsistent implementation and diverse application in different Member States comparing to the regulation.

The self- and co-regulation measures have been praised for their significant contribution to “the smoother operation of the single market”.⁶³ The harmonisation of professional rules and

⁵⁸ See A. Broache, E.U. official: Now isn't time for RFID regulations. CNET News.com, April 2, 2007, available at http://news.com.com/2100-1029_3-6172675.html (consulted 2007-07-25). In the field of networks and information security the Commission also 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); Directive on Services aiming at a high level protection of general interest objectives, especially the protection of consumers, and elimination of barriers for the provision of services in the internal market, encourages development of the codes of conduct at Community level, see Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (paras 7, 113-115 of the Preamble, Article 4 (7), 37).

⁵⁹ The 2006 Recommendation on the protection of minors and human dignity and on the right of reply invites the European audiovisual and online information services industry and other parties to develop positive measures of harmonisation, among them codes of conduct, as well as cooperate with self- and co-regulatory bodies of the Member States in order to fight against discrimination and offences against human dignity. At the same time, it is acknowledged that self-regulation of the audiovisual sector is not sufficient to protect minors from harmful content. See 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 audiovisual and on-line information services industry (2006/952/EC), paras I.3., II.

⁶⁰ Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC (recast), para 18 of the Preamble: “In order to help manufacturers to prove conformity to these essential requirements, and to allow inspection of conformity to the essential requirements, it is desirable to have standards that are harmonised at Community level for the prevention of risks arising out of the design and construction of machinery. These standards are drawn up by private-law bodies and should retain their non-binding status.” (emphasis added).

⁶¹ White Paper (2001), 25.

⁶² Action Plan (2002), 11. Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Amsterdam Treaty, para 6.

⁶³ The Current State of Co-Regulation and Self-Regulation in the Single Market (2005), 22.

the mutual recognition of the national rules on European level often lead to the removal of the barriers that is essential to the proper functioning of the single market.⁶⁴ As examples show, self- and co-regulation might be chosen alongside Community measures to ensure harmonisation of national laws and prevent distortion of competition and barriers to trade.⁶⁵

Taking into account the potential for a diversity of practices due to multiple actors and voluntary nature of rules, the Commission must evaluate whether self- or co-regulation is eligible to produce an adequate Community-wide instrument that could lead to harmonisation or even uniform application of the agreed rules. Such evaluation would have to take into account existing self-regulatory practices in many Member States, the homogeneity of the market or the organizational level of private actors, the observance whether different stakeholders tend to follow agreed voluntary practices.⁶⁶ However, it is not sound to anticipate in absolute terms that, for example, private business in certain homogenous, very well self-organized markets (e.g., banking, financial sectors or sports), aiming to ease their members' activity across the borders and caring for their reputation, are going to pose a far greater risk for the uniform application of rules than individual Member States with their national interests.⁶⁷ Accordingly, it would make more sense to treat self- and co-regulation methods as competitors of traditional instruments rather than de facto intolerable when considering the necessity to ensure uniform application of rules.

c) Important political options

Alternatives to regulation cannot call into question important political options or - in the words of the White Paper - major political choices. The main problem with this requirement is that the documents do not give explanations, how to distinguish an important political choice from the one of the minor importance where self- and co-regulation might be used. It is also not utterly obvious why all the established requirements for self- and co-regulation – public interest, transparency, representativeness and conformity with the Community law – cannot be sufficient to safeguard the outcome of important political choices of the European Union.

⁶⁴ However, see the Commission's opinion on regulation of professional services, where the Commission raises concerns over the dangers of weak regulatory oversight of self-regulation of professions on national level resulting in the distortion of competition. This situation might lead in the future to the Commission's intervention in order to facilitate best practices and enforce competition law. See Commissions Communication, Follow-up to the Report on Competition in Professional Services, COM(2005) 405 final, 10-11.

⁶⁵ See, for instance, Directive 2004/22/EC of the European Parliament and of the Council of 31 March 2004 on measuring instruments, para 11 of the Preamble: "In order to ease the task of proving conformity with the essential requirements and to enable conformity to be assessed, it is desirable to have harmonised standards. Such harmonised standards are drawn up by private-law bodies .."; Directive establishing a framework for the setting of Community ecodesign requirements foresees industry's self-regulation as alternative to implementing measures established by the Commission, and even promotes the former's priority, see 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 16 in the Preamble, para 27 of Article 2, Article 17.

⁶⁶ See, e.g., the rejection of self-regulation on the ground of its incapability to insure a comparable level of harmonisation and enforcement in Proposal for a Regulation of the European Parliament and of the Council laying down Community procedures for the establishment of residue limits of pharmacologically active substances in foodstuffs of animal origin, and repealing Regulation (EEC) No 2377/90, COM(2007) 194 final, 7. See also observation, based on the data available in the Member States, that voluntary agreements have not been an effective measure of tobacco control as private sector had not joined/followed the proposed voluntary measures, see Green Paper - Towards a Europe free from tobacco smoke: policy options at EU level, COM(2007) 27 final, 17.

⁶⁷ F. Cafaggi, *New Modes of Regulation in Europe* (2006), xix-xx.

It seems that Commission and other EU institutions a priori distrust the private rule making practices.

d) Implementation of directives

Another important issue, which is not dealt with by the IIA, but which is highly relevant is to what extent the implementation of directives and international agreements is a precluded area for privately generated instruments, especially self-regulation.

The transposition of directives is most of all relevant in respect of private instruments existing on a national level, however, it should be kept in mind that national measures of self- and co-regulation could also emerge as a consequence of the European level self- and co-regulation or, on the contrary, European level self-regulation, contributing to the achievement of a directives aims, might be encouraged by Member States.⁶⁸

The Treaties do not specify the means for the implementation of the directives; nonetheless, a set of requirements was developed gradually by the ECJ, and can also be found in a number of the Commission's documents.⁶⁹ As case law of the ECJ shows, the Member States' freedom to choose the means for the transposition of directives is not unlimited.⁷⁰ As stated by the Court in the case *Commission v Italy* "it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts".⁷¹ Thus the principle of legal certainty requires implementing directives with measures that would not compromise binding force, precision, clarity of the legal framework, or publicity.⁷²

The IIA does not exclude a possibility to use alternative mechanisms for the implementation of directives, however, the voluntary and vague nature of a self-regulatory instrument is the main obstacle to use it for that purpose, especially taking into regard the criteria, elaborated by the ECJ, that apply to acts implementing directives. The Commission, however, holds the view that in certain cases alternative means might be suitable for the implementation of the Community objectives.⁷³ In the Commission's view, the voluntary agreements might not be used for the implementation of directives where those intend to create rights and obligations

⁶⁸ 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, paras 113-114 of the Preamble, where the Directive urges Member States to take measures encouraging the implementation at national level the codes of conduct adopted at Community level. J. Ziller challenges the EU's right to impose on Member States the use of self-regulation or the validity of prescription in directives obliging Member States to use self-regulation as a rule-making tool, see J. Ziller (2006), 157-158; see also E. Steyger (1993), 177-178.

⁶⁹ See, e.g., Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM(96) 561 final, 16ff; Commission Recommendation of 9 December 1996 concerning Environmental Agreements implementing Community directives (96/733/EC).

⁷⁰ See generally, e.g., K. Lenaerts/P. van Nuffel/R. Bray (2005), 766-768; E. Steyger (1993), 178-182.

⁷¹ Case C-65/01, *Commission v Italy*, Judgment of the Court of 10 April 2003, para 20; see also, e.g., Case C-365/93 *Commission v Greece*, Judgment of 23 March 1995, para 9, or Case C-144/99, *Commission v Netherlands*, Judgment 10 May 2001, para 17.

⁷² Hans-Bredow-Institut for Media Research (2006), 156-161 with references to the case law. See also K. Lenaerts/ P. van Nuffel/ R. Bray (2005), 766-767 with further references to the case law.

⁷³ Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM(96) 561 final, 16ff; Commission Recommendation of 9 December 1996 concerning Environmental Agreements implementing Community directives (96/733/EC).

for individuals.⁷⁴ In the latter cases Member States should take measures to insure the application of the provisions to everyone within their jurisdiction, where the binding force of a measure and appropriate publicity would be crucial.⁷⁵ Voluntary measures would be most suitable in cases where directive requires to set up general targets, however, in the opinion of Van Calster and Deketelaere, they must also be binding.⁷⁶

After the publication of the White Paper, various stakeholders (for instance, the European Environmental Bureau or the European consumers group) expressed their concerns that voluntary agreements “lack the strength and breadth of the applicability” comparing to statutory law.⁷⁷ The choice of private soft law acts as an alternative to hard law has been criticized before the ECJ by Advocates General who build their objections to the use of soft instruments on the premise that they are necessarily vague, ambiguous and lack specificity. In their opinion, presented below, codes of conduct or professional practice appear especially unsuited for the transposition of directives.

Commission v. France was among the first cases where the ECJ accepted the use of voluntary agreements between the French authorities and industry as a means for the implementation of a directive.⁷⁸ Thus later the Member States tend to defend their choice of softer instruments before the ECJ, although not always very successfully. A preference to voluntary measures has been exposed by the Belgian Government in *Commission v Belgium*.⁷⁹ Belgium argued that it had taken sufficient measures for the implementation of the Directive, pointing to a voluntary agreement signed between battery producers aiming to reduce the heavy metal content, and to voluntary programmes developed by the European manufacturers seeking to reduce the quantities of dangerous substances or find less polluting substitutes. It also pointed to the agreement signed between Electricity and Electronics Federation and Fabrimétal to adopt a Code of Good Practice in order to reduce the amount of mercury in primary electric batteries marketed in Belgium.⁸⁰ The Belgian government considered these measures, in combination with other previously undertaken instruments, as sufficient to achieve the aims established by the Directive.

Belgian’s choice of alternative instruments was indirectly encouraged by the Court. The ECJ did not follow the arguments of the Advocate General who had opined that the nature of the instrument in itself might prevent the achievement of the Community’s objectives. Advocate General Cosmas severely criticised soft law instruments chosen by the Belgian Government for the implementation of the Directive.⁸¹ He submitted that, first of all, the Code of Conduct was drafted in very general terms and contained nothing more than just a general statement of

⁷⁴ Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM(96) 561 final, 16-17. See also Case C-365/93, *Commission v Greece*, Judgment of 23 March 1995, para 9, or Case C-144/99, *Commission v Netherlands*, Judgment 10 May 2001, para 17 emphasizing that in such cases the right of recourse to the court is of particular importance. See also G. Van Calster/K. Deketelaere (2001), 217.

⁷⁵ Ibid.

⁷⁶ G. Van Calster/K. Deketelaere (2001), 217

⁷⁷ See, e.g., information available at <http://www.euractiv.com/en/pa/alternative-regulation/article-117444#links> (consulted 2007-05-01).

⁷⁸ Case C-255/93, Judgment of the Court of 5 October 1994, paras 22-23.

⁷⁹ Case C-347/97, Judgment of the Court of 21 January 1999.

⁸⁰ Ibid, para 12.

⁸¹ Opinion of Mr Advocate General Cosmas delivered on 24 September 1998 in Case C-347/97, *Commission v Belgium*.

intentions. The agreements sounded more as encouragement to reduce dangerous substance content, rather than formulated an indispensable objective as required by Article 6 of the Directive. In addition, the required schemes and timetables laid down in the Directive, regular update and communication were also missing.⁸²

The Court, first of all, repeated from its earlier case law that “a Member State may not plead provisions, *practices* or circumstances existing in its internal legal system in order to justify a failure to comply with ... a directive”.⁸³ The Court did not analyse a more general question of the suitability of voluntary agreements for the transposition of a directive, but concentrated on the concept and indispensable elements of a programme that was required to be put in place for the implementation of the Directive. It held that Belgian government has taken positive measures for the implementation of the Directive, however, they did not possess “the characteristics of an organised and coordinated system of objectives such as to make it possible to regard them as programmes within the meaning of Article 6” and had no other conditions (e.g. renewal and update) required by Directive.⁸⁴

In *Commission v Italy*, the Italian Government argued that it had implemented the Directive by way of adoption of “a more open and evolutionary system”.⁸⁵ This system included *inter alia* “a body of general rules whose effect is to impose on the employer, under threat of criminal penalty, the obligation to seek and to apply the best current solutions in terms of safety, to be found, according to settled case-law of the Italian courts, in the state of the art as codified and set out in all the codes of good practice”.⁸⁶ The Court, however, did not deal with the codes of good practice separately, and briefly concluded that none of general national provisions, which transposed requirements of the Directive, is of a sufficiently precise and clear manner.⁸⁷

The recent case *Commission v Germany* concerned the failure of the transposition of the Directive in the field of conservation of natural habitats. Among other statutory provisions, the Directive’s requirement on the restrictions over use of pesticides has been implemented using a combination of a general statutory prohibition and good professional practice. The law also empowered the competent authority to order other necessary measures.⁸⁸ Advocate General Tizzano objected to the reliance on good professional practice as, in his opinion, it cannot guarantee the “necessary level of specificity, precision and clarity in the transposition of directives required in accordance with the settled Community case-law”.⁸⁹ The Court again did not go into the question of the suitability of general practices as a means for transposition of directives and generally agreed with the Commission that national statutory prohibition was not “as clear, precise and strict as the prohibition” as laid down in the Directive.⁹⁰

⁸² Ibid, para 35.

⁸³ Case C-347/97, *Commission v Belgium*, Judgment 21 January 1999, para 15 (emphasis added). See also Case C-303/92, *Commission v Netherlands* [1993] ECR I-4739, paragraph 9, and Case C-298/97, *Commission v Spain* [1998] ECR I-3301, para 14.

⁸⁴ C-347/97, *Commission v Belgium*, Judgment 21 January 1999, paras 16-17, 20, 23-24.

⁸⁵ Opinion of Advocate General Mischo delivered on 26 September 2002, Case C-65/01, para 39.

⁸⁶ Ibid (emphasis added).

⁸⁷ Case C-65/01, *Commission v Italy*, Judgment of the Court of 10 April 2003, para 47.

⁸⁸ Case C-98/03, *Commission v Germany*, Judgment of the Court of 10 January 2006, para 17.

⁸⁹ Opinion of Advocate General Tizzano delivered on 24 November 2005 in the case C-98/03, *Commission v Germany*, para 40.

⁹⁰ Case C-98/03, *Commission v Germany*, Judgment of the Court of 10 January 2006, para 68.

It can be seen from the above and other examples, that notwithstanding the concerns over the nature of private instruments, the Court has not excluded instruments of soft law as a means of implementation of the objectives laid down in the Community law, provided certain conditions are met.⁹¹ However, the problem with the use of alternatives is that the Court simply bypasses the analysis of soft instruments and concentrates on the analysis of sufficiency of national law instead, treating alternative instruments in the “shadow” of legislation. It seems, also, that the ECJ follows the “safe” path, which the Commission suggested in 1996 Communication on Environmental Agreements, arguing for a need to ensure legal certainty by way of combining private instruments with national law provisions that would have “fall-back” provisions in case of failures.⁹² Thus several recently adopted legislative acts directly foresee a possibility that certain provisions of a directive might qualify for their implementation with alternative instruments, yet, as a general rule, alongside legislative acts.⁹³

Thus there should be fewer doubts concerning the use of soft instruments for the implementation of directives in the case of Community level co-regulation, as a Community legal act authorising co-regulation defines the boundaries of voluntary private acts as well as establishes implementation monitoring. In addition, the IIA foresees the grace period for institutional consultations aimed to verify the suitability of a voluntary measure for the achievement of the legislative objectives.⁹⁴ The possibility to use self-regulation for the implementation of

⁹¹ See for other examples, e.g., E. Steyger (1993), 181-182; Hans-Bredow-Institut for Media Research (2006), 152-161, 177.

⁹² Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM(96) 561 final, para 34; G. Van Calster/K. Deketelaere (2001), 218.

⁹³ See 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 paras 20, 27 and 37). 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) and “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” (Amendment 36), see European Parliament legislative resolution of 13 December 2006 on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (P6_TA-PROV(2006)0559). For other examples see also *Soft law in the European Union. A discussion paper by the National Consumer Council*. National Consumer Council, 2001, 7-8.

⁹⁴ Para 20 of the IIA.

directives is, however, not so clear-cut.⁹⁵ Another problem, which is not mentioned by the IIA, is what actions should be undertaken when private parties fail to complement legislative act with self-regulatory measures as expected. When national self-regulation measures are used for the implementation of a directive at national level, Member States remain entirely responsible for the achievement of legislative objectives and could be sued before the ECJ. In case with co-regulation there is no legal procedure to hold private parties responsible, other than just to use a traditional “name-and-shame” ritual or other disincentives at the Commission’s disposal.

The rigorous requirements imposed by the IIA on the use of self- and especially co-regulation mechanisms should guarantee the necessary quality of private rules, whereas a call-back provision should provide with a means of last resort in case of failure or non-compliance.⁹⁶ Still, given the generally disfavoured attitude of the European institutions to certain features of voluntary practices, it is surprising that the IIA did not include a requirement for self- and co-regulation measures to be sufficiently clear and precise. On the other hand, these indispensable characteristics of an act that are essential for the transposition of directives, might be deduced from the function of alternative measures: The self- and co-regulation measures could hardly be acknowledged by the Commission as contributing to the achievement of Treaty objectives and substituting legislative provisions if they were not sufficiently clear and precise.

II.3. Added value for the general interest

The main function of state legislation is to protect the general/public interest. Accordingly, the White Paper made no compromise for alternatives to legislation demanding to use co-regulation only “where it clearly adds value and serves the general interest”.⁹⁷ These two aspects of the function of alternative instruments were merged in the IIA into a single test of “added value for the general interest“. As self-regulation is privately generated instrument, it is largely driven by its own narrow sector specific interests,⁹⁸ thus it is feared that it might produce “self-interested” results.⁹⁹ This subsequently might lead to inequality in the treatment of users of regulation,¹⁰⁰ anti-competitive effects, lower than expected standards,¹⁰¹ or simply “business as usual”. Co-regulation has a more solid basis in this respect due to the fact that a legislator shall define the overall objectives, basic rights, enforcement and appeal mechanisms, and conditions to monitor compliance.¹⁰²

⁹⁵ See, e.g. the recent report in the field of media sector argues that self-regulation is insufficient for the implementation of directives Hans-Bredow-Institut for Media Research (2006), 178.

⁹⁶ Remarkable, that the Parliament approved the conclusion of the IIA with the declaration that it is not going to accept the adoption of the legislative acts combining co-regulation measures “where those acts do not explicitly include the provisions relating to verification and to a call-back mechanism”, 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, para 1.

⁹⁷ White Paper (2001), 21.

⁹⁸ 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, 3.

⁹⁹ M. Priest (1997-1998), 271.

¹⁰⁰ Mandelkern Report (2001), para 2.2.1.1.b.

¹⁰¹ M. Priest (1997-1998), 271-272.

¹⁰² White Paper (2001), 21.

Under the IIA, the Commission has a mandate to use alternative methods of regulation in “suitable cases”.¹⁰³ A systematic analysis of this Agreement leads to the conclusion that voluntary mechanisms might be used only in those cases when they can guarantee the swift and flexible regulation,¹⁰⁴ whereas recalling the Better law-making agenda, the choice shall also contribute to “legal or administrative simplification for the end-users”.¹⁰⁵ Also, 2002 Communication on Environmental Agreements requires assessment of the cost-effectiveness of administration of alternative measure for the Community institutions as they might become significant in the compliance monitoring phase.¹⁰⁶ Thus the added value of using alternatives to legislation lies, first of all, in the *operational* qualities of the instruments themselves.¹⁰⁷

However, as can be concluded from the IIA and other documents, there is an expectation that voluntary measures should add value to the *substance* of the commitments¹⁰⁸ and contribute to the general interest. The specifications of what contributes to such added value of a particular private instrument are not explained in the IIA, but may be found elsewhere. For example, high level of protection of the environment,¹⁰⁹ or improved overall environmental performance¹¹⁰ satisfies this criterion in cases of environmental agreements. In the opinion of the EESC, a measure adopted among persons pursuing similar economic and other interest should “respect and promote certain fundamental values such as honesty, good faith, respect for others, openness to partnership, and a competitive spirit”.¹¹¹ It is likely that these features of a private measure constitute its added value for the general interest.

The added value requirement sets a high standard for an alternative measure as it manifestly presupposes the objective superiority of legislation. The European Parliament requests self- and co-regulation measures to demonstrate equal or even higher level of contribution to the

¹⁰³ Para 16.

¹⁰⁴ Para 17.

¹⁰⁵ Opinion of the European Economic and Social Committee on Better lawmaking, 2005 September 28, para 8.1.7.

¹⁰⁶ Communication on Environmental Agreements at Community (2002), 10-11; See this requirement included in 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, Annex VIII, para 7; however, see critical suggestion by the EESC to remove this requirement as being too restrictive, Opinion of the Economic and Social Committee on the ‘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’ (2003/C 61/23), para 2.13. See also G. Van Calster/K. Deketelaere (2001), 205-206.

¹⁰⁷ See, e.g., suggestion to the Commission before preparing measures implementing directive to take into account self-regulation „which...are expected to achieve the policy objectives more quickly or at lesser expense than mandatory requirements“, 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, part 3 of Article 15.

¹⁰⁸ See, e.g., para 23 of the IIA, requesting the Commission to notify the European Parliament how self-regulation contributes “the added value of the commitments given”.

¹⁰⁹ Communication on Environmental Agreements at Community (2002), 10. In addition, environmental measures should be consistent with sustainable development (p. 12).

¹¹⁰ 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, Annex VIII, para 2.

¹¹¹ The Current State of Co-Regulation and Self-Regulation in the Single Market (2005), 19.

attainment of the general interest than would be feasible with a legislative act.¹¹² The added value test also challenges the spontaneity of the practices of traditional self-regulation measures demanding the Commission to ascertain that a voluntary instrument will bring planned improvements even *before* its coming into force.¹¹³

In our opinion, the presumption in favour of legislation contradicts the statements that widely praised flexibility and efficiency of self- and co-regulation practices are valuable and could alone cure the deficiencies of legislative acts. Alternative means are often promoted as a better remedy as, first of all, they can be introduced much quicker than the European level legislation and thereby can provide a solution in a very politically sensitive situation, or offer certain guidance to the desirable behaviour. It is estimated that it takes around three years to introduce legislation on the Community level,¹¹⁴ for this reason private instruments are often chosen as a quicker means of recourse. For instance, in May 2007 the Commission adopted a White Paper,¹¹⁵ where following the responses given to its earlier Green Paper, the priority tackling nutrition, overweight and obesity problems was given to self-regulatory actions, the progress of which will be reported in 2010. In the words of the Health Commissioner Markos Kyprianou, "given the urgency of the matter, it is better to try with self-regulation at first and see, in 2010, if there's a need for legislation".¹¹⁶

II.4. Transparency and precision

The requirement of transparency, first of all, calls for a necessity of publication or other direct access (e.g., electronic) to the alternative instruments¹¹⁷ so that according to the White Paper people would be "aware of the rules that apply and the rights they enjoy"¹¹⁸. It is important that neither physical access, nor financial costs should prevent from using the document.¹¹⁹ In a broad sense, transparency should also cover participation, decision making and institutional

¹¹² See, e.g., European Parliament resolution on a strategy for the simplification of the regulatory environment, P6_TA(2006)0205, para 23, where the Parliament agreed to the use of alternatives in cases where they "could usefully supplement legislative measures where these methods make improvements of equivalent or broader scope than legislation can provide" (emphasis added). The EESC also comments that "voluntary agreements must always go beyond the minimum standards required by law", see Opinion of the Economic and Social Committee on the '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' (2003/C 61/23), para 2.2.

¹¹³ See, e.g., Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM(96) 561 final, 9.

¹¹⁴ A. Broache. E.U. official: Now isn't time for RFID regulations. CNET News.com, April 2, 2007, available at http://news.com.com/2100-1029_3-6172675.html (consulted 2007-05-01).

¹¹⁵ White Paper on a Strategy for Europe on Nutrition, Overweight and Obesity related health issues, COM(2007) 279 final.

¹¹⁶ See <http://www.euractiv.com/en/health/obesity-eu-gives-industry-3-years-self-regulate/article-164129> (consulted 2007-07-25). Wishing to speed up introduction of regulation for the RFID tags use in order to guarantee the protection of privacy, security and safety the Commission considered choosing the soft guidelines. The latter would allow to reap the result by the end of 2008 and to decide whether legislation is still necessary, see A. Broache. E.U. official: Now isn't time for RFID regulations.... CNET News.com, April 2, 2007, available at http://news.com.com/2100-1029_3-6172675.html. (consulted 2007-05-01).

¹¹⁷ Para 17 of the IIA.

¹¹⁸ White Paper (2001), 21.

¹¹⁹ The Current State of Co-Regulation and Self-Regulation in the Single Market (2005), 19.

structures of private parties involved in self- and co-regulation.¹²⁰ According to the White Paper, the stakeholders participating in co-regulation must be “capable of following open procedures in formulating and applying agreed rules”.¹²¹

However, the publicity of self- and co-regulation raises serious concerns, as currently there is no comprehensive database for alternative instruments of the European dimension, while, on the other hand, private documents are not included into the EUR-Lex or published in the Official Journal.¹²²

According to the Commission staff working paper the Commission started an inventory of existing schemes of the EU self-regulation and co-regulation only around 2005-2006.¹²³ The comprehensive database, where the texts of codes of conduct, practices, voluntary agreements, guidelines and other private instruments would be available, is hopefully going to be finally launched with some delay and several postponements in 2007.¹²⁴ The questions concerning copyrights and authenticity of documents might become major obstacles to their publication and other types of access. This greatly diminishes legal certainty and accessibility that are essential for the rule of law expecting law obedient behaviour.

It is also anticipated that the same requirement of publicity should apply to monitoring reports.¹²⁵ The accessible and unambiguous implementing provisions as well as an open, easy to follow implementation process should also become part of a transparency requirement.¹²⁶ For environmental agreements it might also be associated with quantified and staged objectives requirement.¹²⁷ The transparency in this matter is especially relevant in case of self-regulatory measures, as definition of objectives forms an indispensable feature of a legislative

¹²⁰ See, e.g., Committee on Legal Affairs and the Internal Market, Report on the Commission's communication on simplifying and improving the regulatory environment, A5-0443/2002, 12; See also the European Parliament's call for more transparency in self-regulation of football in the European Parliament Resolution of 29 March 2007 on the future of professional football in Europe, P6_TA-PROV(2007)0100, paras 11-18, 21.

¹²¹ White Paper (2001), 21.

¹²² Currently the main website hosting incomplete information and some examples of alternatives to legislation in the European Union is PRISM2 operated by the Single Market Observatory at the EESC (http://www.eesc.europa.eu/smo/prism/presentation/index_en.asp). The recommendations concerning the use of environmental agreements are published in the Official Journal, which, in the opinion of the Commission could also be used for the publication of voluntary environmental agreements, see G. Van Calster/K. Dekete-laere (2001), 208.

¹²³ The Commission listed and reviewed 20 schemes set up between 1 January 2004 and 30 November 2005 (coregulation: 14; self-regulation: 6), see Commission staff working document - 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), SEC(2006) 737, para 2.1.7.

¹²⁴ See, e.g., Commission working document - First progress report on the strategy for the simplification of the regulatory environment, COM(2006) 690 final, 15: “In order to better inform private parties wishing to set up or improve self-regulatory schemes, as well as regulators responsible for co-regulatory design, the European Economic and Social Committee (EESC) and the European Commission have set up a database of almost 100 EU schemes. Due to be launched in November 2006, this database details among other things the types of problem which led to the development of EU self or co-regulation schemes, their objectives and organisational settings. Identifying good and bad practices will therefore be much easier.”; see also Opinion of the European Economic and Social Committee on the Review of the Single Market (2007/C 93/06), para 1.1.25.

¹²⁵ Communication on Environmental Agreements (2002), 13; Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM(96) 561 final, 12.

¹²⁶ Action Plan (2002), 13; The Current State of Co-Regulation and Self-Regulation in the Single Market (2005), 19.

¹²⁷ Communication on Environmental Agreements (2002), 11.

act in case of co-regulation. It helps preventing simulation or delay of actions and best efforts clauses, traditional in business voluntary commitments.¹²⁸ The stakeholders should clearly and unambiguously define the objectives of a private act, whereas clear and reliable indicators should be set up to measure the degree of implementation. In the case of a long implementation process interim objectives should be set up.¹²⁹ However, the quantification of the objectives might not be always transferable to other fields.

As recent cases show, transparency might become a major obstacle for the choice of alternatives and a reason for preference of legislative instruments. For instance, after the publication of Green paper on European Transparency Initiative,¹³⁰ the proposed voluntary registration system for the European lobbyists was challenged by a considerable number of consulted parties speaking in favour of compulsory registration “as the only way of ensuring full transparency”.¹³¹

II.5. Representativeness and other qualities of participants

The requirement of representativeness of the parties involved in self- or co-regulation¹³² might provide a solution to certain democratic legitimacy concerns over the alternative methods of regulation. However, it does not eliminate a danger of preserving individual and exclusive interests of industries or sectors concerned. As the European Parliament’s position on limitation of standardization to strictly technical matters shows, the participation rules might endanger both transparency and accountability.¹³³

The question arises who should be included among the drafting partners of self- and co-regulatory measure, as representativeness directly affects the credibility and effectiveness of it, however, thinking of European level regulation the number of parties might significantly increase the costs of regulation.¹³⁴ The number of participants is limited by the notion of self-regulation, encompassing only those who draft the rules “among themselves and for themselves”.¹³⁵ The definition itself rejects direct participation in rule-making of the third parties

¹²⁸ Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM(96) 561 final, 11.

¹²⁹ Communication on Environmental Agreements (2002), 11; See also para 2.2 of the Commission Recommendation of 9 December 1996 concerning Environmental Agreements implementing Community directives (96/733/EC); The Current State of Co-Regulation and Self-Regulation in the Single Market (2005), 19.

¹³⁰ Commission of the European Communities, Green Paper: European Transparency Initiative, COM(2006) 194.

¹³¹ The Commission in the end combined voluntary registration with a number of other incentives, see Communication from the Commission. Follow-up to the Green Paper “European Transparency Initiative”, COM(2007) 127 final, 3-4.

¹³² See, e.g., White Paper (2001), 21; the IIA, para 17; Mandelkern report (2001), para 2.2.3.2.b.

¹³³ See European Parliament resolution on a strategy for the simplification of the regulatory environment, P6_TA(2006)0205, para 25: standardization “could lead to less transparency and accountability, since the elected representatives would not be involved in decision making, and participation of non-governmental organisations and other interested parties would not be guaranteed in the same way”. However, see Scott/Trubek (2002), 12-14, for the examples on the ECJ position on the manifestation of the principle of democracy and the Court’s conclusion that the participation of the European Parliament is not indispensable if participation of the people is otherwise assured.

¹³⁴ The Current State of Co-Regulation and Self-Regulation in the Single Market, EESC (2005), 19-20; P. Bailey (1999), 173; E. Best (2003), 10.

¹³⁵ Para 22 of the IIA.

who might be affected by the new rules.¹³⁶ Thus the preparation of instruments of self- and co-regulation should involve first of all the representatives of those stakeholders that are going to be directly regulated by the instruments enacted, as they would have a clear “understanding of both the rationale for regulation and the rules themselves”,¹³⁷ more concerned with the quality of regulation, and they would more easily associate themselves with the rules. This increases the chances that the rules will be more or less habitually accepted, better implemented and complied with, even when they are non-binding.¹³⁸ It has been also argued that “[i]n a self-regulatory structure, the regulated firms are more likely to be conscious of the goals of regulation and be aware of its advantages, such as a level playing field for industry participants or the elimination of ‘bad actors’”.¹³⁹

The following quantitative and qualitative criteria have been mentioned as indicative for the assessment of the representation test in various documents: the representation of the vast majority of the relevant economic sector, with as few exceptions as possible;¹⁴⁰ proportional coverage of the sector (e.g., sectoral and geographical cover),¹⁴¹ or scope of a measure;¹⁴² the consultations with the interested and affected parties and taking into account variety of interests;¹⁴³ etc. In some documents and reports the requirement of representativeness is supplemented by the requirement to be organized and responsible,¹⁴⁴ have means to ensure effective implementation and compliance of the agreed rules,¹⁴⁵ and be accountable.¹⁴⁶ The IIA further complicated the test of representativeness requesting that co-regulation can be entrusted by the legislative authority only to the parties that are “recognised in the field” without qualificatory parameters who and how is going to measure the recognition.¹⁴⁷

Before the conclusion of the IIA, the EESC proposed eight criteria for the evaluation of representativeness of organizations involved in public consultations over policymaking:¹⁴⁸ 1) existing permanently at Community level; 2) providing direct access to its members’ expertise and hence rapid and constructive consultation; 3) representing general concerns that tally with the interests of European society; 4) comprising bodies that are recognised at Member State level as representative of particular interests; 5) having member organisations in most of the EU Member States; 6) providing for accountability to its members; 7) being independent and mandatory, not bound by instructions from outside bodies; and 8) being transparent especially

¹³⁶ Para 22 of the IIA; In this respect F. Cafaggi differentiates self-regulation from private regulation, where in the latter the parties affected by the regulation would participate in the regulatory process, see F. Cafaggi, *Rethinking Private Regulation* (2006), 13.

¹³⁷ M. Priest (1997-1998), 270.

¹³⁸ *The Current State of Co-Regulation and Self-Regulation in the Single Market* (2005), 22; White Paper (2001), 21.

¹³⁹ M. Priest (1997-1998), 270.

¹⁴⁰ *Communication on Environmental Agreements* (2002), 11.

¹⁴¹ Para 23 of the IIA; *The Current State of Co-Regulation and Self-Regulation in the Single Market* (2005), 20.

¹⁴² *The Current State of Co-Regulation and Self-Regulation in the Single Market* (2005), 20.

¹⁴³ *Ibid*, 19.

¹⁴⁴ See, e.g., *Communication on Environmental Agreements* (2002), 11.

¹⁴⁵ *The Current State of Co-Regulation and Self-Regulation in the Single Market* (2005), 19-20.

¹⁴⁶ Even in the opinions of private partners accountability cannot be replaced by the improved efficiency, see Annex to the Report from the Commission on European governance, COM(2002) 705, 27.

¹⁴⁷ Para 18.

¹⁴⁸ Opinion of the Economic and Social Committee on “European Governance - a White Paper” (2002/C 125/13), para 4.2.4.

financially and in its decision-making structures. As it is evident that some of these conditions have been reflected among the criteria imposed generally on the private rule-making by the IIA, it is still not clear whether the Commission intends to follow all of these suggested characteristics.¹⁴⁹ It should also be kept in mind that the representativeness test has a direct impact on the Community freedoms as limited number of participants might create rules based on a regulatory culture of just one or few Member States thereby imposing restrictions for private parties established in other Member States.¹⁵⁰

The implementation of the representativeness (in a broad sense) requirement is going to challenge the internal and external organization of private actors and discard those that do not satisfy the Commission's expectations of geographical, sectoral coverage, membership, or institutional qualities. Consequently, as the EESC observed in its critical remarks over the 2002 Commission Communication on Environmental Agreements, the significant number of voluntary agreements would originate from industry and not from other stakeholders, as only the former would be capable to guarantee expected coverage, representativeness, and added value on Community level.¹⁵¹

The requirement of representativeness of the parties involved in self- and co-regulation shall not be confused with a more general call for the open policy making through the involvement of and consultation with civil society to improve the quality of decision making.¹⁵² It is the position of the EU institutions that all stakeholders in a broad sense should be involved in the governance of their affairs and at least have a possibility to express their opinion over an alternative instrument.¹⁵³ Comparing to the scope of actors listed for self- and co-regulation activity by the IIA, the consultations involve much broader spectrum of actors, which are generally called "civil society organisations".¹⁵⁴ It is thus noteworthy that private organizations expressed their opposition to the condition of representativeness and responsibility likely to be imposed on the civil society organisations wishing to be involved by the EU institutions in consultations on EU policy shaping. In their opinion, the Commission should achieve repre-

¹⁴⁹ For instance, lately the Commission briefly mentioned that membership in two Member States is sufficient to qualify for EU dimension in self- and co-regulation, 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 (14th report), COM(2007) 286 final, 5.

¹⁵⁰ Hans-Bredow-Institut for Media Research (2006), 166.

¹⁵¹ Opinion of the Economic and Social Committee on the "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" (2003/C 61/23), para 2.4.

¹⁵² See, e.g., Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Amsterdam Treaty, para 9: "the Commission should [...] consult widely before proposing legislation and, wherever appropriate, publish consultation documents"; White Paper (2001), 15; para 12 of the IIA; The Commission has also adopted general principles and minimum standards for such consultations, see the Communication from the Commission - Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final.

¹⁵³ Communication on Environmental Agreements (2002), 11; European Parliament Resolution of 29 March 2007 on the future of professional football in Europe, P6_TA-PROV(2007)0100, para 26. P. Bailey urges, though, to distinguish between those directly affected by regulation and interests of general public, see P. Bailey (1999), 174

¹⁵⁴ See the list of actors which might qualify for civil society organization in the Communication from the Commission - Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM/2002/0704 final (p. 6), and compare with paras 18 and 22 of the IIA.

sentativeness not through the requirements imposed on the internal structures of organizations, but by ensuring that a full range of views will be taken into account.¹⁵⁵

II.6. Monitoring and enforcement safeguards

Most, if not all, documents and institutions promoting alternative practices and contributing to the creation of legislative framework emphasize the crucial role of monitoring the achievement of the objectives and evaluation for their success.¹⁵⁶ In the words of F. Cafaggi, “[t]he transfer of regulatory power to private regulators can increase the efficiency and efficacy of regulatory processes only if an appropriate governance design and a set of enforceable liability rules are put in place. There is a clear concern both at the European and MS levels that this transfer may disempower public authority. This is the reason why it is often repeated that public entities should maintain monitoring and controlling power over private regulators.”¹⁵⁷ Although the IIA does not contain a requirement of the judicial review of voluntary measures, the 1996 Communication on Environmental Agreements stressed that a possibility of the enforcement of the agreements shall be an indispensable provision to voluntary agreements.¹⁵⁸

The issue of monitoring and enforcement is where the IIA does make a difference between the two alternative methods of regulation. The Agreement calls for reporting mechanisms, non-compliance measures and even sanctions in case of co-regulation, whereas for self-regulation it only implies a possibility for certain follow-up mechanisms capable to ascertain a failure to observe voluntary practices.¹⁵⁹ Although in principle the Commission bears the general duty of supervision of the use of alternative instruments,¹⁶⁰ in the case of self-regulation the private parties are basically left with self-monitoring, self-enforcement and self-reporting.¹⁶¹ In the case of self-regulation the threat to legislate is in principle the only means of redress in the event of failure.¹⁶² It is thus surprising that the IIA pays more attention to the Commission’s

¹⁵⁵ Annex to the Report from the Commission on European governance, COM(2002) 705, 26.

¹⁵⁶ See, e.g., paras 21 and 23 of the IIA; White Paper (2001), 21; Mandelkern Report (2001), para 2.2.3.2.b.; Action Plan (2002), 13; Communication on Environmental Agreements (2002), 11; 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, 3-4.

¹⁵⁷ F. Cafaggi, *Rethinking Private Regulation* (2006), 29 (footnotes omitted, emphasis added).

¹⁵⁸ Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM(96) 561 final, 7. See also opinion of the Advocate General Léger in Case C-309/99. A.G. Léger looking for the balance between a right to self-regulate and necessity to avoid anticompetitive conduct proposed two conditions: the determination by public authorities of the content of the essential rules of the profession and the availability of legal remedies to the members of the profession, in particular a right to review by the court, see Opinion of 10 July 2001, Case C-309/99, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, interveners: Raad van de Balies van de Europese Gemeenschap*, paras 210-213.

¹⁵⁹ Paras 21 and 23; see also Action Plan (2002), 13.

¹⁶⁰ European Parliament resolution on a strategy for the simplification of the regulatory environment, P6_TA(2006)0205, para 23; Committee on Legal Affairs and the Internal Market, Report on the Commission communication on simplifying and improving the regulatory environment, A5-0443/2002, 12; 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, 4.

¹⁶¹ However, see, e.g., invitation for Commission services to monitor the achievement of the objectives of self-regulation in partnership with the parties to self-regulation, 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, Annex VIII, para 6.

¹⁶² Para 23 of the IIA.

obligations in respect of *ex ante* evaluation of self-regulatory practices concerning their compatibility with the above mentioned requirements, and does not include a single provision for accountability of the parties, supervision and safeguard of the enforcement of voluntary practices, let alone judicial review.¹⁶³

It should, however, be noted that there are expectations, expressed in a variety of other documents and opinions, to have in place detailed and transparent monitoring and reporting mechanisms for the achievement of the objectives not only in respect of co-regulation, but also self-regulation instruments.¹⁶⁴ It could be argued that the existence of these mechanisms is indispensable to ensure objective evaluation of the achievements and failures of self-regulation instruments as the Commission has free hands to opt for the hard-core legislation in cases where alternative instruments fail to achieve objectives, are not complied with, create more obstacles or have other deficiencies.¹⁶⁵ As recent examples show, in practice the institutions are conscious about monitoring of self-regulation and the Commission might use unavailability of enforcement mechanisms as a main reason for the rejection of self-regulation measures.¹⁶⁶ Member States undoubtedly will be responsible for monitoring self-regulation on a national scale.¹⁶⁷

The monitoring and enforcement mechanisms could also include sanctions,¹⁶⁸ although it seems that they do not necessarily have to be traditional penalties provided by law. They may be fines, blacklisting, or expulsions,¹⁶⁹ a self-controlled mechanism,¹⁷⁰ a disciplinary committee possessing a right to issue warnings, reprimands or authorise exclusion,¹⁷¹ quality

¹⁶³ Before the IIA, there were suggestions in the motion for the Parliament resolution for a need to check the ability of self-regulating parties to monitor the implementation of a measure with annual detail reporting by the Commission to the Parliament and Council, see Committee on Legal Affairs and the Internal Market, Report on the Commission's communication on simplifying and improving the regulatory environment, A5-0443/2002, 12, 16.

¹⁶⁴ See, e.g., Communication on Environmental Agreements (2002), 11; The Current State of Co-Regulation and Self-Regulation in the Single Market (2005), 20-21; 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, 3; P. Bailey (1999), 174-176.

¹⁶⁵ White Paper (2001), 21; Paras 21 and 23 of the IIA. See also 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, 4.

¹⁶⁶ Proposal for a Regulation of the European Parliament and of the Council laying down Community procedures for the establishment of residue limits of pharmacologically active substances in foodstuffs of animal origin, and repealing Regulation (EEC) No 2377/90, COM(2007) 194 final, 7.

¹⁶⁷ European Parliament resolution on Follow-up to the report on Competition in Professional Services, P6_TA(2006)0418, para 7.

¹⁶⁸ Action Plan (2002), 13.; Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM(96) 561 final; P. Bailey (1999), 176-177.

¹⁶⁹ Soft law in the European Union, A discussion paper by the National Consumer Council, National Consumer Council, 2001, 16; Self and co-regulatory practices in the European Union (2006), 43-44.

¹⁷⁰ As established by the European EFCA association to safeguard implementation of the 1992 code of conduct for engineering and consulting companies, see The Current State of Co-Regulation and Self-Regulation in the Single Market (2005), 20.

¹⁷¹ Established by a code of conduct for asset managers, see The Current State of Co-Regulation and Self-Regulation in the Single Market (2005), 20; included into the codes of conduct of lobbyist, see Commission of the European Communities, Green Paper: European Transparency Initiative, COM(2006) 194, 9.

marks¹⁷², external control by the NGOs,¹⁷³ etc. It should also be kept in mind that the threat to legislate is going to serve a helpful deterring function in case of non-compliance or temptation to lower standards.

III. In search of the institutional balance in the light of democratic legitimacy

The steps towards privately-generated regulation as a potential alternative to legislation challenge the principle of democratic legitimacy and threaten the principle of institutional balance, which stands at the core of the EU system of governance.¹⁷⁴ In 2002 Communication on Environmental Agreements, the Commission acknowledged the need to respect the institutional balance when choosing to use environmental agreements at Community level as an instrument of regulation.¹⁷⁵ The argument often goes that the involvement of civil society into the policy making does not by itself increase democratic legitimacy of the EU institutions, as business pursuing their individual interests through voluntary adopted rules could never fulfil the expectations of the Community in terms of public regulation.¹⁷⁶ For this reason it is thought that the expectations of output legitimacy should not outweigh input legitimacy. However, there is always a two-way process, as the alternative instruments are often employed and civil society organizations consulted in order to increase the legitimacy of EU policy-making.¹⁷⁷

The concerns over “parallel legislation” circumventing directly elected representatives of the citizens of the EU are quite often voiced by the European Parliament evaluating proposals to use alternatives to legislation or assign tasks to agencies.¹⁷⁸ The Parliament fears weakening

¹⁷² Such as, e.g., the mark to certify application of a European code of good practice for the Internet, see The Current State of Co-Regulation and Self-Regulation in the Single Market (2005), 21.

¹⁷³ P. Bailey (1999), 177.

¹⁷⁴ See G. Majone (2002), 322-24, 326-27

¹⁷⁵ Communication on Environmental Agreements (2002), 9. See also Committee of the Regions urging not to confuse democratic legitimacy of directly elected representatives with wider involvement of civil society, Opinion of the Committee of the Regions on White Paper on European governance (2002/C 192/07), para 3.2.

¹⁷⁶ Annex I to the Report from the Commission on European governance, COM(2002) 705, 28.

¹⁷⁷ P. Bouwen (2006), 277-292; Frykman/Mörth (2004), 170.

¹⁷⁸ 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. See also generally European Parliament resolution on Better lawmaking 2004: application of the principle of subsidiarity – 12th annual report, P6_TA(2006)0203, paras 19, 27 (concerning Open Method of Coordination); European Parliament resolution on a strategy for the simplification of the regulatory environment, P6_TA(2006)0205, paras 23-25; European Parliament resolution on the Commission White Paper on European governance, A5-0399/2001, paras 31-37; European Parliament, Committee on Constitutional Affairs, Report on the conclusion of the Interinstitutional Agreement on “Better Law-Making” between the European Parliament, the Council and the Commission (A5-0313/2003), para 4 (p.7): “Any regression from the status quo with regard to democracy must be avoided, more specifically a regression with regard to democratic legitimacy, of which Parliament is the principal guarantor”; see also information available at <http://www.euractiv.com/en/pa/alternative-regulation/article-117444#links>. See also A. Héritier (2003), 110.

of its role and often feels bypassed in the Better lawmaking agenda. Therefore, the IIA has made a contribution to the allocation of powers between all three EU institutions in the Better law-making agenda, paying special attention to co-regulation.¹⁷⁹ These fears are also closely related with the fact that the current Treaties do not foresee a possibility of delegated legislation, which gives room for numerous disagreements over the nature and legality of outsourcing of certain rule-making tasks to agencies and private parties.

The Commission introduced in the IIA certain safeguards on the use of alternatives to regulation that are expected to strengthen democratic control over private regulatory initiatives. The procedural rules were designed and should be followed by the three institutions to preserve the institutional balance. The Commission undertook to carry the leading role with the heaviest burden in the process of self- and co-regulation, i.e. to measure impact, compliance with Community law, scrutinize the correspondence with the general interest, representativeness, transparency and other criteria. The assignment of such functions, in the opinion of A. Héritier, widens the decision-making role of the Commission and limits the Council's as well as the Parliament's authority to shaping the essential features of legislation.¹⁸⁰

According to the IIA, the Council and the European Parliament play a very important though rather passive role in the choice of alternative instruments, as they must approve the rationality of the Commission's preferences for regulation possessing limited measures for reaction.¹⁸¹ In fact, the IIA does not entrench all aspired empowerments with the help of which the Parliament expected to safeguard its role in the process of "alternativization".¹⁸² However, even though the Commission carries the main "explanatory" and "verification" burden, both the Council and the Parliament theoretically can question the fulfilment of the criteria imposed on the parties and their alternative measures by the IIA and other documents.¹⁸³

In this respect, there is a difference between the powers of the Parliament and the Council in respect to self- and co-regulation. Under co-regulation, the Parliament and the Council can demonstrate an active position suggesting amendments or even rejecting the measure in case of draft voluntary agreements. Choosing self-regulation, the Commission merely notifies the legislative authorities of their compatibility with the aforesaid requirements and has only to *consider* any further request from the legislative authority concerning the adoption of a legislative act. Looking generally at the duty of the Commission to explain and justify to the European Parliament and the Council its choice of legislative instruments, the Parliament might expect that a similar function should be performed in case of self-regulation.¹⁸⁴ However, the

¹⁷⁹ For the last minute changes in the IIA and compromise over the call-back role of the Parliament and the Council in respect of co-regulation see The Committee on Constitutional Affairs, Report on the conclusion of the interinstitutional agreement on "Better Law-Making" between the European Parliament, the Council and the Commission, 25 September 2003, A5-0313/2003, 8.

¹⁸⁰ A. Héritier (2001).

¹⁸¹ This institutional balance was designed already by the 2002 Action Plan in accordance to which the Commission undertook an obligation to inform the legislator in advance of its intentions to use the co-regulation mechanism; the legislator was supposed to have an ultimate right to decide on the use of co-regulation, see Action Plan (2002), 13.

¹⁸² The Parliament wanted the right of approval of agreements drafted under self-regulation; entrenchment of effective monitoring by the Commission over their implementation; call-back mechanism, etc., see Committee on Legal Affairs and the Internal Market, Report on the Commission's communication on simplifying and improving the regulatory environment, A5-0443/2002, 11-12.

¹⁸³ Para 23 of the IIA; Action Plan (2002), 13; Communication on Environmental Agreements (2002), 11.

¹⁸⁴ Committee on Legal Affairs and the Internal Market, Report on the Commission's communication on simplifying and improving the regulatory environment, A5-0443/2002, 12. According to the 2002 Communication

IIA does not provide the Parliament with any real tools to act against Commission's unsatisfactory proposal of self-regulation, nor does it has unquestionable competence to interfere into the Commission's functions.¹⁸⁵ Formally the Parliament cannot interfere with the Commission's executive function, with which all self- and co-regulation instruments might be associated.¹⁸⁶ Moreover, there is no rule to what extent the Commission should follow the request made by the Parliament or the Council in case of self-regulation, which is now increasingly used by the Commission. It is noteworthy, that the EESC questioned the necessity of the Parliament's and the Council's involvement in the self-regulation process, e.g. the Commission merely recommends the use of an environmental agreement, as this might substantially increase the cost of regulation for private parties, also for the reason that the acknowledgment of voluntary agreements "has no direct legal effect".¹⁸⁷

As the scope of the Commission's obligation concerning the reaction to the Parliament's observations or proposals is not clear, the aforementioned "democracy safeguards" do not satisfy the European Parliament.¹⁸⁸ On every occasion the Parliament stresses its right to object to the use of alternatives to legislation¹⁸⁹ and be *always* consulted¹⁹⁰. The Parliament warns the Commission not to overrule its or the Council's opposition to self- or co-regulation practices.¹⁹¹ In addition, the Parliament remains sceptical and very reserved about the use of self- and co-regulation, or even a wider consultative role of organized civil society, fearing that even consultations might impinge the representative democracy or even replace legislators.¹⁹² Yet, despite the mentioned reservations, alongside the examples when the Parliament rejected Commission's softer approach,¹⁹³ the number of cases where it approved the use of self-regulation¹⁹⁴ or co-regulation¹⁹⁵ gradually grows.

on Environmental Agreements, it is clearly established that the Commission should not acknowledge a self-regulatory instrument without prior consultations with other two institutions and public (p. 12); See also in support of this position L. Senden (2005), 27.

¹⁸⁵ In fact, the Parliament expects expansion of its functions in this respect with the new Treaty, see 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' (2004/C 112/02), para 3.1.4.1.

¹⁸⁶ Committee on Constitutional Affairs. Report on the conclusion of the interinstitutional agreement on "Better Law-Making" between the European Parliament, the Council and the Commission (Rapporteur: Monica Frassoni), A5-0313/2003, 8.

¹⁸⁷ Opinion of the Economic and Social Committee on the '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' (2003/C 61/23), paras 2.17, 2.19.

¹⁸⁸ European Parliament, Committee on Constitutional Affairs, Report on the conclusion of the interinstitutional agreement on "Better Law-Making" between the European Parliament, the Council and the Commission (2003/2131(ACI)), 8; Frykman/Mörth (2004), 163-164.

¹⁸⁹ See, e.g., European Parliament resolution on a strategy for the simplification of the regulatory environment, P6_TA(2006)0205, para 23.

¹⁹⁰ European Parliament resolution on the Commission communication on simplifying and improving the Community's regulatory activity, P5_TA(2004)0155, paras 5-8.

¹⁹¹ *Ibid.*, para 9.

¹⁹² Report from the Commission on European governance, COM(2002) 704, 11, 27; European Parliament resolution on the Commission White Paper on European governance, A5-0399/2001, para 11b.

¹⁹³ See, e.g., the Parliament's rejection in recent online copyright fees regulation case, Paul Meller, EU Reconsiders Online Copyright Law. European Parliament is pushing for changes in how musicians collect

On the other hand, the fourth and, perhaps, the most influential EU institution in the developing of the EU law - the ECJ - has kept a rather low profile in the new modes of governance debates.¹⁹⁶ Although the number of cases concerning self- and co-regulation has increased before the Court over the last years, especially in fields of sports or professional self-regulation,¹⁹⁷ the ECJ has so far not expressed its opinion and clarified systematically the role and the status of these instruments and prefers dealing with them on a case-by-case basis. The fact that the status of the IIA is not clear-cut raises the question whether the European Court of Justice (the ECJ) is bound by the concepts and limitations established therein, for instance when the Court will have to decide conflicts between private regulation and Community law. On the other hand, such ad hoc approach leads to less legal certainty than necessary.¹⁹⁸

The regulated self-regulation and co-regulation might raise new issues for the future development of the delegation theory, which is under constant pressure of divergent views among Community institutions, Member States and Community Agencies.¹⁹⁹ As can be seen from the institutional debates and regulatory practices, especially the use of co-regulation, there is no consensus over the legitimacy of delegation and the boundaries of it might be shifting beyond the specifications given by the Court in *Meroni* case.²⁰⁰ It could be argued that the new IIA rules for self- and co-regulation “discount the importance of delegation”,²⁰¹ as the Agreement legitimizes these instruments through verification of conformity with legislation-quality standards. As McHarg points out, this raises new problems for the conditions imposed on self-regulatory practices are not and cannot be fully identical to those applicable to legislative actions.²⁰²

online copyright fees. IDG News Service, 2007-03-13. Available at <http://www.pcworld.com/article/id,129798-pg,1/article.html> (2007-05-01).

¹⁹⁴ For instance, aiming to promote healthy diets and physical activity in the fight with obesity, the Parliament: “Calls on the Commission to establish, within the Platform, voluntary or self-regulatory commitments to end the promotion of foods high in fat, sugar and salt to children but urges the Commission to come forward with legislative proposals should self-regulation fail to deliver change”, see European Parliament resolution on “Promoting healthy diets and physical activity: a European dimension for the prevention of overweight, obesity and chronic diseases”, P6_TA-PROV(2007)0019, para 24, see also para 21.

¹⁹⁵ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), para 48 of the Preamble: “Co-regulation could be an appropriate way of stimulating enhanced quality standards and improved service performance”.

¹⁹⁶ Scott/Trubek (2002), 17-18.

¹⁹⁷ See, e.g., the European Parliament Resolution of 29 March 2007 on the future of professional football in Europe, P6_TA-PROV(2007)0100, 29 March 2007, para H of the Preamble.

¹⁹⁸ European Parliament Resolution of 29 March 2007 on the future of professional football in Europe, P6_TA-PROV(2007)0100, para 5.

¹⁹⁹ See, e.g., F Cafaggi, *New Modes of regulation in Europe* (2006), xxv-xxvi; Joerges/ Schepel/ Vos (1999), 26ff; G. Majone (2002), esp. 328-29.

²⁰⁰ G. Majone (2002), 328ff; see also St. Griller/A. Orator. *Meroni Revisited. Empowering European Agencies between Efficiency and Legitimacy*. NEWGOV Working Paper 04/D40, 2007.

²⁰¹ A. McHarg (2006), 89.

²⁰² *Ibid.*

IV. The new framework for self- and co-regulation in the light of new modes of governance debate: towards shared governance?

After just a couple of years following the signature of the IIA it became quite apparent that definitions and conditions agreed by the EU institutions are not realistic, as the EU institutions are expanding the scope of alternative practices beyond the IIA confines.²⁰³ The conditions imposed on the self-regulation and co-regulation by the IIA and other documents are going to challenge the long existed rule-making practices of private bodies and their instruments.

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 conditions²⁰⁴ and a list of precluded areas. It seems that the EU is going to concentrate on the control of the emergence of self-regulation, giving less attention to its evolution and supervision.

The IIA introduced an institutional consensus on centralized coordination strategy of emergence and integration of self- and co-regulation of the EU relevance.²⁰⁵ Drawing on successful earlier examples, the intention of the Commission was to promote the use of voluntary measures in many other sectors. Thus self- and co-regulation could be employed by the Union institutions not only as methods pertinent to a certain sector, but anywhere where they could satisfy the requirements and show efficiency of regulation. On the other hand, the failure to achieve expected results in those fields where the Union tolerated traditions of self-regulation (e.g., sports, professions) might lead to the Commission's suggestions to intervene with legislative acts.

The requirements imposed on the use of self- and co-regulation show the reluctance of the Commission to employ them by way of tolerating their autonomous rule-making.²⁰⁶ They shape alternative practices into a new hybrid centrally-governed self- and co-regulation instruments.²⁰⁷ The treat to legislate or call-back provisions in case of failure to observe self-regulatory practices induces the self-regulatory bodies to assume a legislator's role and command-and-control functions over its members' voluntary practices. This might create positive competition for higher quality self-regulation, but also a negative feeling of discrimination for those private parties that do not have sufficient resources and/or competence to match the IIA conditions, but which were engaged in private rule-making for many years.²⁰⁸ This is particu-

²⁰³ See, e.g., E. Svilpaite (2007); it is also remarkable that the recent study on practices of co-regulation in media sector in the EU has used wider definition of co-regulation than is entrenched in the IIA, see Hans-Bredow-Institut for Media Research (2006), 27-42.

²⁰⁴ As was admitted by the representative of the Commission in the end of 2004: "the inter-institutional agreement had not yet been implemented in respect of co-regulation and said that it was worth considering whether the established framework was not in fact too complex, insufficiently adapted or too demanding". Talking about the self-regulation he admitted that the Commission had difficulties implementing the obligations to carry regular reports alongside the evaluations of existing self-regulation practice. The difficulty lies first of all in determination of the European level coverage for self-regulation as the Commission is supposed to map out the self-regulatory practices for the entire Europe while at the same time it has to justify non-legislation, 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 Nov 2004, 6.

²⁰⁵ For centralization perspective, see F. Cafaggi, *New Modes of Regulation in Europe* (2006), xxi.

²⁰⁶ See similar conclusion concerning the use of the OMC in Scott/Trubek (2002), 16; C. Scott (2002), 71, 74; F.W. Scharpf (2001).

²⁰⁷ McHarg (2006), 89; Frykman/Mörth (2004), 170.

²⁰⁸ A. McHarg also questions the compatibility of the imposed requirements with the freedom of association and economic liberty, see A. McHarg (2006), 90. See also recommendations what tools parties should possess to

larly alarming since today there emerge concerns of the shortage of European-wide bodies pursuing “quality” self-regulation.²⁰⁹ Thus the imposition of the conditions together with the too generally defined precluded areas might in the end decrease the employment of alternatives to legislation, even comparing with earlier practices.²¹⁰

The Commission urges civil society to share responsibility for the future of Europe through self-regulation, though promises nothing concrete in exchange. The main problem is that just about few and very diverse hints can be found in various Community documents concerning the content of the criteria agreed by three institutions in the IIA.²¹¹ This does not provide any certainty for costly rule-drafting and organizational processes of private bodies, while Commission was granted a means to outsource costly preparatory workload and pick the sweetest cherries of its own individual choice, and, in case of failure, use the knowledge generated by private parties for the drafting of the Community legal acts.²¹²

On the other hand, the promotion of private practices might lead to changes in the legislation process within the business-States-Commission triangle. Strong and organized business and other society organizations will no longer need Member States’ mediation to initiate or create the rules to benefit from the Single Market. On the contrary, from now on they can circumvent Member States’ regulatory efforts and national interests coming directly with a draft proposal to the Commission. This might diminish the role of Member States in the Community policy making. At the same time, it contains a danger that private parties will prefer hard lobbying for self-regulation over binding rule-making on the basis of which they would have more freedom than with the state- or Community-made law to choose the level of commitment and (non)compliance, especially in cases where self-regulation is highly desirable to the Commission, but unacceptable to the industry.²¹³

It might also lead to a reconsideration of the relations between the Commission and private actors, as the Commission will no longer be seen attractive as a body for appeal for private business against national administrations.²¹⁴ The involvement of private subjects into the Community policy-making should also shift responsibility burden as private parties acting at European level could not offload responsibility for their non-compliance with Community rules on the Member States as was in case with national self-regulation measures.

develop a successfully functioning scheme, Self and co-regulatory practices in the European Union (2006), 40-44.

²⁰⁹ See information available at <http://www.euractiv.com/en/pa/alternative-regulation/article-117444#links>.

²¹⁰ C. Scott (2002), 69.

²¹¹ The biggest exception are environmental agreements, however, the Commission’s Communications elaborating their conditions of use were adopted prior to the IIA, and, contrary to the requirements to comply with Treaty provisions on public-private partnership in social policy, entrenched in the IIA, there is no similar provision tying the IIA and the Commission communications and other documents on environmental agreements.

²¹² For the acknowledgement by the Commission of this option see Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM(96) 561 final, 12.

²¹³ 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, para 1.6.1.; Self and co-regulatory practices in the European Union (2006), 40.

²¹⁴ European Parliament, Committee on Culture and Education, Report on the future of professional football in Europe (Rapporteur Ivo Belet) (2006/2130(INI)), 14.

V. Conclusions

It can be concluded that the complexity of the legal framework and general safeguards show the Commission's preference to assign to self- and co-regulation instruments an important role but only at the legislator's pre-law-intervention stage, as if to put the idea of regulation on a "reliability trial". More time has to pass before the impact of the IIA regulatory framework on the proliferation of self- and co-regulation practices can be assessed. It is quite evident now that the successful function of the legal framework will to a large extent depend on the mutual cooperation of both private and European institutions.

However, at this early stage of promotion of alternatives to legislation it seems that Commission and other institutions have added too much classical law and hierarchical governance flavour into this regulatory mix which changes the nature of self-regulation. The EU institutions impose nearly identical requirements for both co-regulation and self-regulation that in principle match nearly all features traditionally associated with law: the general interest, transparency, representativeness of the parties involved in rule-making, monitoring implementation, sanctions, etc.²¹⁵

Looking from these perspectives, we come to the conclusion that the requirements imposed on the integration of self-regulation into the Community's legal framework and their subordination to Union's hierarchical structure (especially emphasis on the right of the Parliament for intervention) might threaten to deprive self-regulation practices of their exclusive and much sought-after features such as flexibility, cost-efficiency or better adaptation.²¹⁶ It also noticeably limits the number of practices that could be employed for the Union's purposes.²¹⁷ Such shaping of self-regulation practices under the law pattern depreciates the very idea of new modes of governance, i.e. non-hierarchical and distant from states and government.²¹⁸ It also overturns "the reality of shared – collaborative – governance" giving preference to traditional hierarchy and final authority of European institutions.²¹⁹

This paper did not aim to advocate unregulated "self-regulation". However, the pursuers of better law-making agenda for the EU have to keep in mind that self-regulation practices encompass hundreds of years of experience, means and reputation of functioning beyond state confines, thus the 50 years old Community law has to become attractive enough to change their natural path.

²¹⁵ Scott/Trubek (2002), 17-18. See official recognition of this assertion by the EU institutions in the Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), para 48 of the Preamble: "Co-regulation should be guided by the same principles as formal regulation, i.e. it should be objective, justified, proportional, non-discriminatory and transparent." (emphasis added).

²¹⁶ See in similar direction McHarg (2006), 94; Scott (2002), 74.

²¹⁷ Scott (2002), 69.

²¹⁸ M. Rhodes, The Scientific Objectives of the NEWGOV Project. A Revised Framework. Paper presented at the opening session, 20 May 2005, 12.

²¹⁹ Scott/Trubek (2002), 17.

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