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**Self-Regulation as a Regulatory Strategy –
A Comparative Law Perspective: Introduction**
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Summary

This introduction addresses the research questions as well as the methodology applied by the national reports on self-regulation as a regulatory strategy. It outlines the four main fields of research: constitutional aspects of self-regulation, delegability of legislative and administrative powers, limits to delegation, nature of regulatory body and its consequence, judicial review and liability of private regulators.

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I. Introduction

European legal and political science is paying growing attention to the fact that the European Community (EC) is increasingly promoting self-regulation, directly or indirectly, as a regulatory strategy in order to implement supranational policies.

This development in the European legal order is certainly impressive in quality and marks a new orientation in the shaping and management of EC policies, which put ever more emphasis on the role of private actors within the regulatory process.

Moreover, the emergence of self-regulation has to be situated in a more general tendency toward both the identification, within the Nation-States, of new mechanisms of regulation based on a stable combination of public and private action, and the strengthening of juridical pluralism in the global legal space.

Conceptually original as it may be, the increasing recourse to self-regulation as a regulatory technique in the European context is nevertheless highly problematic and certainly requires substantial systematic legal investigation, both at the empirical and theoretical level. This is necessary not only for defining the appropriate accountability mechanisms applicable to self-regulators and self-regulation at European level, but also for assessing the effectiveness of the choice of self-regulation as a regulatory strategy, from the perspective of implementation of European law in the Member States.

So far, the debate has focussed either on specific sectors where self-regulation has traditionally existed, or on certain general issues, such as better law making and the definition of the function and the mode of self-regulation as a European regulatory strategy. Also, self-regulation has been analysed from the perspective of linking the current concerns related to the emergence of new modes of governance at the European level to the separate debate on the evolution of European private law.

On the one hand, these studies emphasise the role of self-regulation as a strategy for implementing European legislation and thus a driving force for European integration and a device for the coordination of legal differences that cannot or should not be formally harmonised. On the other hand, the research undertaken thus far has devised a comprehensive typology of regulatory modes: public regulation, co-regulation, delegated self-regulation, ex-post recognised private regulation and purely private regulation.

And yet, the reflection on self-regulation as a tool for European integration is only at an incipient stage and it is far from clear whether it may hold as a long term regulatory mode. To date, no systematic comparative research focussing on the concrete legal regimes underpinning self-regulation in the Member States has been undertaken. Due consideration must be given to the often significant differences between the various national traditions and the simple fact that the promotion of self-regulation might not have the same impact from one country to the other. In this sense, a serious problem in the effectiveness of EC law is connected with the development of self-regulation as a European regulatory technique. Divergent national regimes may create risks for harmonisation goals.

This refers us back to the study of the status of self-regulation in the national laws of the Member States before the intervention of the European institutions and to the careful analysis of the processes of impact, reaction and adjustment taking place after the EC move. Understanding and evaluating the supranational dimension mandates consideration of the existing national structures and procedures, which ultimately determine the shape and character of European self-regulation.

II. The comparative approach

Self-regulation is promoted at the European level in two ways: as a direct incentive for private parties to regulate matters that, for various reasons, are not dealt with by the European institutions and as an implementing device for European norms. Both modalities can make use of two models: purely private self-regulation or self-regulation having some public law status attached to it. Effective use of self-regulation at European level presupposes a thorough understanding of the way Member States distinguish between the two models, the differences among the Member States within each model and the consequences they attach to them.

In the case of purely private self-regulators (operating solely in the private remit), important differences might stem from contract law or the law of organisations applicable to the private regulator. In the case of self-regulators which have some public-law status attached (ie operating according to some public mandate or otherwise considered to perform a public function), Member States might diverge primarily in relation to the consequences attached to such status. Differences among the various national regimes are not intrinsically problematic; on the contrary, they constitute an argument supporting the use of self-regulation as a means for preserving national traditions and diversity within the European setting. Yet, if Member States' legal systems diverge about principles and the basic ways self-regulation can operate, the achievement of common goals may be endangered. Hence, there is a need to focus on the various national legal systems in order to identify the different principles they apply to self-regulation and self-regulatory bodies. This will constitute the basis of a comparative law analysis of self-regulation, which will further permit the assessment of national divergences and their impact on the use of self-regulation as a European regulatory mode. However, at this stage, the impact of the European dimension will count as a single factor among the various elements which shape national legal frameworks applicable to self-regulation.

The focus of our research has been on SR at national level, focusing mainly on three aspects: the constitutional dimension of self-regulation, the legal regime concerning governance and regulatory activity and the liability of private regulators.

II.1 The constitutional dimension

Constitutional law might envisage a number of legal provisions capable of affecting, directly or indirectly, the recourse to self-regulation by either promoting or prohibiting it. Thus, it becomes crucial to identify all such provisions and to evaluate their inter-relationship within the context of the constitutional order and their overall relevance vis-à-vis the practice of self-regulation. For instance, the constitutional conceptions of private autonomy and the rules establishing the «economic Constitution» can affect the legal system's capacity to adopt self-regulation. The same applies to the provisions regulating the system of legal sources, to those governing courts and jurisdictions and the possibility to establish alternative dispute resolution mechanisms. Procedural structures and certain fundamental rights may also be relevant.

Within this framework, it seems essential to elaborate on the following specific questions.

- Does self-regulation require a certain constitutional structure? Does it impact upon it?
- Does self-regulation have a constitutional underpinning (e.g. general constitutional values like private autonomy, freedom of association, etc.) from which a postulate of self-regulation might be inferred?
- Is there any direct or indirect link between self-regulation and constitutional values? Would it be possible to identify a strategy aimed at upholding rationality, relevance and

proportionality in the context of self-regulation? To what extent are fundamental rights upheld in the context of self-regulation?

- Does the Constitution impose any duties on the State with regard to self-regulatory mechanisms, for example, an obligation to monitor the regulator's activity, to control its internal organisation and procedures, to supervise its interaction with third parties, to intervene in the case of a failure by the regulator to respect fundamental rights, etc?
- To what extent is self-regulation compatible with the rule of law?
- Does the constitutional framework define the areas which might be appropriately subject to self-regulation? Does it reserve rule making on certain issues to the Parliament or the political majority?
- Would it be possible to reconstruct a number of constitutional limits in order to apply them to self-regulation (e.g. the principle of non discrimination)?
- In which way are all these questions affected by the influence of European constitutionalism on the national legal order? In which way does the latter contribute to the development of the former?

II.2 The legal regime concerning governance and the regulated activity

The *second* dimension concerns the determination of the nature of the regulatory body as well as the nature of its activity.

These two aspects constitute an essential profile of the understanding of self-regulation within the European States, both in conceptual and practical terms, given the number of legal implications resulting from the choice of one regulatory scheme or another. Thus, the recognition of the public or private nature of the regulatory body and its activities may be decisive in order to determine whether the application of a public, private or mixed law regime to its action and functioning is most desirable [or appropriate?]. More generally, self-regulation is directly connected with the phenomenon of the increasing differentiation of the intersections between administrative law and private law instruments.

A number of issues should therefore be systematically dealt with in each national report, including the following:

- What are the legal criteria for determining the public or private nature of a regulatory body? What is the specific relevance of the source of power of the regulatory body in determining its legal nature? Does the existence of formal/informal delegation of regulatory powers impinge on the nature of the self-regulatory body?
- Does the monopoly position of a regulator affect the determination of its legal nature?
- Does the characterisation of a body as public or private entail the application of a certain set of substantive and procedural rules? Does it trigger the jurisdiction of different courts?
- Does the «public» label applied to a body established under private law trigger the same consequences as for a body established under public law?
- Does the private nature of a self-regulatory body imply respect for private autonomy, so that the self-regulatory body may freely make, interpret and apply its own rules and determine its membership? Or are there any public law restraints on this freedom? What are the criteria used for identifying the nature of the activity of a self-regulatory body? Should it be determined on a case-by-case basis, or does the nature of the body necessarily deter-

mine the nature of its acts? Does the identification of a public element in the activities of the self-regulatory body trigger any change in the legal nature of that body?

- Does self-regulation tend to coincide with the [affect?] codes or different types of rules which may be adopted? If so, what is the specific relevance of administrative acts? Is it possible to identify a genuine typology of self-regulatory measures?
- Can the influence of European law be located in this field? Does the Europeanisation of national administrative law and the development of a corpus of supranational administrative law affect the internal legal order as far as the nature of the regulatory body and its activity is concerned?
- To what extent do the subjects of regulation (the regulatees) matter when assessing the nature of the activity of a self-regulator? What is the legal relationship between regulatees and self-regulatory bodies?
- Does the control or the intervention of the State in the activities of a self-regulatory body depend on or differ according to the private/public nature of the body or its activities? What kind of control is it and what are the powers of the controller?
- Which legal framework is applicable to purely private self-regulators? Are such regulators tolerated/encouraged by the State?

II.3 The liability of private regulators

The *third* and final dimension is the way in which national law might impose liability on regulatory bodies.

- Does the same liability regime apply to both public and private regulators? Is there a rationale for possible differences in the legal treatment of the two hypotheses?
- Under which conditions is a self-regulator held to be liable?
- What happens in circumstances where a self-regulatory body fails to act, despite its explicit/implicit obligation to regulate?
- What consequences flow from a self-regulatory body's violation of the rules according to which it was to regulate, or where it infringes on other public interests?
- Which parties can hold the regulator accountable for a violation? How should we assess the current legal regime? Could the requirement of standing be expanded?

III. Methodology

The purpose is not to demonstrate a certain hypothesis posited at the outset. Rather, we have formulated the questions and issues in such a way that the outcome of the inquiry is open. The various dimensions we will consider are points of departure which may not have uniform relevance for all national legal systems. A generalised inquiry is more suitable in order to avoid labelling the different systems, however we do wish to extract the essential features and consequences attached to self-regulation and self-regulatory bodies. Our comparative law analysis is intended to achieve a coherent conceptualisation of self-regulation which opens the way to more consistent future approaches to the subject.