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## Summary

The purpose of this study is to give an overview of how self-regulation is framed in the Finnish legal system. This study is a partial contribution to a comprehensive comparative study of self-regulatory practices across Europe. Three specific questions are addressed: Firstly, how the Constitutional values inhibit or enable self-regulation; secondly, which are the legal rights and responsibilities of self-regulatory activities; and thirdly, what are the liability rules attached to self-regulators. As what comes to Finnish legal system, one can construct “a test” that either points to public or private law regime under which an individual self-regulator operates. Consecutively, the applicable regime gives an indication of the: constitutional and legal rights and responsibilities, as well as, liability rules that the self-regulator is expected to comply with in its regulatory activities. The study finds that, normally, self-regulator is to comply only with private law regime and constitutional values envisaged for private actors and entities. However, in case that the self-regulator has been delegated specific regulatory powers through a statute (co-regulation), she might be subject to public law regime, instead. Yet, in case of statutory delegation, also the actual regulatory tasks performed by the (self-or co-)regulator have a role in determining whether the public law regime applies instead of the private law regime. Thus, the Finnish “regime test” for self-regulators needs to be based on both: formal and material criteria.

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## I. Introduction

### 1.1. Aim of the Study

The purpose of this study is to give an overview how self-regulation is used in Finland as a regulatory strategy. This study is a partial contribution to a more comprehensive comparative study aiming at increasing awareness how self-regulation is utilised across European jurisdictions.

The concept of self-regulation has not settled to the Finnish academic literature nor to the statutes. The direct translation of self-regulation is *itsesääntely*<sup>1</sup>. The term *itsesääntely* is commonly understood as a form of private regulation that, however, incorporates a certain level of public interference. English academic literature would probably describe *itsesääntely* as *co-regulation*<sup>2</sup>, *ex post recognised self-regulation* or *delegated self-regulation*. However, also relatively *pure forms self-regulation*<sup>3</sup> can be found, e.g. in sports, advertising and media sectors.

The study addresses three specific questions. Firstly, it is examined how the Constitution inhibits and enables the use of different forms of self-regulation. Second question concerns the legal rights and responsibilities attached to the activities of self-regulator. It is useful to distinguish between public and private law and discuss the difference in rights and responsibilities that public law and private law attach to the activities of self-regulators.

The study shows that sometimes varying forms of self-regulation are justified and regulated through public law and other times through private law. The study strives to identify the circumstances under which public law principles and responsibilities apply to self-regulators. In the preliminary research carried out by the comparative study group, two distinct tests were found. Depending on the jurisdiction, either self-regulator's *activities* (based on *ex post* evaluation in the court) or *statute delegating regulatory powers* to a self-regulator (i.e. *ex ante* recognition), seemed to be the key tests in determining whether the private self-regulating entity has to comply with public law or not. The following Chapters show that in Finland the self-regulator can be subject to public law, if the self-regulator has been delegated specific public regulatory powers, i.e. standard setting, monitoring or enforcement powers that usually belong to a public remit. Without a statutory delegation of public powers, the self-regulator is to comply only with the private law rules, i.e. it is a *pure self-regulator*. Thus, *ex ante* recognition of public functions of a private entity is a necessary factor, if one wants to attach public law effects to a self-regulator. However, the following Chapters will demonstrate, that also the nature of the activities that self-regulators perform, play a role in determining the applicable regime. The applicable regime can be private law, even though the self-regulator would have delegated public powers.

The third question of this study concerns the type of liability and associated legal remedies when self-regulator fails to set self-regulatory standards, or violates principles according to which it should have set the standards, fails to monitor compliance to the produced standards, or fails enforce them. An interesting and relevant question examined is whether public regulators and self-regulators face the same liability regimes when their regulation fails. The underlying assumption is that self-regulators might experience a different liability regime. Those

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<sup>1</sup> Or less commonly known as *autoregulaatio*.

<sup>2</sup> It should be noted that *here* co-regulation is not understood as the European Commission has defined it, but as an interaction of different interest groups (both public and private) resulting to regulation.

<sup>3</sup> Here meaning self-regulation without direct public influence or interaction to it.

self-regulators that are subject to public law can be subject to liability under public law and judicial review as opposed to those that remain within private law sphere and, thus, are probably only responsible for their actions based on tort or contract law. The Finnish outlook on the liability of self-regulators is not clear due to absence of relevant case law and clear statutes. However, this study introduces some possible repercussions that a self-regulator could face in the case of regulatory failure.

The organisation of the study is following. Firstly, the three questions posed above are discussed individually after which they are reflected through different sectors that utilise self-regulatory strategies. The presentation of self-regulatory sectors is not exhaustive but a representative overview of the self-regulatory map. The sectors examined include: professions, financial markets, sports, media, internet and advertising.

## 1.2. General Tendencies of the Finnish Public Governance

The recent trends in public law, especially the trend towards *governance*, can help in explaining the phenomena of contemporary self-regulation<sup>4</sup>. Finland has experienced very similar structural changes in its public governance as the other European countries in the recent years: The efficiency and flexibility of public governing has gained attention. Consequently, there has been general trend to reduce the number of detailed norms in public administration. By using steering methods, more commonly acknowledged in private sector than in public, the public governing has been directed to more flexible policies.<sup>5</sup>

As the recession hit hard in the beginning of the 1990's privatisation and the cuts in the public sector spending and the cuts in supply of public services became unavoidable. A so called *third sector* or *indirect sector*<sup>6</sup> gained in importance.<sup>7</sup>

One of the key characteristics of public law has been to draw a line between public and private. This has, however, become more and more difficult over the years. The public sector has shattered into separate units, which *exercise public powers*<sup>8</sup> and manage public tasks fairly independently from the legislature<sup>9</sup>. Furthermore, numerous private entities have been empowered with the right to exercise public powers. Wilhelmsson sees that the whole system of law, not only public law, has become chattered. The monolithic state law is being replaced and completed with norms of subcultures and groups. New public and private, local and international legislators have stepped in to the legislative process.<sup>10</sup>

However, one could argue that the Finnish experience has been twofold. In the year 2000 a revised version of Constitution was enforced. The Constitution has brought about strengthen-

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<sup>4</sup> Though, it should be noted, that the term *governance* has not been well rooted to the Finnish academic discussion, because there is no direct translation to it, if it is not translated as *hyvä hallinto*, of which the writer is uncertain.

<sup>5</sup> Husa, Jaakko – Pohjolainen, Teuvo: *Julkisen vallan oikeudelliset perusteet – Johdatus julkisoikeuteen*, Talentum 2002, p. 1.

<sup>6</sup> Also described as *non-profit sector*, *quasi-non governmental organisations* or *économie sociale*. See: Helander, Voitto: *Kolmas sektori*, Gaudeamus, 1998.

<sup>7</sup> Helander, Voitto: *Kolmas sektori*, Gaudeamus, 1998.

<sup>8</sup> See footnotes <sup>28</sup> and <sup>30</sup> for definition.

<sup>9</sup> Husa, Jaakko – Pohjolainen, Teuvo: *Julkisen vallan oikeudelliset perusteet – Johdatus julkisoikeuteen*, Talentum 2002, p. 65.

<sup>10</sup> Wilhelmsson, Thomas: *Systeemien hajoaminen ja pienet kertomukset*, in *Pieniä kertomuksia hyvinvointivaltion siviilioikeudesta*, WSLT, 2000, p. 338-339. Wilhelmsson, Thomas: *Vastuu ja yksityisoikeuden Systeemi*, in *Lakimies* 1997, nro 8, 1180–1205, p. 1194.

ing of the system of government, system of public governing and characters of a Constitutional state. Public governing is still subordinate to the steering by the Parliament Acts, in line with the principles of democracy and the *rule of law*.<sup>11</sup>

## II. Constitutional Rights and Limitations to Self-Regulation

### 2.1. Rule of Law vs. Materialisation of law

Constitutional provisions as well as general legal principles unavoidably affect the recourse of self-regulation. This chapter examines how the rule of law might affect the rights and responsibilities attached to self-regulators.

The rule of law is expressed in the Constitution, Section 2.3: “*The exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed*”.<sup>12</sup> However, the rule of law has been affected by other tendencies of law, mainly ideals of Welfare State.<sup>13</sup> Aarnio argues that Nordic countries are text book examples how the *materialization of the rule of law*.<sup>14</sup>

In Finland the materialisation of law can be seen in many fields. The separation of powers has become blurred in many ways. One example being that the executive power has strengthened in relation to legislative power<sup>15</sup>. This is because the parliament often delegates powers to the departments of state without defining how the power should be used or further delegated. This development has resulted to the fact that the structure of the *Acts of Parliament* has changed. For example, we can see an increased tendency towards legislation through Acts that only de-

<sup>11</sup> Husa, Jaakko – Pohjolainen, Teuvo: *Julkisen vallan oikeudelliset perusteet – Johdatus julkisoikeuteen*, Talentum 2002, p. 1.

<sup>12</sup> The Finnish jurisdiction has been quite formalistic (legalistic). Traditionally, the rule of law ideology has included separation of state powers. Furthermore, the rule of law has stressed the necessity of clear ex ante legislation that regulates the use of coercive power. It is also understood as a framework that sets the conditions for the proper exercise of legislative power and stipulates reasonable generality, clarity and consistency in the law. It has emphasised the legal protection, legal certainty, hierarchy of norms, formally structured argumentation and, generally speaking, formality of law. Arnio, Aulis: Introduction, in *Introduction to Finnish Law*, edited by Pöyhönen, Juha, Kauppakaari Oyj, 2002, p. 16-20.

<sup>13</sup> Finland can be classified as a Nordic Welfare State. Arnio, Aulis: Introduction, in *Introduction to Finnish Law*, edited by Pöyhönen, Juha, Kauppakaari Oyj, 2002, p. 16-20. In a recent report by OECD the Nordic governance method is characterised as follows: “*The Nordic values of equity and solidarity continue to play a central role in policy-making ... The state retains a strong and central role in the economy and society ... Decision making is based on a search for consensus and the avoidance of conflict, often working through informal structures and procedures. Government is very decentralised.*” OECD: *Reviews of Regulatory Reform, Finland, A New Consensus For Change*, SG/SGR, 2003:2, p. 7.

<sup>14</sup> Arnio, Aulis: Introduction, in *Introduction to Finnish Law*, edited by Pöyhönen, Juha, Kauppakaari Oyj, 2002, p. 16-20. See also Wilhelmsson, Thomas: *Vastuu ja yksityisoikeuden Systemi*, in *Lakimies* 1997, nro 8, 1180–1205, p. 1194. Though the ideals of Welfare State are widely accepted in the Finnish academic literature, they are not necessarily connected to the concept of materialisation of law. However, there is some evidence of materialisation of law also beyond academic writings, e.g. in the report of OECD it is said that in Finland “[p]ragmatic solutions are favoured. There may be no perceived need for formalised structures and procedures, which may be seen as undermining the trust-based culture... The consensus-based approach to decision-making draws its strength and effectiveness from a close and informal network of contacts within government and society, based on mutual trust.” OECD: *Reviews of Regulatory Reform, Finland, A New Consensus For Change*, SG/SGR (2003)2, p. 12.

<sup>15</sup> In the report of the OECD it is claimed that “*(p)owers are devolved to individual ministries, which are highly autonomous, and the centre of government is relatively weak.*” OECD: *Reviews of Regulatory Reform, Finland, A New Consensus For Change*, SG/SGR (2003)2, p. 12.

fine goals, open policies or general clauses. The delegation has also led to the creation of so called *intermediate or indirect public sector* comprising of associations of public character and other institutions which include both, private and public characteristics.<sup>16</sup>

In short, the Welfare State expectations have resulted in new systems of flexibility, e.g. open and goal oriented statutory norms that allow plurality of regulatory systems in executing the goals. I see that, despite of different starting points, the rule of law and materialisation of law act in concert creating a duty to the state to supervise the goal oriented and open policies that are set. Together they create a duty for the state to monitor self-regulatory entities that have coercive powers: to control their internal organisation and procedures, to supervise their interaction with third parties and to intervene in cases of failed self-regulation. This duty is also demonstrated in the Constitution's Sections 80 and 124 that I discuss in the following Chapters.

## 2.2. Prohibition to Delegate Legislative Powers

The Finnish Parliament exercises the legislative power, i.e. the right to issue Acts<sup>17</sup>. The Constitution explicitly reserves to regulation to be issued in the form of an Act of Parliament “*when the regulation affects the rights and obligations of private individuals or other matter that under the Constitution is of legislative nature*” (Section 80.1). The interpretation of this clause is strict, for example, all substantive regulation that affects constitutionally guaranteed fundamental rights must be done in the form of an *Act of Parliament*.<sup>18</sup>

Section 80.2. states that “(o)ther authorities may be authorised by an Act to lay down legal rules on given matters, if there is a special reason pertinent to the subject matter and if the material significance of the rules does not require that they be laid down by an Act or a Decree. The scope of such an authorisation shall be precisely circumscribed”<sup>19,20</sup>. Evidently, delegation is only rendered to public authorities.

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<sup>16</sup> Hakalehto-Wainio, Suvianna: Vastaako valtio? In Pieniä kertomuksia hyvinvointivaltion siviilioikeudesta (edited by Thomas Wilhelmsson), WSLT, 2000, p. 271. See also Husa, Jaakko: Perustuslaki ja julkishallinto, Vaasan yliopiston julkaisu, 2000.

Furthermore, the *materialisation* appears in the involvement of various participants in the drafting, implementing, interpreting and monitoring norms and policies. The parties involved are not legal scholars but scholars of other disciplines. This has partly resulted in the use of discursive methods as a method of legal reasoning. Aarnio argues that as discursive methods, weighting and balancing, are becoming more relevant. This modern post-industrialised statutory interpretation process dominates over the logical one. Aarnio, however, concludes that all the classical elements of the rule of law have not disappeared in the development towards materialised law, for example, the legal protection or the general principles of legal certainty. Aarnio, Aulis: Introduction, in Introduction to Finnish Law, edited by Pöyhönen, Juha, Kauppakaari Oyj, 2002, p.18-20.

<sup>17</sup> However, the President, the Council of Ministers and Ministries all have competence to issue Decrees on the basis of an authorisation given in the Constitution or an Act of Parliament. Section 80.1: *The President of the Republic, the Government and a Ministry may issue Decrees on the basis of authorisation given to them in this Constitution or in another Act. However, the principles governing the rights and obligations of private individuals and the other matters that under this Constitution are of a legislative nature shall be governed by Acts. If there is no specific provision on who shall issue a Decree, it is issued by the Government.*

<sup>18</sup> Scheinin, Martin: Constitutional law and Human Rights, in Introduction to Finnish Law, edited by Pöyhönen, Juha, Kauppakaari Oyj, 2002, p. 39.

<sup>19</sup> The delegating authority should focus on the exactness of the delegation, the preciseness of the limits concerning its application and examine whether the delegation is possible in view of the importance of the subject matter. Jyränki states that the Constitution's Section 80 is important and reflects the recent changes in the

However, looking at the present situation, despite the Section 80.2, legislator has rendered to private entities regulatory powers, i.e. public standard setting, compliance monitoring and enforcement powers. For example, there are *associations of public law character*, which have been given regulatory powers delegated to them by a legislative Act (see Chapter 4.5. for more illustrated examples)<sup>21</sup>. In the light of the Finnish legislative history this kind of lack of Constitutional basis of the delegated self-regulatory powers is not startling. In the recent past, the emphasis has been on the Parliamentary Acts, not on the Constitution: Derogation of Constitutional provisions has been common<sup>22</sup>. Nowadays the outlook is different: Acts are generally tailored to the Constitutional limits, although the Constitution still allows for derogation.<sup>23</sup>

However, besides this there are also other grounds, indicating, that the Section 80 does not apply to self-regulators. The reason lies within the definition of *legislation*. Self-regulatory entities, even with delegated public regulatory powers, do not have right to issue *Acts* or *Decrees*: Their self-regulation is at lower level than legislation. The self-regulatory powers of private entities are based on either *private autonomy* (see Chapter 2.4.) or Section 124 of the Constitution (that concerns administrative functions and their delegation) and not the Section 80. The following Chapters discuss the Section 124 in detail.

It should be noted that, as regulations (or norms) set by self-regulators, are at lower level than Acts or Decrees issued by the Parliament, Ministries or the President, their self-regulation is to be in harmony with the legislative norms. If self-regulation conflicts with the existing legislation, the courts do not apply them, but render their verdict basing on applicable legislation<sup>24</sup>.

## 2.3. Possibility to Delegate Public Regulatory Powers

### 2.3.1. Introduction

In this Chapter two questions posed in the introducing Chapter are combined. Firstly, I discuss whether either:

(1) nature of the body (*formal* characteristics, e.g. statutory delegation of regulatory powers) or

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regulatory sphere. Previously there were no provisions concerning the delegation of legislative powers in the Constitution See also: Travaux préparatoires for the Constitution (HE 1/1998 vp.) p.133.

The sub-delegation of legislative powers is prohibited, i.e. the delegation of legislative powers by the delegated authority. However, even sub-delegation is possible, if this right is granted in the Act of Parliament delegating the legislative powers. See: Travaux préparatoires for the Constitution (PeVM 10/1998 vp) p.23.

<sup>20</sup> Some important instructions are still lacking, but can be constructed: The Constitution does not contain authorisation to the Parliament to check *ex post* that the conditions of delegation set in the Section 80 are adhered to by the delegated authority. The right to *ex post* checking is usually included to the Act that delegates the legislative powers. However, Jyränki sees that, given the privity of the Parliament legislation, the right to *ex post* checking is always possible. Jyränki, Antero: Uusi perustuslakimme, Jura Nova, 2000, p. 176. This view is also in line with the argumentation concerning the interplay materialisation of law and rule of law discussed in the previous Chapter.

<sup>21</sup> The *Finnish Bar Association*, the *Finnish Chambers of Commerce* and *herding co-operatives* are associations of public law character that have their basis in a specific delegating Act of Parliament. These Acts impose rule making, monitoring and enforcement powers to the associations.

<sup>22</sup> Scheinin, Martin: Poikkeuslait ja perusoikeusuudistus, in Lakimies, 1996, no 5-6, p. 816–831.

<sup>23</sup> Viljanen, Veli-Pekka: Oikeusjärjestyksen valtiosääntöistyminen, Lakimies, 2003, no 3, p. 444–448.

<sup>24</sup> The court can base its verdict on Acts or Decrees that are appropriate, or even the Constitutional principles, if there are no close points of reference.

## (2) actual visible activities of the self-regulator

is the determining factor when determining which the regime (public or private law regime) is applicable to a self-regulator. Generally, I find that public (and administrative) law regime can *only* apply to those self-regulators that operate under statutory delegation of public powers<sup>25</sup>: thus, existence of *formal* delegation of public powers is necessary condition for the applicability of public law regime. However, this formal requirement of delegation is only a necessary but *not an exhaustive determinant* of applicability of public law, because public law regime becomes applicable only with respect to those functions that are considered as exercise of public powers.

Secondly, I discuss what kind of Constitutional limitations the Section 124 imposes on the use of self-regulation as an alternative to public authority regulation. It is noteworthy that Section 124 of the Constitution at the same time enables and limits the delegation of public powers to private entities, i.e. the delegation of public (regulatory) powers to self-regulators. However, the Section 124 and the public law regime do not apply to those other self-regulators that do not exercise public powers, i.e. pure self-regulators<sup>26</sup>. The applicable regime and limitations to pure self-regulation are discussed in Chapter 2.4.

The two questions of this Chapter are discussed simultaneously in this Chapter, because the answers to both questions can be found by examining the Section 124 of the Constitution and the concept of *exercise of public power*.

### 2.3.2. Exercise of Public Powers and the Applicability of Public Law regime to Self-Regulators

Firstly, the concept *exercise public powers* (EPP) is examined as the concept is important in understanding this Chapter and becoming Chapters of this study. There is no and there will be no exhaustive definition of *public power* or EPP: It depends on the context<sup>27</sup>. Generally the EPP refers to a non-contractual relationship where a *public authority* one-sidedly makes decisions which affect the rights or responsibilities of private persons or entities<sup>28</sup>. However, as

<sup>25</sup> Delegation meaning delegation from the legislature (or administration) to the self-regulators.

<sup>26</sup> See for definition in footnote <sup>3</sup>.

<sup>27</sup> The exact definition of public power (and thus also the EPP) differs through various Sections of the Constitution depending on the different rights or responsibilities that these Sections render. Source: Travaux préparatoires of Constitution (PeVM 25 /1994 vp) p. 3.

Furthermore, the definition of EPP also varies depending on the Acts of Parliament. Source : Valtiovarainministeriö: Vällinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999. p. 14.

An administrative decision is a typical example of EPP. Furthermore, issuance of an Order is also considered as an EPP. Source: Husa, Jaakko – Pohjolainen, Teuvo: *Julkisen vallan oikeudelliset perusteet – Johdatus julkisoikeuteen*, Talentum, 2002, p. 69. See also Travaux préparatoires concerning amendments to Fundamental Rights Act, (HE 309/1993 vp.) p.25-26. Implementing legislation, monitoring compliance and sanctioning the non-compliance to laws and other regulations, i.e. enforcement, belong to the notion of EPP.

<sup>28</sup> One definition is provided in the Penal Code (39/1889) Chapter 40, Section 11.5: "a person exercising public authority is defined as (a) a person whose functions on the basis of an act or decree include issuing orders that oblige another or deciding on the interest, rights or duties of another, or who on the basis of an act or decree in fact in his/her duties intervenes into the benefits or rights of another, and (b) a person who on the basis of an act or decree (or on the basis of a commission from an authority on the basis of an act or decree) participates in the preparation of a decision referred to in paragraph by presenting a draft decision or a proposal for a decision, preparing a report or plan, taking a sample, carrying out an inspection or in another corresponding manner."

public powers have been entrusted also to *third sector* or *indirect sector*, it has become obvious that also *private entities* can have, under certain conditions, delegated rights to EPP.

The right to EPP can be granted to private entities only through statutory delegation. The Constitution, Section 124, allows for delegation of EPP to private entities, for example, self-regulatory entities: “A *public administrative function* (including EPP<sup>29</sup>)<sup>30</sup> may be delegated to others than public authorities only by an Act or by virtue of an Act<sup>31</sup>...”

The reason why I discuss the EPP is that there seems to be a close relationship between the EPP and applicability of public law regime to self-regulators: When a private entity exercises public powers (or public administrative functions<sup>32</sup>) rendered to it by a delegating Act, the private entity acts within the remit of public law<sup>33</sup>. A self-regulator, that has statutorily delegated: regulatory powers, compliance monitoring powers and enforcement powers<sup>34</sup>, usually does exercise public powers in these activities<sup>35</sup>.

As administrative law and public law regime generally applies to those private entities that EPP, public and administrative law regime also applies to self-regulators that EPP. In fact, there are several private self-regulatory entities that have statutorily delegated right to exercise public powers. The *Central Chamber of Commerce*<sup>36</sup> exercises public powers (and self-

However, Husa and Pohjolainen argue that, nowadays, this definition is considered insufficient to catch the whole spectrum of the usage of the concept.

Source: Husa, Jaakko – Pohjolainen, Teuvo: *Julkisen vallan oikeudelliset perusteet – Johdatus julkisoikeuteen*, Talentum, 2002, p. 69. Their statement probably refers to the increasing number of private actors involved in the EPP and the mixing of contractual and non-contractual relationships in public sector.

The determining factor between the contractual relationship and exercise of public powers is that exercise of public power is unilateral.

Source: Valtiovarainministeriö: *Välillinen valtionhallinto – hankkeen muistio*, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999, p. 14.

<sup>29</sup> The addition in brackets is author's. See the distinction between the EPP and public administrative function in footnote <sup>30</sup>.

<sup>30</sup> In the Constitution, concepts such as *public function*, *public administrative function*, *public service function* and *exercise of public power* (EPP) are used. Unfortunately, all these concepts are open to interpretation. Travaux préparatoires do not offer any further guidance to what is already said in the Constitution. Furthermore, in academic writings the concepts are categorised and explained various different ways.

*Public administrative function* refers to a function which aim is to accomplish public goods, and its aims or its function has features of public services. The EPP is a subgroup of public administrative function. Furthermore, EPP, *public administrative function* and *public service function* all belong to the more general category of *public functions*.

Source: Husa, Jaakko – Pohjolainen, Teuvo: *Julkisen vallan oikeudelliset perusteet – Johdatus julkisoikeuteen*, Talentum, 2002, p. 69.

<sup>31</sup> By virtue of an Act signifies that a public authority that has been rendered the right to delegate an administrative function or right to EPP to a private entity, e.g. a municipality and also a ministry can be granted such right.

Välillinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999, p. 25.

<sup>32</sup> See for explanation of this term in footnote <sup>30</sup>.

<sup>33</sup> Välillinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999, p. 14.

<sup>34</sup> I.e. it maintains alternative dispute resolution mechanisms.

<sup>35</sup> Valtiovarainministeriö: *Välillinen valtionhallinto – hankkeen muistio*, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999, p. 14.

<sup>36</sup> See Chapter 4.2.1.

regulates) when it nominates auditors and takes punitive measures against them<sup>37</sup>; The *Finnish Bar Association*<sup>38</sup> exercises public powers (and self-regulates) when it regulates its members and takes punitive measures against them<sup>39</sup>. These self-regulatory activities are based on statutorily delegated public powers. Thus, they are subject to public and administrative law.

It should be noted that, there are also self-regulators that do perform certain functions based on a specific delegating Act, but the delegated functions are not considered as exercise of public powers (nor a public administrative function)<sup>40</sup>. Furthermore, there are self-regulators that perform their regulatory functions independently from the state, i.e. there is no delegation. This pure self-regulation is generally based on the rendered right to enter into contracts and establish legal personalities (*private autonomy*). Such purely private self-regulators do not possess public powers. They have inherent *private powers* that are exercised through self-regulation. Generally, such purely private self-regulators are obliged to comply only within the private law remit and not public law. A good example of the exercise of private regulatory powers is the stock exchange (see Chapter 4.5.2.).

However, the applicability of public law to private entities (and self-regulators) *exercising delegated public powers* is still to be narrowed. Necessarily, private entities are not exercising public powers in all their activities. If a private entity with delegated public powers is *not* exercising public powers in a particular activity, the public law and administrative law regimes do not apply to this specific activity<sup>41</sup>: On the contrary, the private law regime applies. The private entities with statutorily delegated EPP are examples of ‘mixed’ entities to which both public and private law regimes can be applied depending on the nature of their specific activity<sup>42</sup>. See table 1.

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<sup>37</sup> Travaux préparatoires of Tort Liability Act (HE 187/1974 vp.), p. 17.

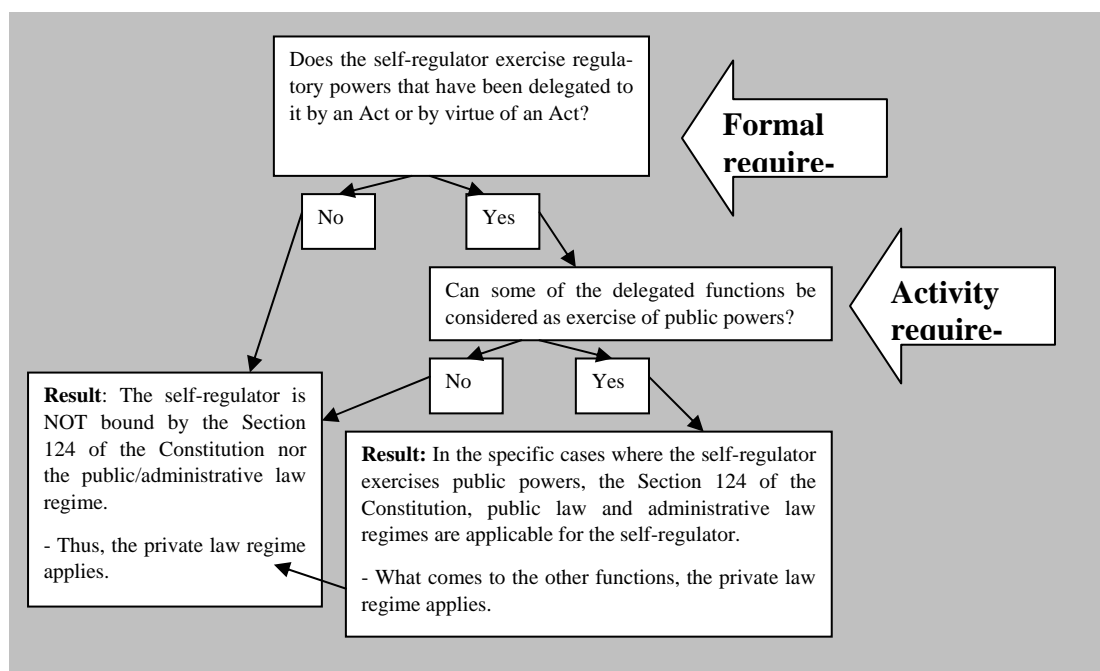
<sup>38</sup> See Chapter 4.5.

<sup>39</sup> Routamo, Eero – Pauli Ståhlberg: Suomen vahingonkorvusoikeus, Kauppakaari Oyj, 2000, p.177.

<sup>40</sup> See for example Chapter 4.1. that concerns delegated functions to a Finnish standardising association.

<sup>41</sup> As opposed to private entity, public entity or government official can be subject to public law and administrative law also when it is not exercising public powers.

<sup>42</sup> Valtiovarainministeriö: Välillinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämisosasto, Helsinki 1999. p. 29-.

**Table 1: Are the self-regulators bound by the public law regime?**

There are some indications that the statutory delegation of the right to EPP would *not* be a necessary requirement for private entity to gain public powers. It seems that sometimes public powers have been delegated through a contract between public authority and self-regulators or through an administrative decision<sup>43</sup>. We have to recall that a delegation of public power can also be given *by virtue of an Act* (section 124 of the Constitution), thus, delegation can also be given either: *on the basis of an Act, a Decree or an authorisation given in an Act*. This definition makes it more difficult for outsiders to actually locate the statutory delegation of public powers, i.e. the formal requirement.

Nevertheless, the importance of the formal delegation requirement should not be undermined: When a court has to decide whether public law regime applies to a certain activity of a private body, a statutory delegation of some form is usually a prerequisite for even considering that the entity might have exercised public powers, i.e. that the public law regime could apply to the private entity.

### 2.3.3. Limitations to Delegate Regulatory Functions to Self-Regulators

It is noteworthy to restate that Section 124 of the Constitution at the same time enables and limits the delegation of public powers, i.e. it also limits and enables the delegation of public (regulatory) powers to self-regulators<sup>44</sup>. However, the Section 124 does not seem to concern those other self-regulators that do not have delegated public powers. In a simplified picture, such 'pure' self-regulators do not have to concern themselves with the Section 124 of the Constitution or public law principles.

However, even the 'pure self-regulators' could be seen to have indirect delegation of self-regulatory powers in the Constitution, for example, from the principles of freedom of associa-

<sup>43</sup> Valtiovarainministeriö: Välillinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämisosasto, Helsinki 1999. p. 25.

<sup>44</sup> At least, monitoring and enforcement powers, if not standard setting powers.

tion or private autonomy. However, these principles lack the aspect of delegation of public power. These principles protect the *private power* that can also have (self-)regulatory features. These private Constitutional principles are discussed in the coming Chapters.

The delegation of the EPP is limited in the Constitution, Section 124: Delegation is possible, “...if this is necessary for the appropriate performance of the function and if basic rights and liberties, legal remedies and other requirements of good governance are not endangered. However, a task involving significant exercise of public powers can only be delegated to public authorities.”

There are material prerequisites for the delegation. Firstly, if the delegated regulatory function constitutes a significant EPP, it should not be delegated to a private entity. For example, the independent right to use physical force is considered as a significant EPP and, thus, restricted for the public authorities<sup>45</sup>. Furthermore, all measures that would significantly hinder the fundamental rights granted in the Constitution are considered as significant EPP<sup>46</sup>.

Secondly, the delegation has to be *necessary for the appropriate performance of the* (delegated) *function* which signifies that there has to be special and relevant reasons for making the decision to delegate powers to private entities. The most frequently used reasoning are that: the private sphere has already been active in providing feasible framework in order to take up public powers (maybe in fear of further public regulatory intervention); taking account the framework to which the regulation is attached to, it is seen that the interests of the of all the parties are secured; and with delegation, it is possible to avoid substantial regulatory burden.

For example, public authority has considered that, as there is already obligatory third party auditing of firms’ finances, firms should have right to self-regulate their internal activities to ensure that that financial reporting and auditing obligations are fulfilled. Thus, the public authority opposed the idea of *European Commission* that proposed an obligatory auditing committee, which would have statutorily fixed organisation and tasks, and be constituted within the governance structure of firms. In Finland, the *Helsinki Stock Exchange* and *Central Chamber of Commerce* provide practices and codes of conduct for the organisation and monitoring of accounting and auditing within the firms, which Finnish authorities saw sufficient. Such self-regulation was seen responsive to the changing market conditions and needs. On the other hand, statutorily set and organised auditing committee within a firm’s remit was seen as rigid and having a potential for negative externalities for various market actors<sup>47</sup>. Thus, self-regulatory approach was strongly favoured.

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<sup>45</sup> However, in recent years even the private companies offering security services have increasingly started to offer their services. Guards have given very restricted but independent powers to use physical power.

<sup>46</sup> Travaux préparatoires of the Constitution (HE 1/1998 vp) , p. 179/II)

<sup>47</sup> Source: Economic Committee: Comment on the European Commission’s proposal for directive on statutory audit of annual accounts and consolidated accounts (18/2004 vp). Note: this Comment provided by the Economic Committee does not necessarily represent the unified outlook of legislator on this specific matter, but reflects the path of reasoning in choosing between public and private regulation.

See also: Proposal for a Directive of the European Parliament and of the Council on statutory audit of annual accounts and consolidated accounts and amending Council Directives 78/660/EEC and 83/349/EEC, COM/2004/0177 final.

However, this example given above would leave internal organisation and monitoring to the remit of pure self-regulation. This is not an example of delegating an EPP, but merely the question of freedom to organise the compliance with the financial reporting and auditing legislation completely independently as long as the legislation is complied with. However, the path of reasoning that a public authority would use would be

Thirdly, it is to be ensured that, even after the delegation, the regulatees retain the fundamental rights and liberties, legal remedies guaranteed by the Constitution<sup>48</sup>. This can be done, for example by requiring that the delegating authority approves the internal rules of the private entity that has received the right to exercise public powers.

In addition, the delegating authority has to ensure that the private entities with delegated public powers observe the principles of good governance. Good governance includes four legal principles that are expressed in the Constitution's Section 2.3: equality, proportionality, objectivity and prohibition of the use of abusive power (*détournement de pouvoir*).<sup>49</sup>

In the spirit of good governance, the delegating authority has to ascertain that delegation is precisely circumscribed and limited<sup>50</sup>, and professional skills of the delegated entity are sufficient.<sup>51</sup> The public authority has often raised the question of relevant skills when compliance monitoring powers have been delegated to private entities or persons. Examples of such delegation of monitoring powers to private include the delegation of public powers to EMAS verifiers and accreditors<sup>52</sup>. Furthermore, the public authorities have to ascertain that there is possibility for sufficient and appropriate *ex post* public monitoring of the private entities.<sup>53</sup>

The organisation of efficient monitoring is more demanding task than the withdrawal of delegation in the case of non-compliance. Given the privity of the Parliament legislation, the Parliament has always the right to repeal the statutory delegation of public powers. For example, if the private entity does not fulfil its general<sup>54</sup> or specific obligations<sup>55</sup>. I would even say that

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probably very similar: In balancing the public and private interests, the delegated self-regulation is seen as a better option than public regulation.

<sup>48</sup> These interpretations of the Section 124 are derived from the Section 80 of the Constitution. The parallels are drawn because, in the Travaux préparatoires for the Constitution (He 1/1998 vp.), it was said that the Section 124 is to be interpreted in line with the Section 80.

<sup>49</sup> Source: Mäenpää, Olli: Administrative law, in the Introduction to the Finnish legal system, WSTL, 2002, p. 407.

<sup>50</sup> This is again derived from the Section 80 of the constitution which is to be interpreted in liason with the Section 124.

<sup>51</sup> Husa, Jaakko – Pohjolainen, Teuvo: *Julkisen vallan oikeudelliset perusteet – Johdatus julkisoikeuteen*, Talentum 2002, p. 70. Travaux préparatoires for amending the Insurance Company Act, PeVL 25/2000 vp

<sup>52</sup> Besides its standardisation activities, Finnish Standards Association, SFS, provides auditors for the European Union's Environmental Management and Audit Scheme, EMAS, in Finland. The aim of the EMAS is to promote sustainable development, environmentally sound processes, in all phases in production. There are private and public authorities involved in implementing EMAS. The Act on EMAS (914/2002) stipulates that, when the accredited auditors perform public tasks or EPP, auditors have to comply with Language Act (previously 148/1922, now renewed and amended 423/2003), Act on Right to Information on Administrative Matters (621/1999)

According to a government study a private accreditation body is performing a public administration function (as understood in the Section 124 of the Constitution), when it performs a task specified in the legislation, or when its activity is based on legislation and it affects the rights or responsibilities of the client (who is a voluntary subject to audition). This pushes the interpretation of public administrative function to its limits, because, ultimately, EMAS is a voluntary scheme.

<sup>53</sup> Husa, Jaakko – Pohjolainen, Teuvo: *Julkisen vallan oikeudelliset perusteet – Johdatus julkisoikeuteen*, Talentum 2002, p. 70.

<sup>54</sup> General requirements of public law, administrative law and Constitution, to the extent that they are applicable to the private entity. Extend to which: public law, administrative law and Constitutional principles set for the public authorities, is applicable to private entities with delegated powers is discussed in the next Chapter 2.3.3.

<sup>55</sup> Set in the specific delegating Act.

the delegation can be withdrawn, if the general aims or intended public goods outlining the delegation do not materialise.<sup>56</sup>

It seems that there is no limitation concerning the legal form of private entity to which public powers can be delegated: Associations, foundations and limited companies can exercise public powers based on a delegation<sup>57</sup>. However, within the remit of delegated EPP, the standard setting and enforcement powers are usually delegated to associations. Monitoring powers have also been delegated to corporations or natural persons. However, to some extent, the possibilities for the public authority to monitor the private entity's EPP differs according to the legal form. This can affect the evaluation whether public authority can ensure inviolability of basic rights and liberties within a certain legal form, i.e. decision to which legal form right to EPP (including self-regulatory functions) is delegated to.

The legislator has sometimes used a special legal form: *association of public law character* (henceforth APLC) which is a special form of association. One of the benefits of the APLC is that, contrary to the ordinary associational form, the legislator can stipulate a semi-mandatory and automatic membership to the APLC (e.g. automatic membership based on profession). With this stipulation the legislator can aim at securing the equality and proportionality of representation when the private entity exercises its delegated public powers<sup>58</sup>. An example of automatic membership and APLC is reindeer herding co-operative<sup>59</sup>.

The governance of an APLC is in many ways co-regulatory. The internal rules of the APLC are often approved by the public authorities, generally by the ministry responsible for the regulated area in which the APLC operates (consider for example the case of *Finnish Bar Association* in Chapter 4.5.). The approval of rules and public representation is based on the statute constituting the APLC.

There are not many differences between the APLC and ordinary association with delegated right to EPP. In associations that have delegated right to exercise public powers, the public authority can have an interest representation in the governing board similarly to the APLC. Consider, for example the case of SFS in Chapter 4.1. or the case of sports in Chapter 4.6. However, the representation is not necessarily based on statutory provision, but a contract between the public authority and the private entity. Furthermore, the rules can be approved by public authorities. The approval of rules is based on the statute delegating the right to EPP. Sometimes the associations are intentionally formulated as very distinct from the public authority, especially, when they represent the interests of a regulated sector. Despite of this independence, they can possess delegated right to EPP<sup>60</sup>.

### 2.3.4. Public Law Shaping the Activities of Self-Regulators

An interesting question is whether it is possible to reconstruct, from a perspective of basic rights, Constitutional limits to self-regulation. As already stated in previous Chapter, if self-

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<sup>56</sup> This conclusion is derived in the spirit of Section 80 of the Constitution which is to be interpreted in parallel with the Section 124. See: Jyränki, Antero: *Uusi perustuslakimme*, Jura Nova, 2000, p. 176.

<sup>57</sup> Valtiovarainministeriö: *Välillinen valtionhallinto – hankkeen muistio*, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999, p. 22.

<sup>58</sup> Valtiovarainministeriö: *Välillinen valtionhallinto – hankkeen muistio*, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999, p. 25.

<sup>59</sup> Act on Reindeer Herding (848/1990).

<sup>60</sup> Valtiovarainministeriö: *Välillinen valtionhallinto – hankkeen muistio*, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999, p. 25.

regulation is based on statutory delegation and it involves EPP, public law and administrative law principles can delineate self-regulator's activities. However, it should not be forgotten that these private entities with statutorily delegated EPP are examples of 'mixed' entities to which both public and private law regimes can be applied – depending on the context. The applicability of private law regime is the basic hypothesis, and the specific cases of EPP can cause deviation from this principle<sup>61</sup>.

The central general administrative Acts that can delineate the EPP are, for example: Act on Administration (434/2003), Administrative Judicial Procedure Act (586/1996), Act on Maintaining Archives (831/1994), Language Act (previously 148/1922, now renewed and amended 423/2003), Act on Right to Information on Administrative Matters (621/1999)<sup>62</sup>, Decree on the Openness of Government Activities and on Good Practice in Information Management (1030/1999), and the criminal liability of government officials (Penal Code, especially, Chapter 40, (39/1889). These Acts can be applicable to various private entities with delegated right to EPP<sup>63</sup>.

Going to the constitutional remit, the self-regulators with delegated public powers have to observe basic rights and liberties, legal remedies and other general requirements of good governance. They have to take into account the very same principles and value premises as public authorities: The Section 124 has brought the framework of public law to the activities of private entities when they are EPP<sup>64</sup>.

Under the Constitution, Section 22, *public authority* has to protect fundamental (basic) rights and human rights in its activities. The notion of *public authority* includes private entities that have delegated right to EPP<sup>65</sup>, i.e. also self-regulators that have delegated right to EPP. Generally, those who exercise public powers have to take into consideration a wider range of rights than those who do not.

The Constitutional fundamental rights are divided into three different kinds of groups: a) *protected rights*, b) *access to* - rights and c) *justice as* -rights. The group a) consists of, for example, rights to property and privacy. These rights are applicable in the horizontal relationship of private individuals and entities. The group b) consists of: economical, social and educational rights; and group c), is characterised as collective rights<sup>66</sup>. Groups b) and c) are generally applicable in the vertical relationship of public and private, but not in the horizontal relationship between private and private. Some see the group a) as being applicable also in the horizontal relationship.

Thus, generally, private self-regulators with delegated public powers have to observe the relevant general principles delineating, for example: economical, social, educational and collective rights in their activities, as opposed to those pure self-regulators who have to observe only protected rights, i.e. horizontal rights. Furthermore, the self-regulators with delegated

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<sup>61</sup> Valtiovarainministeriö: Välillinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999.

<sup>62</sup> Valtiovarainministeriö: Välillinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999. p. 29.

<sup>63</sup> Valtiovarainministeriö: Välillinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999. p. 29. The travaux préparatoires for the Act on Traffic Safety, HE 211/2002.

<sup>64</sup> Husa, Jaakko – Pohjolainen, Teuvo: *Julkisen vallan oikeudelliset perusteet – Johdatus julkisoikeuteen*, Talentum 2002, p. 70.

<sup>65</sup> Travaux préparatoires for the Act on Ascertaining the Equality, HE 44/2003 vp.

<sup>66</sup> e.g. positive discrimination of ethnic minorities and pledge for sustainable development.

regulatory powers have to obey the other public law principles deriving from the Constitution such as: equality, proportionality, objectivity and the prohibition of the abuse of power<sup>67</sup>.

The second question is, to what extent the Constitutional limits and public law principles, that public authorities face, can be reconstructed to self-regulatory bodies that do not have statutory delegation and to whose activities do not fall to the category of EPP, i.e. pure self-regulation. This question is more demanding and will remain unanswered for the time being. We can only say for certainty that the legal scholars are even in disagreement with which fundamental rights are applicable in vertical and which in horizontal relationship<sup>68</sup>. Vertical basic rights considerations are increasingly introduced also to the horizontal sphere.

Let us consider, for example, the principle of equality based on the Section 6 of the Constitution<sup>69</sup>. Nowadays, in the framework of labour law, the employee discrimination is categorically prohibited<sup>70</sup>. There is an interesting High court precedent where a pure self-regulator, a sports association, *Mynämäen Isku*, prohibited one of its members, an athlete, from participating to sports competitions organised by a coalition of sports organisations, to which *Mynämäen Isku* was a member to. The court saw that since the coalition of sports associations was a *de facto* monopoly, the principle of equality was to be applied to the decisions issued by it and its member organisations<sup>71</sup>. Thus, at least, the principle of equality should play a significant role when considering the limitations or requirements for pure self-regulation.

## 2.4. Private Autonomy and Self-Regulation

### 2.4.1. General

In the sphere of this research project the constitutional conceptions of *private autonomy* and the rules establishing the *economic Constitution* have been considered as one possibility to have an affect to the legal system's capacity to adopt self-regulation. However, in Finland the question of economic Constitution is not much discussed. Thus, the attention is drawn to the question, how private autonomy could facilitate self-regulation.

On the whole, only the legislator can issue norms that are generally binding to the private persons (Sections 80 and 124 of the Constitution). On the other hand, private persons have right to issue norms in the relation to other private persons (*lex inter partes*), if the legislators grants such right, i.e. *private autonomy* or *right to self-regulate*<sup>72</sup>. Naturally, the Finnish law

<sup>67</sup> Husa, Jaakko – Pohjolainen, Teuvo: *Julkisen vallan oikeudelliset perusteet – Johdatus julkisoikeuteen*, Talentum, 2002, p. 63-70. Mäenpää, Olli: Administrative law, in the Introduction to the Finnish legal system, WSTL, 2002, p. 407.

<sup>68</sup> See example of a quite modern understanding of applicability of basic rights: Pöyhönen, Juha: Uusi varallisuus oikeus, Kauppakaari, 2000. And its critique e.g.: Siltala, Raimo: Perusoikeusjärjestelmän sisäisestä logiikasta, in *Lakimies* 2001, no 4, p. 735–744. See also: Lämsineva, Pekka: Perusoikeuskeskustelun kriittiset pisteet?, in *Lakimies*, *Lakimies*, no 2, 2004, p. 274–285.

<sup>69</sup> Section 6 of the Constitution: “Everyone is equal before the law.

*No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.”*

<sup>70</sup> Act on Equality (21/2004) and Travaux préparatoires for the Act on Ascertaining the Equality (HE 44/2003 vp).

<sup>71</sup> Supreme Court decision, KKO 1998:122.

<sup>72</sup> Here the word regulation intends the right to impose rights and obligations through contracts.

does allow for this: Private persons have a right to self-regulate their *mutual behaviour* by entering into contracts<sup>73</sup>.

Private autonomy is usually understood as the right to pursue one's goals as long as they are within the confines of the law. The Section 15 of the Constitution, protection of property<sup>74</sup>, is said to reflect the principle of private autonomy in the Finnish legal system. The reasoning is following: The right to property demonstrates that the legislator has committed itself to issue and maintain *organisational norms*<sup>75</sup> that constitute a right to property. The effective rights to property also presuppose that private persons have a right to issue binding behavioural rules amongst themselves (i.e. right to private autonomy).<sup>76</sup>

The view of the academics is that (the Constitution's Section 15) right to property incorporates also the rights to outstanding debts based on contract, immaterial property rights and *rights that are based on a membership in an legal entity*. Thus, the right to property also reasserts the right of private persons to establish legal entities (e.g. associations, and corporations), that have right to self-regulate (self-organise) within the framework set by the legislator<sup>77</sup>. Such obligations are also important for the self-regulatory activities – It is important that the legislator creates framework for legal personalities and entitles private individuals to establish such legal persons, for example, associations and limited companies.

It should be also noted that a legal person has right *and* responsibility to self-regulate its internal activities (corporate governance) in order to deal with, for example, its members, workers, owners, contractual partners. However, responsibilities also bring valuable benefits: A legal entity does not necessarily presuppose a mutual consent, as a purely contractual relationships between individuals usually do, because the legislator might have issued specific norms concerning binding decision making within the entity (e.g. majority decision making in a executive board of limited company<sup>78</sup>).

The freedom of association, Section 13 of the Constitution, is certainly an additional Constitutional guarantee for self-regulation and self-organisation. The legislator has issued an Act on Associations (503/1989) that enables private persons to form an association with legal personality (Sections 1, 6 and 7)<sup>79</sup>. The members of such association are obliged to issue the internal rules of the association: a kind of constitution of a legal entity (Section 8).

The governing board of an association makes binding decisions, self-regulates, based<sup>80</sup> on its rules or the organisational rules set by the legislator (set in the Act). For example, governing

<sup>73</sup> Kivimäki – Ylöstalo: Siviilioikeuden oppikirja, Yleinen osa, Juva, 1981, p. 57.

<sup>74</sup> Previously in the Constitution, Section 6.1.

<sup>75</sup> 1) Who can issue private norms? 2) What are the limits for private norm giving (content)? 3) What are the courses of action?

<sup>76</sup> Telaaranta, K. A.: Sopimusoikeus, 1990, Vammala, p. 1-24.

<sup>77</sup> Telaaranta, K. A.: Sopimusoikeus, 1990, Vammala, p. 1-24, 30-33. However, it should not be forgotten that, even if private individuals had right to issue behavioural and organisational norms (self-regulate), the compliance to these private norms could ultimately be enforced only in courts, because coercive executive powers belong to public authorities (for example, distraint).

<sup>78</sup> Chapter 8 Section 9 of the Act on Limited Companies (734/1978).

<sup>79</sup> It is noteworthy that associations can be formed also outside the remit of the Act on Association, due to the Constitutional right. However, such associations, that are not established as the Act presupposes, do not have a separate legal personality.

<sup>80</sup> Inherently, in making this decision, the association can also interpret its rules and the organisational rules set in the legislation.

board can dismiss a member of an association by voting (Section 14 of the Act on Associations). However, associations do not have final enforcement powers. – If a member considers association's decision concerning his rights or liabilities to be ungrounded, he has a right to bring the case before a court.

Although not much discussed in the academic literature, I argue that freedom of association<sup>81</sup>, at least, explains the right to self-regulate, because this right has certainly had the possibility to shape Finnish society: The right was included to the Constitution already in 1906. In fact, nowadays there are tens of thousands of associations in a country of little more than five million inhabitants.

There are a number of other Constitutional liberties that delineate or reinforce the private autonomy. Besides freedom of association, some other fundamental rights justify self-regulation in certain sectors, for example, freedom of expression (Section 12 of the Constitution) can be seen as reinforced through self-regulation in the media and advertising sectors<sup>82</sup>. The freedom of speech character is discussed in more detail in the sectoral analysis of this study (See especially the Chapter 4.3.).

However, the core of Finnish private law is not found from the Constitution, but from the current discussion of the evolutionary directions of contract and tort law. Thus, it is important to look at how contract and tort law are seen as, on one hand, being affected by the changes and, on the other hand, shaping the regulatory field.

#### **2.4.2. Materialisation of Contract Law and Self-Regulation**

I have already discussed the issue of *materialisation of law* in connection with the *rule of law*. Mononen<sup>83</sup> argues that also the area of contract law has undergone a change that has led to decrease of private autonomy due to a strong influence of the Welfare State ideology and its expectations. This materialisation of law might explain some of co-regulatory initiatives.

In business-to-consumer (B2C) relationships are highly standardised. The standards are often drafted unilaterally by the big firms or business groups meaning that a firm in B2C relationship<sup>84</sup> can dictate the contractual terms to the detriment of a consumer. Thus, over the years, the imbalance of the parties to a contract has resulted in increased public authority legislation and different forms of monitoring in the area of (consumer) contract law. Arguably, public authorities have increasingly permeated to the area of contract law leaving less space to the *private autonomy*.

However, it is difficult to answer to whether the above described development has led to the decrease or increase in *private autonomy*, because there are counter forces at work. The materialisation, the aim to attain materially correct outcomes, has resulted in laxity or generality of the legislation: Legislation concerning contracts is not detailed in nature, but consists of gen-

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<sup>81</sup> An interesting feature is that, besides ordinary associations, there are associations of public law character (APLC) featuring the indirect public sector or the third sector. An APCL is an association that has right to EPP due to a statutory delegation by Act of Parliament. Associations of public law character interestingly demonstrate both, the private and public law characters, of self-regulators.

<sup>82</sup> Ollila, Riitta: Sananvapaus, Pieksämäki, 2004, p. 100-101.

<sup>83</sup> Mononen, Marko: Oikeus ja vakaus – Viimeinen suuri kertomus in Pieniä kertomuksia hyvinvointivaltion siviilioikeudesta edited by Thomas Wilhelmsson, WSTL, 2000, p. 357.

<sup>84</sup> Or a firm with a considerable market power in business-to-business relationship (B2B) can dictate the contractual terms to the firms that do not possess market power.

eral guidelines or general clauses, such as in the Contracts Act, Section 36<sup>85</sup>: “*If a contract term is unfair or its application would lead to an unfair result, the term may be adjusted or set aside.*”<sup>86</sup>

Clearly this kind of legislation leaves room for interpretation. This interpretation is not only left to the courts. Private entities are engaged to the process of seeking ‘objective’ interpretation for these general clauses. Increasingly businesses and other stakeholders work in concert with public authorities, e.g. with *Ombudsman*, producing *self-regulation*, *co-regulation* or *ex post recognised self-regulation* that put flesh on the general clauses of the legislation.

Besides this co-operation, the Consumer Ombudsman is a supervisory body whose task is to ensure that marketing methods used by businesses when selling goods or providing services for consumers conform to the law.<sup>87</sup> The Consumer Ombudsman and his office (*Consumer Office*) are public authorities, because they do not have a separate legal personality from the state and they are under budgetary power of the state. However, it *does not act in a judicial capacity*. Nevertheless it has wide powers, not only to weigh the merits of each party's case but also to investigate the matter. The Ombudsman's decisions arrived at are not purely on legal grounds but also on *good industry practice* and the need for change: A procedure which reflects the Welfare State ideals and materialization of law.

Norms created by self-regulatory entities can be accepted as permitted legal sources when the court seeks for correct interpretation of existing legislation<sup>88</sup>. Furthermore, in contractual disputes, self-regulatory norms of private entities are binding and enforceable in courts in the same way as contracts terms are, if they have been taken explicitly as part of the contract and they are not contravening the legislation (see Chapter 4.6.)<sup>89</sup>. Nevertheless, recall that self-regulation can never be accepted as a legal source, if it is in contradiction with mandatory legislation.

The role of the permitted substantive legal sources is not to be diminished in future. As the opportunities for interpretation and weighing alternative decisions increase, so does the consideration<sup>90</sup>. Furthermore, Wilhelmsson sees that the plurality of legal sources and regulators is a crucial precondition of regulatory efficiency in the complex post-regulatory state<sup>91</sup>. Thus, it seems that the importance of private regulators is on the rise.

<sup>85</sup> Unofficial translation of the act is available at: <http://www.finlex.fi/pdf/saadkaan/E9290228.PDF>.

<sup>86</sup> Contracts Act (228/1929), Section 36 continues: “*In determining what is unfair, regard shall be had to the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, and to other factors.*” However, the courts have used this particular unfair contract term extremely cautiously, especially, if it has been a question of B2B contract, even though a business had possessed considerable market power in relation to its contracting party.

<sup>87</sup> See Act on the National Consumer Administration (1056/1998). See also Ombudsman's site: [http://www.kuluttajavirasto.fi/user\\_nf/default.asp?tmf=0&lmf=0&id=0&site=36](http://www.kuluttajavirasto.fi/user_nf/default.asp?tmf=0&lmf=0&id=0&site=36).

<sup>88</sup> However, this view has been recently contested, for example in the discussion of freedom of the press and banking regulation. See: Neuvonen, Riku: *Sananvapaus, joukkoviestintä ja itsesääntely*, Helsingin yliopisto, liseniaatintyö, 2004.

<sup>89</sup> Halila, Heikki: Seminar in Sports Law, Rovaniemi, Finland, 27.3.2002.

<sup>90</sup> Timonen, Pekka: Sources of Law and Material of the sources of Law, in *Introduction to Finnish Legal System*, edited by Pöyhönen, Juha, Kauppakaari, 2002, p. 28.

<sup>91</sup> Wilhelmsson, Thomas: *Vastuu ja yksityisoikeuden Systeme*, in *Lakimies*, 1997 no. 8, p. 1180–1205.

### III. Liability

#### 3.1. Introduction

In the course of the research project it was argued that legal system's capacity to adopt self-regulation is affected by, on one hand, the flexibility of the system and, on the other hand, its capacity to produce legal certainty. The capacity to adopt self-regulation can be adversely affected, if there is uncertainty concerning the liability regime, process, or court of litigation, applicable to self-regulators. In the Finnish system, the process and the court of litigation can be determined with reasonable preciseness when the applicable liability regime, i.e. public or private law, is known.

Again, the *activity* criterion (see Table 1), i.e. the exercise public powers, ultimately determines whether private or public regime applies to a private entity, i.e. a self-regulator. Public law regime, administrative review procedure in an administrative court and public law remedies apply to virtually all public entities<sup>92</sup> and to the activities of those private entities that EPP<sup>93</sup>, thus also to self-regulators that possess delegated right to EPP.

Private law regime applies to contracts between private persons (or entities) and to torts committed by private persons (or entities). Within the private law sphere the disputes are generally resolved in civil courts in a civil procedure. Pure self-regulation of private entities is regulated within the framework of private law. Thus, disputes are resolved in a civil court in a civil procedure, because pure self-regulation does not have a separate status from the contract and tort law (in Finland often described as law of obligations and law of torts).

Acts constituting the framework for different legal personalities (for example, corporations and associations) presuppose a certain level of self-organisation. That is not, however, considered as delegated right to EPP, but a kind of delegated '*private power*'. Furthermore, sector specific legislation can denote that legal entities have special rights, but also responsibilities (for example, the stock market's right and responsibility to self-regulate)<sup>94</sup>. However, also these special rights and responsibilities fall to the remit of private law and private liability, if the special rights and responsibilities do not denote delegation of EPP.

#### 3.2. Judicial Review of Entities Bound by the Public Law Regime

It is important to recall that the right to EPP, delegated to private entities, is not considered as delegated right to *legislate*<sup>95</sup> (the Constitution, Section 80). There is no possibility to delegate

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<sup>92</sup> Public entity is such that it is not a separate legal entity from the state and that it belongs to the government budget. Source:

<sup>93</sup> To some extent also to those entities that are exercising other public functions, e.g. public service functions. However, here only the delegated right to EPP is discussed because I consider delegated regulatory powers as belonging essentially to the category of EPP.

<sup>94</sup> Additionally, public authorities can have additional powers and venues to monitor compliance, prohibit illegal activities and sanction non-compliance, within these more strictly regulated sectors.

<sup>95</sup> This is important, because the courts' right to independent review on the account of delegated legislation (based on Section 80 of the Constitution) has remained restricted: Only delegated legislation of municipalities can be reviewed. However, even if delegated public powers were considered as delegating legislative powers, i.e. they could not be reviewed, the courts would not apply unconstitutional legislation in their ruling. Furthermore, increased emphasis on basic rights and human rights has changed the scenery – The traditional strict adherence to law has yielded to human-rights-friendly interpretations of law emphasising the importance of fundamental rights stated in the Constitution. Mäenpää, Olli: Administrative law, in Introduction to Finnish Law, Kauppakaari, 2002, p. 461-462.

legislative powers to private entities. Thus, statutorily delegated right for private entities to (self-)regulate has to be equated with norms, codes of practice and decisions issued by public administration (based on Section 124 of the Constitution). Thus, private entities with delegated right to EPP can be subject to same review procedure and liability as public administration would face.

The Administrative Judicial Procedure Act (586/1996) (henceforth AJPA), regulates the procedural aspects of administrative appeal comprehensively when an administrative *decision*<sup>96</sup> is challenged.<sup>97</sup> *Administrative appeal* can also be taken against private entity's<sup>98</sup> decision that it has given in the course of its EPP<sup>99</sup>. Thus, administrative appeal can also be initiated against self-regulators, against a decision that it gave when it was exercising delegated public powers.

However, the administrative appeal is not generally available for damages<sup>100</sup>. Ordinary *civil or criminal procedures* in civil courts can be used as venues for seeking monetary compensation for administrative wrongs<sup>101</sup>.

On the basis of an administrative appeal administrative court can nullify or modify the *decision* based on illegality (and/or expediency) of the decision<sup>102</sup>. It is noteworthy that the administrative courts are not able to modify or revoke the procedures or norms through which an entity reached the illegal or mismatched decision: The court can only modify or revoke the decision itself.

The general control of *legality* in public administration, also on the account of self-regulators that have been granted the right to EPP, is the duty of two ombudsmen, *Chancellor of Justice* and *Parliamentary Ombudsman* (Sections 108-110 of the Constitution). Senior administrative organs also control the legality and appropriateness of the administration.

Any person can initiate an *Administrative complaint* against self-regulators that EPP by issuing a complaint to either of the ombudsmen. The administrative complaint can be initiated on

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<sup>96</sup> However, if a private entity has not taken a decision (based on delegated EPP) that affects the rights and responsibilities of the appellant, other appeal measures have to be considered.

<sup>97</sup> The AJPA is applied regardless of what kind of an appellate body has jurisdiction

<sup>98</sup> As already noted in the introduction, the public liability regime applies to all those entities that EPP. Thus, also AJPA applies to all entities that EPP. However, at the first glance, it seems that the right to use AJPA is more limited than that. Under the Section 10 of AJPA, the right to challenge a decision of a private entity (i.e., for example, co-regulators or mandated self-regulators) is possible in administrative appeal, but only when specifically provided in the law. This limitation is usually not a problem, because such provision is generally added to Act that delegate public powers to private entities. However, even if such specific provision would be missing, basic rights guarantee that everyone has right to have a decision relating to her rights and duties reviewed by a court. Thus, the administrative courts have duty to review all cases where there is evidence that a private entity has, in fact, exercised public powers.

Administrative Procedure Act, Section 3.3: "It may be provided by decree that this Act shall also govern the consideration of an administrative matter when the said consideration is performed by an independent institution of public law character, by an association of public law character, by a limited company in which the State is the majority shareholder, or by a private individual."

<sup>99</sup> To some extent also to those entities that are exercising other public functions, e.g. public service functions. However, here only the delegated right to EPP is discussed because I consider delegated regulatory powers as belonging essentially to the category of EPP.

<sup>100</sup> Mäenpää, Olli: Administrative law, in Introduction to Finnish Law, Kauppakaari, 2002, p. 403-466.

<sup>101</sup> However, then again, civil courts are not able to render such orders as administrative courts.

<sup>102</sup> The expediency evaluation rare especially on the account of private entities statutory delegation to EPP. Kulla, Heikki: Välillisen valtionhallinnon valvonnasta. Oikeussystemaattisia näkökohtia erityisesti alistuksesta, Abo Akademi, 1983, p. 20.

the basis that subordinate authority has acted in breach of its duties, has failed to conform with the law, or irregularities or errors have been committed, or that the authority has failed to act (e.g. self-regulator with delegated regulatory powers has failed to self-regulate). Also inadequacy, inappropriateness and non-compliance with good governance are legitimate reasons to initiate a procedure. As a collateral, the administrative complaint remains however very ineffective remedy for illegal action or administrative inappropriateness. There is no possibility of reversal of overruling of a decision for the benefit of person who initiated the administrative complaint<sup>103</sup>.

The Chancellor of Justice and the Ombudsman may prosecute or order that charges be brought also in other matters falling within the purview of their supervision of legality. More often they just provide written statements that are published.

The Ombudsmen are also otherwise obliged to monitor that authorities, civil servants, public employees and other persons, when the latter are performing a public task (i.e. also self-regulators with the right to EPP), obey the law and fulfil their obligations. In the performance of his or her duties, the Ombudsmen also monitor the implementation of basic rights and liberties and human rights.

Finally, it should be clarified that, as pure self-regulators are bound by the private law and not by the public law regime, there is no room for administrative appeal or administrative complaint.

### 3.3. Tort Liability Act and Contractual Liability Applicable to Self-Regulators

In the Tort Liability Act (412/1974) (Chapter 2, Section 1) it is stated that a person who deliberately or negligently causes injury or damage to another shall be liable for damages. This general liability principle applies to all public and private entities and individuals in their activities that fall either to the remit of public or private law. However, again, if an (private or public) entity is considered exercising public powers, when the injury or damage occurred, the outlook of recovering damages is somewhat different than, if there was no exercise of public powers involved.

The liability for damages in the course of EPP is determined according to the Tort Liability Act (Chapter 3, Section 2.1.): *Public entity shall be vicariously liable in damages for injury or damage caused through an error or negligence in the exercise of public powers. The same liability shall apply also to other entities that perform a public task on the basis of an Act, a Decree or an authorisation given in an Act.*<sup>104</sup> In short, the liability is vicarious, if EPP is in-

<sup>103</sup> Mäenpää, Olli: Administrative law, in Introduction to Finnish Law, Kauppakaari, 2002, p. 461-462.

<sup>104</sup> Tort Liability Act. Source: A database of translations of Finnish acts and decrees available at <http://www.finlex.fi/english/> (unofficial translation). There are number of problems in the translation the Act which is taken from the Finlex database. Some of the words require further definitions in order to be understood correctly. Firstly in the Finnish text the Chapter 3, Section 2.1 of the Act begins with the word *julkisyhteisö* which was translated to a *public corporation*. More precise and informative translation is *public entity*, which I use. Furthermore, in the Section 2.1., for consistency and accuracy reasons, I have replaced the notion *other corporations* to *other entities*; and in Section 2.2. notion *corporation* is replaced to notion *entity*. These *other entities* (or *other corporations*) are private entities that perform public administration functions and exercise public powers.

Second problem in the translation of the Act is the phrase *exercise of public authority* which is a translation of a Finnish phrase *julkisen vallan käyttö*. In the Constitution exactly the same phrase *julkisen vallan käyttö* is translated as *exercise of public powers (EPP)*. I prefer the phrase *exercise of public powers* over the *exercise of public authority*. It is, however, important to understand that both of these English translations are often used in the same sense when Finnish legal system is described in English.

volved. Vicarious liability affects the type of damages recoverable. Generally, damages constitute compensation for personal injury and damage to property<sup>105</sup>. However, in the case of vicarious liability, also pure economic loss (intangible loss not connected to personal injury or damage to property) has to be compensated<sup>106</sup>.

For example, if a self-regulator, possessing a statutory delegation to regulate, is found to be liable for damages caused by error or negligence in the course of its EPP, the self-regulator has to compensate economic loss, exactly the same way as the public authorities. If the damage was not caused in the course of EPP, the self-regulator does not have to compensate economic loss.

A pure self-regulator cannot have delegated public powers. Thus, if a pure self-regulator were found to be liable in tort, it would only have to compensate personal injury and damage to property. However, pure self-regulation is often organised through contracts. The damages recoverable based on contractual liability generally constitute of: compensation for personal injury, damage to property as well as economic loss (both intangible and tangible losses are recovered). Thus, only in extra contractual situations of pure self-regulation the recoverable damages become less than in the case of delegated self-regulation.

In tort, economic loss can become recoverable, if there are *weighty reasons*<sup>107</sup> for such compensation. Thus, economic loss can under certain circumstances become recoverable, even though the damage was not caused in exercising public powers. I see possible, that if a pure self-regulator possessed significant private regulatory powers, which would cause harm for third parties, this could constitute weighty reasons for compensating economic loss. However, there is no evidence that this kind of ruling would have actually ever occurred.

However, the question, whether an entity (for example, self-regulator) exercising public powers faces a stricter liability regime, is ambiguous. This is because, Tort Liability Act (Chapter 3, Section 2.2) constitutes a rise in liability threshold caused through an error or negligence in the course of EPP<sup>108</sup>: “*The liability of the entity referred to in paragraph (1) arises only if the performance of the activity or task, in view of its nature and purpose, has not met the reasonable requirements set for it.*” These additional prerequisites for liability signify that the general tolerance level is raised. Those who exercised public powers are not found liable as easily as those who do not.

I therefore conclude that, generally, the damages to be paid are higher for private regulators with statutory delegation to EPP, than they are for purely private self-regulators, provided that the damage was the result of exercising delegated public power. However, EPP presupposes higher tolerance level from the regulatees – the self-regulators exercising public powers are not easily found liable in the first place.

It should be noted that besides damages, the injunction is a possible ‘remedy’ in contractual, as well as, tort cases, i.e. the court can order the defendant to stop its illegal activity (either illegal based on law or a contract). However, what is the applicability of this aspect towards self-regulators? It is limited, because obviously the courts cannot modify, e.g. a self-regulatory norm or an inefficient compliance monitoring scheme.

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<sup>105</sup> Tort Liability Act, Chapter 5, Section 1, determines the damages of which the compensation is to be paid.

<sup>106</sup> Tort Liability Act. Source: A database of translations of Finnish acts and decrees available at <http://www.finlex.fi/english/> (unofficial translation).

<sup>107</sup> Tort Liability Act, Chapter 5 Section 1.

<sup>108</sup> Such limitation of liability in tort does not exist for ordinary torts.

Finally, it is worth noting that public officials (servants) are subject to qualified criminal responsibility, which embraces all their activities as public officials. It is often stated that the legislator should stipulate in the Acts delegating public powers to private entities that they are subject to qualified criminal responsibility.<sup>109</sup> However, the renewed Penal Code (39/1889) stipulates that the private entities and persons that EPP are subject to criminal liability the same way as public officials are<sup>110</sup>. Thus, there is no need to restate this in the delegating Acts, if it is clear that delegated activities constitute EPP for the private entity.

### 3.4. ADMRs – Self-Enforcing Regulation

The use of *Alternative Dispute Resolution Mechanisms*, ADRM, is fairly stabilised in Finland, which can be seen positive from a point of view of self-regulation – it increases the choice of courts and the types of processes. In the Arbitration Act (967/1992)<sup>111</sup> it is stated that any dispute in a civil or commercial matter which can be settled by agreement between the parties may be referred for final decision by one or more arbitrators. A private entity, Central Chamber of Commerce<sup>112</sup>, has been delegated a duty to uphold arbitration board, which appoints arbitrators to the B2B disputes.

There are also other institutions that maintain ADRMs that contribute to the existence of self-regulatory practices, for example, *Consumer Complaint Board*, CCB<sup>113</sup>, which is closely connected to Consumer Ombudsman's office. Unlike in many other countries, the CCB is independent public agency not private entity. The CCB settles disputes primary by seeking reconciliation between the parties, but it also give recommendations in matters of consumer goods and services, the sale of housing and security collaterals given by private persons<sup>114</sup>. The CCB has the right to organise reviews, public hearings and hear professional opinions. The CCB's recommendations are not legally binding. The CCB is not a control authority: It cannot reprimand businesses, issue guidelines concerning good practice or impose injunctions. However, its recommendations are generally very well observed.

## IV. Sectoral Analysis

### 4.1. Standardisation

Main standardising body is the *Finnish Standards Association*<sup>115</sup> (hereinafter SFS) which is an umbrella organisation for standardisation. It is a private, non-profit association co-operating with trade federations and industry, research institutes, labour market organisations, consumer organisations, and governmental and local authorities. Members of SFS governing board include representatives from the professional, commercial and industrial organizations, and a government representative<sup>116</sup>. Right at the outset, it has to be stated that the government

<sup>109</sup> Consider for example: Travaux préparatoires for the Constitution, PeVM 10/1998 vp.

<sup>110</sup> Penal Code, Chapter 40, Section 12

<sup>111</sup> Unofficial translation available in: <http://www.finlex.fi/pdf/saadkaan/E9920967.PDF>.

<sup>112</sup> See later the Chapter 4.2.2.

<sup>113</sup> See *Act of Consumer Complaint Board* (42/1978)

<sup>114</sup> If a case is brought in a court of justice, the same case cannot be decided in the CCB.

<sup>115</sup> See: [www.sfs.fi/](http://www.sfs.fi/) *SFS-sertifiointi* (owned by *Finnish Standards Association* and the *Finnish Association for Quality Assurance of Construction Products*) offers certification services. SFS's services cover the certification of systems and products.

<sup>116</sup> The SFS and its standards-writing bodies, the Finnish Electrotechnical Standards Association and Telecommunications Administration Centre, are members of the European standards organisations CEN, CENELEC

influence is pervasive in the SFS. The influence is mostly contractual and consensual between the authorities and the other member organisations of the SFS<sup>117</sup>.

In 2002 the Government made a proposal for Act on Standardisation, which never was actually proved by the Parliament<sup>118</sup>. Even though the Act was never passed, I use it, because it is mostly stating the *status quo* concerning the functions and responsibilities of the SFS. The SFS maintains an organisational framework for standardisation activities together with the federations of industries (that are founded for the standardisation purposes). The SFS organises and governs standardisation in Finland. It prepares national standards. Furthermore, it gives guidance and monitors the sector specific federations and industry that prepare standardisation initiatives. Furthermore, the SFS ratifies and revokes national standards (that are, however, in principle voluntary)<sup>119</sup>.

The literature is doubtful whether the SFS exercises public powers. This is probably, because the standardising activity is, in most parts, voluntary<sup>120, 121</sup>. One could even argue that, even if the Act on Standardisation had been approved, the Act only would have reshaped limits of its pre-existing right to self-regulate and self-organise<sup>122</sup>, i.e. the industry's private autonomy and right to establish legal entities. This indicates that public law regime or public law remedies should not be applied to this kind of activity.

However, the literature is unanimous in stating that the SFS does have *public administrative functions*, even though it is not necessarily *exercising public powers*<sup>123</sup> and even though, at present, there is no delegating act present. According to the view of *Ministry of Justice*, the SFS would have exercised public administrative functions in all the activities described in the proposed Act on Standardisation<sup>124</sup>. This would have signified that the SFS, in all its delegated activities, would have been subject to public authority surveillance and would have been obliged to comply with general Acts on public administration and public law<sup>125</sup>. Fur-

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and ETSI. SFS is the Finnish source for all international standards and drafts of the International Organization for Standardization, ISO, for European standards and drafts of CEN and, furthermore, for publications of ISO member bodies. SFS also distributes other foreign standards and technical regulations.

<sup>117</sup> For example, some of the specifications of the obligations of the SFS can be seen from: Kauppa- ja teollisuusministeriön ja Patentti- ja rekisterihallituksen välinen tulossopimus vuodelle 2004, which is an administrative budget agreement that allocates funds and tasks to the SFS.

<sup>118</sup> Travaux préparatoires for the Act on Standardisation (HE 214/2002 vp.)

<sup>119</sup> Consider Sections 4 and 5 of the Act on Standardisation in Travaux préparatoires for Act on Standardisation, (HE 214/2002 vp). Besides, the SFS has a number of other functions that it has engaged into that are, however, not discussed here.

<sup>120</sup> Valtiovarainministeriö: Välillinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999, p. 111. Travaux préparatoires for Act on Standardisation HE 214/2002

<sup>121</sup> Exercise of public power signifies decision making that is unilateral and compulsory to the subjects of regulation.

<sup>122</sup> Valtiovarainministeriö: Välillinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999, p. 23.

<sup>123</sup> See for the definition of these concepts, footnote <sup>30</sup>. Valtiovarainministeriö: Välillinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999.

<sup>124</sup> Another government study disagrees with this view and considers that only some of the activities specified in the Act would constitute a public administrative function. Valtiovarainministeriö: Välillinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999, p. 111.

<sup>125</sup> i.e. Act on Administration (434/2003), Administrative Judicial Procedure Act (586/1996), Act on Maintaining Archives (831/1994), Language Act (423/2003), Act on Right to Information on Administrative Matters (621/1999) and Decree on the Openness of Government Activities and on Good Practice in Information

thermore, also basic rights, access to justice and good governance were mentioned as public law principles that would have become applicable to the SFS.<sup>126</sup> However, it has been considered that, despite there is currently no specific delegating Act<sup>127</sup>, the general Acts on public administration and public law principles can still apply to certain functions of the SFS – especially to the ratification and revocation of standards, maintaining the catalogue on standards and EMAS activities, of which the SFS is also responsible<sup>128 129</sup>.

The applicability of public law regime, or at least special parts of it, is justified because the SFS has special monopoly powers in the area of standardising. That could distort the freedom of commercial activity (guaranteed in the Constitution, Section 18), if the SFS did not observe certain principles, general Acts applicable for public authorities and would not be subject to public monitoring. However, it is problematic, from the point of view of coherence of the legal system, that there is no explicit delegation of public powers, even though the SFS is considered to have public administrative functions.

Nevertheless, there are necessarily both, public and private, features present in the standardising activity. Standardising organisations are recognised as belonging to the *intermediate or indirect public sector*<sup>130</sup>. The SFS has other (commercial) activities, besides those specified in the delegating Act, which are subject to private law. In those activities, the SFS and its collaborating standardising organisations have to comply with, for example, the Act on Associations<sup>131</sup> and general principles of contract and tort law.

To conclude, even though public law regime would apply, it has to be adjusted to the private and public objectives of standardising. In fact, it seems that the authorities have attempted to do this.

In the proposed Act on Standardisation there was an attempt to translate the language of some general administrative acts to more specific obligations taking account of the voluntary nature of most of the standards<sup>132</sup>: According to the proposed Act on Standardisation, the drafting of standards should have been voluntary, primary consensual, open and public activity. Everybody should have a possibility to present their views<sup>133</sup>. Even though the Act was never enacted, the SFS has drafted guidelines for standardising activity that reflect these obligations. For example, according to the guidelines everyone has the possibility to propose a new standard, propose amendments to, or revocation of an old standard, to a specific committee that

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Management (1030/1999). Source: Travaux préparatoires for Act on Standardisation, HE 214/2002 vp. Valtiovarainministeriö: Välillinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämisosasto, Helsinki 1999. p. 29.

<sup>126</sup> Travaux préparatoires for Act on Standardisation HE 214/2002, p.21.

<sup>127</sup> Except a very general and old Act on Standardisation that does not say anything specific about the SFS (197/1942), but delineates the rights of the public authorities in standardisation.

<sup>128</sup> See footnote <sup>52</sup>.

<sup>129</sup> Valtiovarainministeriö: Välillinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämisosasto, Helsinki 1999, p. 111.

<sup>130</sup> Travaux préparatoires for Act on Standardisation HE 214/2002

<sup>131</sup> The SFS is not an association of public law character created for a special purpose. Source: Travaux préparatoires for Act on Standardisation HE 214/2002.

<sup>132</sup> The Sections 4 and 9 of the Act on Standardisation delineate the (public) law responsibilities of the SFS and other standardising bodies.

<sup>133</sup> The Section 9.3 stipulates that any national standardisation body has to comply with these conditions.

prepares standards<sup>134</sup>. In the preparation phase, the proposed standard has to be sent to stakeholders that could have an important interest on issue or important knowledge on the matter, i.e. importers, trade associations, consumers, accreditors, industry, public officials. The stakeholders are free to propose changes to the standards that are under preparation in the committee. The committee has to prepare a statement of the comments and try to establish a draft-standard that satisfies all the views presented. If needed, it has to re-send the draft-standard to the commented stakeholders for further comments. The SFS standardising committee ratifies the standard based on a proposal of a preparatory committee. There are special procedures for the ratification required, for example, if it seems that the draft-standard is not widely supported or the above described procedures are not followed in the drafting phase<sup>135</sup>.

The SFS and its collaborating member organisations are subject to monitoring of the ministry of trade and industry based on a financing contract<sup>136</sup>. Furthermore, I consider that the administrative appeal and other public law remedies are available for those that directly suffer damage based on the decisions made by the SFS or its collaborating organisations in their public administrative functions.

## 4.2. Self-Regulation in the Advertising Sector

### 4.2.1. The Central Chamber of Commerce

While the *Consumer Ombudsman* is in charge of the monitoring of compliance to the laws, e.g. concerning misleading advertising<sup>137</sup>, the *Central Chamber of Commerce* (hereinafter CCC)<sup>138</sup> is a private self-regulatory association<sup>139</sup>, which has an important role in pure self-regulation of advertising and marketing practices. However, before looking at this pure self-regulation, it is useful to note that the CCC has also delegated rights to EPPs in some other sectors<sup>140</sup>.

The Section 2 of the Act on Chambers of Commerce and the CCC (878/2002) lists the delegated (self-regulatory) powers. The CCC is obliged to accredit and monitor auditors based on the Act on Audit of Finances (936/1994), appoint arbitrators in specific cases, based

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<sup>134</sup> The SFS committee, who ratifies and revokes the standards, sets committees for different industry sectors. These committees are responsible for drafting standards.

<sup>135</sup> SFS: Working procedure of draft SFS standards, SFS, December, 2004.

<sup>136</sup> For example, some of the specifications of the obligations of the SFS can be seen from: Kauppa- ja teollisuusministeriön ja Patentti- ja rekisterihallituksen välinen tulossopimus vuodelle 2004, which is an administrative budget agreement that allocates funds and tasks to the SFS.

<sup>137</sup> Act on Consumer Ombudsman 40/1978, see especially the Sections 7-11.

<sup>138</sup> See: <http://www.kauppakamari.fi/keskuskauppakamari/index.cfm?language=English>. Generally speaking, the CCC is a joint body representing the Chambers of Commerce in Finland. The CCC supports the work of the regional chambers of commerce and protects the interests of the business community on a nation-wide basis. Furthermore, the aim of the CCC is to bring the point of views of the business community to the preparation of public authority regulations in various work groups and committees.

<sup>139</sup> In the Section 1 of the Act on Chamber of Commerce and Central Chamber of Commerce (878/2002) stipulates that the Act on Association applies to the CCCs. However, it also stipulates that the CCC has public functions which are specified in the law.

<sup>140</sup> They include the authorisation and supervision of the authorised public accountants and auditing societies, the authorisation of real-estate and housing agencies. Furthermore, the CCC is obliged to hold an Arbitration Board, AB, which appoints arbitrators of business to business disputes. It has further public tasks that are set in the Act of Limited Companies and Act on Insurance Companies. The CCC is also responsible of the financing all of these public tasks. See the Act on Central Chamber of Commerce, Act on Auditions, Act on Real-Estate and Housing Agencies.

on the Act on Limited Companies (734/1978)<sup>141</sup>, and accredit and monitor real estate agents based on Act on Real Estate Agents (1075/2000). In the cases of misconduct, accredited auditors and real estate agents may either receive a notice or a revocation of qualification based on a decision of the CCC's Committee (that is in charge of the self-regulated field). Thus, CCC has delegated compliance monitoring and enforcement powers towards real estate agents and auditors.

All the activities described above are considered as delegated EPP. These activities are principally subject to monitoring of the Ministry of Trade and Industry, which also approves the governance rules set by the CCC.<sup>142</sup> The EPP of the CCC belongs to the remit of public law along with the lines explained in Chapters 2.3. and 3.2<sup>143</sup>. Thus administrative court and public law remedies are available to persons or entities suffering from CCC's unlawful exercise of public powers.

As stated, the CCC's self-regulatory activities also concern advertising, marketing and business practices, but these activities are not based on statutory delegation. Thus, these activities are purely self-regulatory, even though they are recognised as activities of the CCC in the preparatory document for the Act on Chambers of Commerce and the CCC<sup>144</sup>.

The CCC develops ethical principles for marketing and advertising, issues statements on improper business practices in the business sector and develops the principles of good business practices.<sup>145</sup> The *Board on Business Practices* (hereinafter BBP) of the CCC handles business-to-business disputes. A business can request a statement from the BBP about its advertising and marketing practices. BBP handles cases related to misleading and comparative advertising, business practices, the violations of business secrets, as well as, libel and slander of competing businesses. The BBP issues statements on whether or not a practice is contrary to good business practice and whether or not it violates the *ICC Code of Advertising Practice*. In practice, the decisions of the BBP are obeyed nearly without exception<sup>146</sup>, even though it is not a public authority with coercive powers.<sup>147</sup>

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<sup>141</sup> It also appoints arbitrators outside the legislative delegation and then its appointments and the procedures of the arbitration are based on the self-regulation of the CCC

<sup>142</sup> Valtiovarainministeriö: Vällinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämisosasto, Helsinki 1999, p. 107

<sup>143</sup> In addition, there are some specific Administrative Acts that are especially applicable to the CCC. Valtiovarainministeriö: Vällinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämisosasto, Helsinki 1999, p. 109.

<sup>144</sup> See travaux préparatoires for the Act on Central Chamber of Commerce and Chambers of Commerce, HE /2002.

<sup>145</sup> See travaux préparatoires for the Act on Central Chamber of Commerce and Chambers of Commerce, HE /2002. <http://www.kauppakamari.fi/keskuskauppakamari/index.cfm?language=English>.

<sup>146</sup> Schulze, Reiner - Scult-Nolke, Hans (editors): Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices, National report, Finland, June 2003, p. 7. Wilhelmsson, 1991, p.114.

<sup>147</sup> Recently established Council of Ethics in Advertising, CEA, deals with all types of consumer complaints. The CCC and the Consultation Committee of Advertising, CCA, are the organizations responsible of the CEA. The aim of the CEA is to give statements of advertising practices. Also the CEA applies the ICC International Code of Advertising Practice and other similar codes of conduct. The CEA has also developed the code of ethics in advertising. Its aim is not to give decisions whether advertising complies with the state laws. Furthermore, it should be noted, that the CEA has explicitly stated that it does not give decisions whether advertising complies with the state laws. The primary function with respect to interpreting legal norms remains with the CCC and decision of the BBP.

Interestingly, the BBP's decisions can have weight as a permitted legal source<sup>148</sup> in an ordinary court. For example, the regulations and rulings produced in the BBP can delineate the content of Consumer Protection Act, CPA, especially its Chapter 2, Section 1, which stipulates: *No conduct that is inappropriate or otherwise against good practice, from the point of view of consumers, shall be allowed in marketing.* However, this right to use CCC's regulations and rulings as a legal source is not granted directly in the CPA, or in any other statute, but in the preparatory documents (for the CPA)<sup>149</sup>.

To conclude, though the CCC has a statutory delegation for some activities described above, it does not have statutory delegation for its self-regulation, monitoring and enforcement of advertising and marketing practices. Thus, the public law remit does not delineate CCC's activities in the field of advertising and marketing practices. However, the existence of marketing and business conduct self-regulation is based on the general right to exercise private powers: In this case, deriving from the Constitutional rights to enter into contracts and establish legal entities (Sections 15 and 13) and Constitutional guarantee of freedom of expression (Section 12), which also limits the possibility for government to regulate on marketing. Under private law, the CCC has right to regulate its members, who have consented to its pure self-regulation. Thus, the CCC's self-regulatory activities in the field of marketing and advertising are judged based on private law, in private courts.

However, there is some level of public *ex post* supervision present, as the marketing practices and business conduct regulation of the CCC is considered a permitted legal source. In the possible mis-regulation of the CCC, meaning that its regulations and ruling would be considered not suited for the purposes, the courts would probably simply cease to use them as a basis of their judgements.

#### 4.2.2. Medical Products Marketing

Marketing of medical products is nowadays a strictly legislated area. In the recent past, the marketing of medicinal products was primarily regulated by without reference to an Act through low level statutes. This kind of administrative regulation was seen contravening Section 12 of the Constitution, freedom of expression. It was seen that the concerns of public health did allow for limitation of marketing through legislation, but such limitations have to be made in a form of an Act<sup>150</sup>. As a result, Act on Medicines that regulates the marketing of medical products was enacted.<sup>151</sup>

However, it seems that there is still room for self-regulation. The pharmaceutical industry, the *Pharma Industry Finland*, PIF, voluntarily controls marketing practices in accordance with its

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<sup>148</sup> However, there are various opinions about this. If such 'right' or peculiarity to delineate or interpret certain general norm is specifically stated in the Act or travaux préparatoires and such rights is given to some private actors or to a certain group of actors, I do not see a reason why the courts could not use such precedents of codes of practice as permitted legal sources.

<sup>149</sup> See: travaux préparatoires for the Consumer Protection Act, HE 8/1977 vp, p. 25. And similar right to use CCC's rulings and regulations as a legal source in court is granted to business-to-business complaints in the travaux préparatoires of Act on Improper Business Practices, HE 114/1978 vp, p. 1. However, if self-regulation contradicts mandatory legislation, it cannot have significance as a legal source. See: Schulze, Reiner - Scult-Nolke, Hans (editors): Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices, National report, 2003, p. 3.

<sup>150</sup> This is how the Section 80 of the Constitution and the rule of law, Section 2.3, principle are interpreted.

<sup>151</sup> Travaux préparatoires for Act on Medicines (HE 46/2002) p. 26.

strict code of ethics, the *Code for the Marketing of Medicinal Products*, CMMP. PIF is a purely private self-regulator, i.e. it does not have a statutory delegation of EPP.

Though the PIF is a private entity, its self-regulation, the CMMP, very closely corresponds to the existing legislation relating to medicinal products, consumers and competition<sup>152</sup> and on the *International Code of Advertising Practice* and the provisions introduced by the Council Directive<sup>153</sup>. All members of PIF have agreed to comply with the CMMP. The compliance with the CMMP is monitored by the *Supervisory Commission for the Marketing of Medicinal Products*, SC, and by two *Inspection Boards* working under the SC<sup>154</sup>. The SC<sup>155</sup> deals with appeals against decisions made by the Inspection Boards. If necessary, it deals with and issues statements concerning marketing principles and matters guiding the work of the Inspection Boards. The SC also appoints the members of the Inspection Boards.<sup>156</sup>

If a marketing practice is found to contravene the CMMP, the company concerned may be admonished or requested to discontinue the practice. A request to discontinue a marketing practice shall be made in cases in which a violation is major. The practice must then be discontinued immediately. The SC or Inspection Boards may order the company which contravened the CMMP to pay a sanction fee (max. 20 000 EUR). In cases of continued violation of the CMMP the SC may order a company to pay damages of an amount of at least EUR 20,000 and not exceeding EUR 200,000. The Supervisory Commission may also order a handling fee, which covers for the costs of the procedure.

The same reasoning applies to self-regulation of PIF as to CCC. They self-regulate area that is Constitutionally protected primary for the private sphere due to the freedom of expression. Furthermore, the self-regulation of the pharmaceutical industry is possible due to the freedom of contract and right to establish legal entities. Thus, the applicable regime is private law.

#### 4.2.3. The Direct Marketing Association

Finnish *Direct Marketing Association*<sup>157</sup>, DMA, and *Association of Finnish Advertisers*<sup>158</sup>, AFA, are also examples of pure self-regulation in Finland. The DMA represents the major

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<sup>152</sup> For example, Act on Medicines 395/1987.

<sup>153</sup> 92/28/EEC.

<sup>154</sup> Inspection Board I monitors all marketing of medicinal products to the general public. It checks all magazine and newspaper advertisements of medicinal products from a two weeks period four times a year. All radio and television commercials shall be inspected in advance. Inspection Board II monitors marketing activities directed towards health care personnel. On request, Inspection Board II will determine whether or not a product has been marketed contrary to the Code. On its own initiative, the Board may also deal with or issue statements concerning matters relating to marketing in general. Both Inspection Boards consist of four permanent members and personal deputies who are experts from outside the pharmaceutical industry and a secretary.

<sup>155</sup> The SC comprises of the Chairman and 5 members and personal deputies who are experts from outside the pharmaceutical industry and a secretary.

<sup>156</sup> Disagreements between companies concerning activities violating the CMMP shall be submitted for examination to the system set forth in the Code before they may be brought to the attention of the relevant authorities.

<sup>157</sup> [http://www.ssml-fdma.fi/english/main\\_english.html](http://www.ssml-fdma.fi/english/main_english.html)

<sup>158</sup> The AFA's aim is to further the interests of advertisers and to promote a policy of informative advertising which conforms to the accepted practice of the trade. The member companies account for over 80 per cent of Finland's total advertising expenditure. The Association is a member of the World Federation of Advertisers (WFA), whose members account for 85 per cent of the global advertising expenditure. As services to mem-

direct marketers in Finland. The member companies of the association include the largest book and magazine publishing companies, mail order houses, direct selling companies, companies in trade and industry, banks, insurance companies, DM advertising agencies, DM planning agencies, as well as, many other service enterprises in the field, such as addressing, mailing, printing and telemarketing companies<sup>159</sup>.

Through joining the DMA the member companies have committed to follow the self-regulatory codes such as: Rules for Electronic Consumer Trade, The Rules of Fair Play, and Direct Selling Industry Code of Conduct, which include rules for network marketing (based upon the provision of the ICC International Code on advertising Practice). Since there are no specific provisions for e.g. snowball systems or Multi-Level-Marketing, the rules for network marketing are not without significance as a legal source.<sup>160</sup>

The same reasoning applies to self-regulation of DMA and AFA as to PIF and CCC. Freedom of expression is their primary source of legitimation. The basis is on private law. If their self-regulation fails, to extend that legislator sees that is necessary to do something in order to protect other basic rights violations, the outcome would be probably a Parliament Act.

### 4.3. Media

The self-regulation of media, especially, journalists' pure self-regulation, has been one of the few sectors where there has been fierce academic discussions concerning the role of self-regulation and the legal significance of such regulations<sup>161</sup>. The Constitutional right, Section 12 concerning freedom of expression, dominates the discussion. As, in Finland, so much emphasis is put on the self-regulation of journalists and so little is being said about self-regulation in broadcasting, I will concentrate on the interplay of journalists' self-regulation and legislation.

The journalists and other personnel engaged in mass media have voluntarily committed themselves to advancing and upholding the ethical principles of the profession and issued *Ethical Principles for Journalists* (Hereinafter EPJ). The *Council for Mass Media*<sup>162</sup> (hereinafter CMM) is a pure self-regulatory entity for publishers and journalists in the field of mass communication. Its task is to interpret good professional practice through interpreting EPJ and defend the freedom of speech and publication. Additionally, the CMM handles complaints against its members. If the CMM establishes, through investigation, that *good professional practice* has been breached, it issues a notice which the party in violation must publish within a short time span<sup>163</sup>. Therefore, the CMM interprets, monitors and solves disputes based on ethical principles, not based on legal norms.

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bers, the AFA provides information and advice on matters concerning advertising; arranges seminars and workshops; commissions surveys; publishes reports, guidebooks and directories; and maintains a library.

[www.mainostajat.fi/mliitto/index.asp](http://www.mainostajat.fi/mliitto/index.asp)

<sup>159</sup> The objective of the Finnish DMA is to support the direct marketing industry and the members of the association in establishing a good and trusting relationship with consumers, media, business, industry, the authorities and government institutions.

<sup>160</sup> Schulze, Reiner - Scult-Nolke, Hans (editors): Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices, National report, 2003, p.9. [http://www.ssml-fdma.fi/english/main\\_english\\_rules.html](http://www.ssml-fdma.fi/english/main_english_rules.html)

<sup>161</sup> E.g. Wilhelmsson, Thomas, Semmodern Ansvarsrätt, Jyväskylä 2001, p. 332-333.

<sup>162</sup> See: <http://www.jsn.fi/english/>.

<sup>163</sup> Under certain circumstances involving important principles, the CMM can initiate an investigation on its own initiative. It can also issue policy statements regarding questions of professional ethics. The CMM is com-

The *Ethical Principles for Journalists* have existed from the beginning of 1958 and they have been amended several times. They concern: correct methods of information gathering and publishing for journalists, occupational standing of the journalists, obligation to observe persons' right to privacy and personal integrity and journalist's responsibility to correct false statements and to publish a counterword. However, the principles do not contain any procedure to deal with the breach of these principles.

The greatest points of interference between the ethical principles and legislation is the responsibility to correct false statements (and to publish a counterword) and right to privacy<sup>164</sup>. In the preparatory document for Act on Freedom of Speech (2003/460) it was considered that the precedents, given by the CMM, are to be used to interpret the Section 10 of the Freedom of Speech Act: responsibility to correct false statements and to publish counterpart.<sup>165</sup> Thus, concerning this specific question there is an overlap between the self-regulation and legislation, and the precedents of the CMM can be used as a permitted legal source.

The affect of self-regulation to the legally protected right to privacy is more problematic. The right to privacy is a constitutionally guaranteed under the Section 12, which is specified, for example, in Penal Code, Chapter 24 concerning the offences against privacy, public peace and personal reputation. For mass media the Section 8 of the Chapter 24 is especially important<sup>166</sup>.

There has been a disagreement over the legal significance of the ethical principles: whether breach of ethical principles delineating privacy can constitute a tort liability<sup>167</sup>. Over the recent years the district and appellate courts have issued damages partly basing their verdict partly on the violation of ethical principles of CMM. Also in the Court of Highest Instance, the *good professional practice* of journalists has been under scrutiny (e.g. KKO 1991:79, 2002:45)<sup>168</sup>. In the recent case of Helsinki appellate court (Nostokonepalvelu Oy, HO 17.11.2003) it was decided that the ethical principles of journalists were not to be used as a basis of the verdict. The Court of Highest Instance did not grant right for the appeal for this case.

Recently the CMM has given a statement in which it condemns the rulings based on ethical principles illegal, because it considers that ethical principles can not be a basis for a judgement in a court of justice. Besides, it sees that the ethical principles are stricter than legal lim-

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prised of a president and nine members. Of the nine members, six represent areas of expertise in the field of mass media, and three represent the public at large. The president and representatives of the public are elected by the council itself, but they may not be employees or board members of any company or organization engaging in mass media. The media representatives are appointed by a separate selection committee, which is comprised of representatives of media organizations affiliated to the CMM.

<sup>164</sup> Neuvonen, Riku: Sananvapaus, joukkoviestintä ja itsesääntely, Helsingin yliopisto, lisensiaatintyö, 2004.

<sup>165</sup> Neuvonen, Riku: Sananvapaus, joukkoviestintä ja itsesääntely, Helsingin yliopisto, lisensiaatintyö, 2004.

<sup>166</sup> *Section 8 - Invasion of personal reputation (531/2000) (1) A person who unlawfully (1) through the use of the mass media, or (2) in another manner publicly spreads information, an insinuation or an image of the private life of another person, so that the act is conducive to causing that person damage or suffering, or subjecting that person to contempt, shall be sentenced for an invasion of personal reputation to a fine or to imprisonment for at most two years. (2) The spreading of information, an insinuation or an image of the private life of a person in politics, business, public office or public position, or in a comparable position, does not constitute an invasion of personal reputation, if it may affect the evaluation of that person's activities in the position in question and if it is necessary for purposes of dealing with a matter with importance to society.*

<sup>167</sup> Neuvonen, Riku: Sananvapaus, joukkoviestintä ja itsesääntely, Helsingin yliopisto, lisensiaatintyö, 2004.

<sup>168</sup> Helsingin Sanomat 10.1.2003, p. A7.

its set<sup>169</sup>. This issue divides the legal scholars. Some are absolutely certain that<sup>170</sup> ethical principles can be used and have to be used in the interpretation of the general clause of the Tort Liability Act, Chapter 2, Section 1, which states that “*a person who deliberately or negligently causes injury or damage to another shall be liable for damages*”. They argue that what is *deliberate* or *negligent* has to be judged against the backdrop of general good practice of the journalist that the ethical principles delineate<sup>171</sup>. Other academics argue that the freedom of expression demands that ethical principles are not to be used in courts, even as permitted legal sources. I support this view, as the Act on Freedom of Speech (or its preparatory documents) does not refer to the *good practice of journalists* or to the use of precedents produced by the CMM as permitted legal sources. The situation is different on the account of using the BPP’s precedents (the disciplinary board of the CCC). As in the previous Chapter it was demonstrated, the CPA, especially its Chapter 2, Section 1, refers to the *good marketing practice* and the preparatory documents assigns for the courts the right to use the CCC’s decisions as legal sources. On the account of privacy, an implicit delegation of interpretative powers to CMM, through requirement of good practice, is missing.

The academic discussion and court rulings demonstrate the strong independence of self-regulators in the field of freedom of expression. The self-regulation is based on private law and concerns those journalists that have consented to it.

#### 4.4. e-Commerce

There are various codes of conducts set by private and public bodies for the e-commerce. They are all based on international codes of conduct for e-Commerce originally set by organizations such as OECD and FEDMA. The Nordic Consumer Ombudsmen's Position Paper to Trading and Marketing on the Internet and in Similar Communication Systems is the most well known code of conduct in the field of e-commerce in Finland. The FFCT, the CCC, the Finnish DMA and the Finnish Federation for Communications and Teleinformatics, FiCom, have also set codes of conduct for the e-commerce.

The SFS also awards Qweb certification marks. Qweb is the IQNet system for the certification of e-commerce and e-business activities worldwide. It is based on international standards and on a proprietary IQNet technical specification. The Qweb certification service has been developed under the guidance of IQNet through previously existing and validated certification schemes. Its aim of the Qweb mark is to assure customers and users that certified suppliers satisfy the most severe principles that apply to the e-commerce and e-business activities including codes of conduct in business transactions, contract terms, privacy and security of transactions.

The driving forces behind self-regulatory initiatives of e-commerce are the difficulties of states, tied to a one geographical location as opposed to e-commerce, to succeed in protecting their citizens from illegalities. As many of the code of conducts introduced are lacking the self-regulating body that would monitor and enforce the codes of conduct, it is pointless to go deeper on the discussion of whether such body would be considered public or private and what kinds of legal affects would be attached to it. As what comes to the SFS and its Qweb certificate, what is already said about the legal status of the SFS, applies.

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<sup>169</sup> The legal limits are set e.g. in the Penal Code 39/1889 Chapter 24 which concerns offences against privacy, public peace and personal reputation.

<sup>170</sup> If not in the interpretation of Penal Code – in the interpretation of Tort Act at least.

<sup>171</sup> For example: Wilhelmson, Thomas: *Senmodern Avtalsrätt*, 2001, p. 333.

#### 4.5. Legal Practitioners

The *Finnish Bar Association* (hereinafter FBA) is an association of public law character, and it is a self-regulator with delegated public powers (and regulatory powers) to regulate lawyers. Public powers and other functions of the FBA are specified in the Act on Advocates (496/1958) (hereinafter AA) and in the Decision of Ministry of Justice (191/1959) which also approves the rules of FBA.

Although, in some associations of public law character the membership is obligatory, the AA does not require this. A lawyer can choose not to belong to the FBA and still exercise his profession. However, the AA limits the membership to qualified lawyers only (hereinafter, advocates). The FBA has specified that a qualification to gain the title of advocate presupposes from the applicant: a Master in Law, a past written examination (designed by the FBA) and certain years in legal practice.

Furthermore the AA requires that the FBA maintains an arbitration tribunal for solving disputes concerning advocates and their clients. The client of an advocate can always initiate proceedings against his advocate in an arbitration board. The arbitral tribunal can issue a binding decision in a dispute regarding advocate's fee. The arbitration board consists of members of the board of the FBA, or of members of the boards of local chapters of the FBA. The members of the board have to comply with the Acts concerning judges and they have similar liability regime as judges in courts.

Besides the rules set on the AA, the FBA has set rules governing good professional conduct, *Rules of Proper Professional Conduct for Advocates*<sup>172</sup>. The stipulations in the AA, as well as the code of conduct have to be obeyed by all the members of the FBA. The FBA can set sanctions against those who are not complying with the rules.

When the FBA is exercising its public powers, based on the delegating act (i.e. activities described above), it has to comply with the general administrative Acts specified in the previous Chapters. The FBA is subject to monitoring of the ministry of justice. Furthermore, the Chancellor of Justice has some monitoring powers over the decisions of the arbitration boards.<sup>173</sup> The members of the arbitration board and the governing board are subject to judicial review when they EPP and the public law remedies apply. In other activities, than described above, the FBA is a private entity and private law regime applies.

Furthermore, there is another lawyers' association, *Association of Finnish Lawyers*, AFL. It has approved a code of conduct, which defines *Good Practice of Lawyers*. This code of conduct is, however, a mere statement of aspiration. The powers to enforce and monitor this code are weaker than in the case of FBA. One of the reasons, why the AFL was established, was to provide an alternative association for lawyers. The fact that there are two lawyers associations could trigger a 'regulatory competition' between them. However, if this were to happen, these two associations would in unequal competitive position, because the FBA has a statutory base and, thus, also statutory responsibilities. On the other hand, the AFL is freer to act as long as it benefits its members. Of course, the AFL must recognise that has to maintain a good reputation also towards the general public in order to bring benefit for its members.

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<sup>172</sup> The rules delineate the requirement of good professional practice of advocates set in the AA, Section 5. Thus, there is some scope in using the arbitration board's rulings as permitted legal source, when a case against an advocate is tried in an ordinary court.

<sup>173</sup> Valtiovarainministeriö: Välillinen valtionhallinto – hankkeen muistio, Valtiovarainministeriö, Hallinnon kehittämissosasto, Helsinki 1999, p. 50-51.

## 4.6. Financial Markets Regulation

### 4.5.1. Introduction

The *Ministry of Finance* is responsible for drafting legislation for banking and securities markets to be enacted by the Parliament. It is also responsible for issuing detailed statutes, such as *Decisions* or *Degrees* concerning banking and securities markets. The *supervision* of the banking, securities and insurance markets is divided between independent State authorities: the *Financial Supervision Authority* (hereinafter FSA) which operates in connection with the *Bank of Finland*, and the *Insurance Supervision Authority*, which is an agency under the *Ministry of Social Affairs and Health*. The FSA supervises the banks, other credit institutions and the securities markets. The *Insurance Supervision Authority* supervises insurance markets.

Generally, the financial markets have embodied relative many self-regulatory bodies and this self-regulation has been able to capture many of the relevant businesses in the policy field concerned<sup>174</sup>. In addition to that, public authorities have had a positive outlook towards self-regulation in the financial sector – especially in the securities markets<sup>175</sup>. However, there are also several Acts affecting Finnish financial markets<sup>176</sup>.

### 4.5.2. Securities Markets – Stock Exchange

Among other statutes, Finland's securities markets are regulated by the *Securities Markets Act* (495/1989) (hereinafter SMA). This Chapter examines the interplay between the SMA and the self-regulation of the Finnish stock exchange. There are also other statutes that regulate and allow for self-regulation in the securities markets, market actors and instruments. However, this research does not leave room for a closer examination of all of them.

The SMA stipulates that only a stock exchange (or approved securities intermediary entitled to trade on the stock exchange list) may, on a professional basis, organise trading of securities

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<sup>174</sup> Most of the functions and market places of the *foreign exchange* and the *money markets* are set in the global and European level by private actors.

<sup>175</sup> Wuolijoki, Sakari. Hyvä Pankki- ja Vakuutustapa, Suomalaisen lakimiesyhdistyksen julkaisu, E-sarja No. 9, p. 55.

<sup>176</sup> Such as, in the securities law framework, the *Securities Market Act* (495/1989), *Act on Trading in Standardised Options and Futures* (772/1988) *Act on the Book-Entry System* (826/1991), *Act on Certain Conditions of Securities and Currency Trading as well as Settlement Systems* (1084/1999) and *Guidelines by the FSA on Securities Offering and Obligations to Provide Information under the Securities Markets Act* (No.204.1). Furthermore, there are several *Decisions of the Ministry of Finance* concerning stock exchange listing rules.

Furthermore there are several Acts on credit institutions: the *Act on Credit Institutions* (1607/1993), *Act on Commercial Banks and Other Credit Institutions in the Form of a Limited Company* (1501/2001), *Savings Banks Act* (1502/2001), *Act on Cooperative Banks and Other Credit Institutions in the Form of a Cooperative* (1504/2001), *Act on Mortgage Credit Banks* (1240/1999), *Act on Mortgage Societies* (936/1978) and the *Act on the Temporary Interruption of the Operations of a Deposit Bank* (1509/2001). The legislation specific to credit institutions is not the total collection of laws governing these institutions. There are some of other important laws that pertain to credit institutions such as (in the company law framework) the *Companies Act* (1978/734).

Recently the *Act on Financial Collateral* (11/2004) implemented *Directive 2002/47/EC of the on Financial Collateral Arrangements*. The Act applies to the use of securities and cash on account as collateral in the financial markets and in corporate financing. A new Act on the *Supervision of Financial and Insurance Conglomerates* was enacted in July 2004. It will replace the current *Act of 2002 on the Supervision of Financial and Insurance Conglomerates* and implement *EU Directive 2002/87/EC on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate*.

to the general public, i.e. to bring together buyers and sellers of securities<sup>177</sup>. In this Chapter I concentrate on the statutes delineating and facilitating self-regulation in the stock exchange and exclude the securities intermediaries<sup>178</sup>. The SMA<sup>179</sup> sets several criteria for the organisers and organisation of stock exchange<sup>180</sup>.

Firstly, the presumption is that a stock exchange is to be administered through a limited company structure, because SMA stipulates that a license to operate a stock exchange may be granted to a Finnish *limited company*.

Secondly, it is required that a stock exchange has a reliable administration, sufficient economic operating conditions and whose organization of operations and rules (i.e. *self-regulation*) provide sufficient protection to investors. The Ministry of Finance grants the licence for stock exchange, if the limited company applying for the right to stock exchange (hereinafter applicant) fulfils these criteria. A successful applicant has to demonstrate convincingly that it would manage stock exchange with professional skill and in accordance with sound and prudent business principles. The license application of the applicant has to contain a sufficient account of the applicant, the most important shareholders of the applicant, holdings of the shareholders, the place of business, nature of operations to be carried out and persons in charge of the management of the stock exchange. Furthermore, the application has to contain information on the reliability, good reputation, experience and the suitability of shareholders, persons comparable with shareholders and, at least, two persons engaged in the management of stock exchange<sup>181</sup>.

After a company has been granted the licence for stock exchange, the FSA still monitors the changes in the shareholdings of the licensed company. Upon certain conditions it may object to the acquisition of a holding (new shareholders) in the licensed company or, in some cases, deny the voting rights of a new shareholder(s). Furthermore, under the SMA, the voting rights have to be dispersed: At a governing meeting of the stock exchange and/or the licensed company, no one may vote with more than one-twentieth of the votes represented at the meeting.<sup>182</sup>

The *Helsinki Stock Exchange*<sup>183</sup> (HEX) is a limited company affiliated to the OMX Ltd, largest integrated securities market in Northern Europe. HEX is the sole licence holder entitled to

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<sup>177</sup> SMA Chapter 3, Section 16.

<sup>178</sup> There are some specific regulatory self-regulatory obligations for securities intermediaries that slightly diverge from the obligations of the stock exchange.

<sup>179</sup> Chapter 3, Sections 1, 1a and 2.

<sup>180</sup> The criteria are monitored ex ante, because running a stock exchange requires a license from the *Ministry of Finance*.

<sup>181</sup> The criteria are monitored ex ante, because running a stock exchange requires a license from the *Ministry of Finance*.

<sup>182</sup> SMA Chapter 3, Sections 2d, 2e, 8.

<sup>183</sup> The *Helsinki Stock Exchange* operated as a free-form association from its establishment in 1912 until 1984, when it was re-organised into a non-profit cooperative. In 1995, the cooperative was converted into a limited company, and in December 1997 the *Helsinki Exchange* and *SOM Ltd (Finnish Securities and Derivatives Exchange Clearing House)* merged to form *HEX Ltd (Helsinki Securities and Derivatives Exchange Clearing House)*. In 1999, following a reorganisation, the new consolidated *HEX Ltd* was established, consisting of the parent company, *Helsinki Exchanges Group Ltd*, and its subsidiaries. In 2001 and 2002 *HEX Ltd* acquired a majority share of the Tallinn Stock Exchange and the Riga Stock Exchange.

The name *HEX Ltd* was changed to *HEX Integrated Markets Ltd* after its merger with the Swedish *OM* (The *OM* was the leading supplier of transaction technology which both owned and operated the Stockholm Stock Exchange). Nowadays, *HEX Integrated Markets Ltd* is a subsidiary of *OM HEX AB (publ)*. (*OM HEX* was

establish and maintain stock exchange operations for the general public in Finland. Even though the SMA and other legislation concerning securities trading stipulate a number of duties to self-regulate for the stock exchange (in this case HEX), the public authority has not delegated specific powers to exercise public powers to HEX.

Generally, HEX's right to self-regulate originates from private sphere: Freedom to engage in commercial activity (Section 18 of the Constitution): right to enter into contracts and right to establish legal entities. HEX is a pure self-regulator. HEX's duty to self-regulate certain activities constitutes a limitation for its private autonomy and not an extension of its powers. As the HEX is seen as a pure self-regulator, its self-regulation is based on contracts and falls totally to the remit of private law.

Regulations: Under the SMA<sup>184</sup> a stock exchange has to have a stock exchange list for the purposes of listing and trade of listed securities. The trade on the stock exchange list has to be arranged reliably and impartially so that the price formation of listed securities is based on binding tender offers and sales offers or calls for offers. The SMA further stipulates<sup>185</sup> that a stock exchange has to have rules containing (self-)regulations supplementary to the SMA at least on: 1) the admission of a security for trade; 2) the organisation of trade on the stock exchange list; 3) how the information relating to the offers, offer calls and transactions are made available to the parties to trade; 4) what grounds granting and revocation of the rights of a securities intermediary, another operator in the stock exchange and a stock exchange broker; 5) demands, rights and duties imposed on listed companies and their management, other issuers of listed securities and their management, stock exchange members, other operators in the stock exchange and stock exchange brokers for the fulfilment of the duties based on the SMA and the *Rules of the stock exchange* or otherwise; 6) how the equality between the shareholders is safeguarded, if a limited liability company may trade in its own shares in the stock exchange; as well as 7) how the stock exchange realises its the supervisory duties set in the SMA<sup>186</sup>. The self-regulation has to take into consideration the special features of the securities subject to trade and the investors participating in the trade. The stock exchange self-regulation and any amendments thereto have to be confirmed by the *Ministry of Finance* on application (*mandatory delegated self-regulation or co-regulation*). Ministry of Finance may, in order to enhance trust in the securities markets, or for another weighty reason, order that the rules are amended or supplemented<sup>187</sup>.

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created when Swedish *OM* and *HEX* merged in the beginning of September 2003.) The names were, once again, renewed in September 2004: *HEX Integrated Markets Ltd* became *OMX Exchanges Ltd*; *Helsinki Securities and Derivatives Exchange* became *Helsinki Stock Exchange Ltd*; *HEX Back Office and Custody Services Ltd (HBO)* became *OMX Back Office and Custody Services Ltd*; and *HEX Securities Services Ltd (HSS)* became *OMX Securities Services Ltd*. *OMX* is a limited company that owns and operates the largest integrated securities market in Northern Europe and is a leading provider of marketplace services and solutions for the financial and energy markets. *OMX* has two divisions: *OMX Exchanges* and *OMX Technology*.

Sources: Koskenkylä, Heikki (ed.): *Finnish Financial Markets 2002*, Bank of Finland Studies, A:105:2003, p 83, HEX: <http://www.hex.com/en/releases/releasesarchive/2003/release2903en.shtml>, Ministry of Finance: *Product and Capital market Reforms in Finland*, 6/2003, p. 38, and *OMX*: <http://www.omxgroup.com/company/en/index.aspx?rt=1&menu=company>.

<sup>184</sup> Chapter 3, Section 2a.

<sup>185</sup> Chapter 3, Section 4.

<sup>186</sup> SMA: Chapter 3, Section 6.

<sup>187</sup> As a last resort it is seen that the Ministry itself can issue such rules, as an emergency procedure, if the self-regulator fails to regulate or its regulations are seen as unacceptable. *Travaux préparatoires for Modifying the Securities Market Act und Other Acts Concerning Clearing (HE 209/1997 vp.)*

Monitoring and enforcement: The operations of stock exchange (or operations of the actors involved in stock exchange trading) have to be ceased, if they disobey the mandatory legislation, self-regulation of the stock exchange, or *good practice* in the stock exchange. The stock exchange is responsible of self-monitoring the compliance and ceasing the operations that are against to law, its self-regulation and good practice in the stock exchange<sup>188</sup>. Furthermore, HEX is obliged to report the violations to the public monitoring authority, FSA. Equally, public authorities are responsible for monitoring the compliance to the legislation, self-regulations and good practise as well as enforcing them<sup>189</sup>.

For example, *Act on Book-entry Accounts* (827/1991), and *Act on Trading in Standardised Options and Futures* (772/1988) also presuppose self-regulation from the stock exchange and from some other securities markets actors, such as securities depository. Thus, the SMA is not the only statute based on which, HEX (and the *Finnish Central Securities Depository Ltd*) have obligations to self-regulate and supervise activities and actors in the securities markets. Some of the self-regulations have to be approved by the Ministry of Finance .

It should be also noted that some parts of the self-regulation of the HEX and some other self-regulators operating in the securities markets (i.e. the *Finnish Central Securities Depository Ltd*), are based on their (purely private) need to secure flexibility and security in the Finnish securities market, i.e. the legislation does not explicitly presuppose such self-regulations.

Self-regulations of the HEX and *Finnish Central Securities Depository*, either presupposed in the statutes or based on purely private initiative have included, for example: Rules of the Securities Exchange, Rules of professionally organised trading, Rules of the Finnish Central Securities Depository, Decisions related to rules of the Finnish Central Securities Depository, and Rules of the Derivatives Exchange and the Clearing House.<sup>190</sup> However, it should be noted that the rules are in constant change – this list represents the *status quo* in 2004. In 2005 the rules and the rule names were already renewed.

As already said, the obligation to impose self-regulatory rules (delegated self-regulation) has to be considered rather a limitation to private autonomy of the stock exchange than a delegation of public powers.

The supervisory rules of the HEX were renewed in 2001 (and partly again 2005). The aim of the reforms was to make market supervision more effective and emphasize that breaches of (self-)regulations are handled independently from HEX's (and *Finnish Central Securities Depository's*) other operations.<sup>191</sup>

If a company is suspected of acting in breach of the stock exchange's rules and regulations, the matter is always investigated by the *Exchange's Surveillance Function* which is a private organ established . In 2005 it was decided that the majority of *Surveillance Function's* members are to have an independent status and all of them an excellent working knowledge of the securities markets. The chairman is recruited outside the remit of stock exchange and the major owners of the stock exchange. The *Surveillance Function* is independent of the *Boards of Directors of OMX Exchanges* (parent company of the HEX) and the HEX.<sup>192</sup>

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<sup>188</sup> Travaux Préparatoires for amending the Securities Market Act (HE 184/2001 vp.) p. 18.

<sup>189</sup> Chapter 3, Section 5-6.

<sup>190</sup> Travaux Préparatoires for amending the Securities Market Act (HE 184/2001 vp.)

<sup>191</sup> [http://www.hex.com/en/trading/index/unnamed\\_8/unnamed\\_1.html](http://www.hex.com/en/trading/index/unnamed_8/unnamed_1.html)

<sup>192</sup> <http://www.hex.com/>

Minor breaches result in written criticism of the company. More serious cases are referred to the *Disciplinary Committee*. Members of the *Disciplinary Committee* are legal and financial experts independent of the HEX. Sanctions possible for companies are a warning, a fine or de-listing. Those subject to enforcement include: *Helsinki Stock Exchange's* securities and derivatives trading members, market makers, brokers employed by them and listed companies. Those covered at *Finnish Central Securities Depository* include clearing parties and account operators.<sup>193</sup>

There was no explicit obligation under the Acts to create a *Disciplinary Committee*, but the HEX and *Finnish Central Securities Depository* saw it useful for fulfilling their monitoring obligations. In 2005 it was decided that all disciplinary fines imposed by the exchange's *Disciplinary Committee* are donated to a foundation established for promoting research in securities markets<sup>194</sup>.

In the OECD's country report concerning Finland some concern is raised whether the self-regulation in the financial markets leads to market imperfections. In the report, for example, parts of the securities market is described as a self-regulated network where regulation is delegated to the main (domestic) market players, HEX and Finnish Central Securities Depository, which are purely private bodies organised to a company format. In the report it is claimed claim that there can be signs of discrimination of these actors. They admit that discriminatory behaviour to outsiders (through fees or administrative barriers for example) is hard to pin down. However, what is evident is that the Finnish Central Securities Depository has not accepted any foreign rivals with clearing party status despite there has been applications<sup>195</sup>.

#### 4.5.4. Other General Self-Regulators in the Securities Markets

Organisations such as the *Finnish Association of Securities Dealers* (hereinafter FASD), and the *Finnish Association of Mutual Funds* (hereinafter FAMF), which represent securities (and financial) markets operators, contribute to legislative development by, for example, commenting on development projects or participating in legislative working groups.

The FASD is a purely private self-regulatory association of the Finnish investment services industry. The association accepts as its member broker/dealers and other licensed financial services firms engaged in public securities business. The FASD gives rules and recommendations to its members such as: General terms for the lending of securities, General contract terms of investment service, General terms and conditions of orders to purchase and sell securities, Global Master Securities Lending Agreement and Investment research disclosure instructions.

The FAMF is a purely private trade association for the Finnish investment fund industry. It also has self-regulatory functions. The FAMF gives rules and recommendations such as: Recommendation for the Regular Reporting of Certain Fund Statistics and Recommendation for the Valuation of Non-Quoted Portfolio Securities.

The enforcement of self-regulation is efficient in the securities market. The self-regulation is made binding to the market participants by standard contracts. It is impossible to enter the marketplace, if one does not agree (in written) with the self-regulations. Thus, self-regulation

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<sup>193</sup> [http://www.hex.com/en/trading/index/unnamed\\_8/unnamed\\_1.html](http://www.hex.com/en/trading/index/unnamed_8/unnamed_1.html)

<sup>194</sup> Press release of the OMX, 14th of May 2005.

<sup>195</sup> OECD: Reviews of Regulatory Reform: Finland, A New Consensus for Change, SG/SGR (2003)2, p.90.

in the securities market is based on contractual arrangements (a network of standard contracts). It is explicitly said in the preparatory works for legislation that self-regulation does not have legal effects outside the contractual relationship. However, in the same token, it is said that a well established practice, through self-regulation, can become *customary law* that can in disputable cases create binding affects (rights and liabilities) towards third parties.<sup>196</sup>

There is also a relatively new purely privately initiated ADRM in the securities market that is predominantly directed towards consumers. The *Securities Complaint Board* (hereinafter SCB)<sup>197</sup> is partly inspired by the European Commission's Recommendation for ADRSs<sup>198</sup>. The operations of the SCB are based on a contract signed between the Finnish Shareholders' Association, the FASD, the FSA, the FBA and the FAMF. The SCB offers consultative advice concerning the content of securities market legislation and related authority orders, the application of contractual terms, good commercial practices in securities trading and other issues related to securities practices in relation to specific cases<sup>199</sup>.

The SCB is characterised as an impartial third party recommending a settlement and bringing parties together for reconciliation. The SCB enables an alternative, economic way, to ensure consumer protection and promote consumer confidence in the securities market both in Finnish and European cross-border incidents<sup>200</sup>. The operations of the Securities Complaint Board abide by the principles of impartiality, transparency, reciprocity, efficiency, legality, freedom and representation defined in the Commission Recommendation (2001/310/EC)<sup>201</sup>.

#### 4.5.5. Banking Sector

In Finland overall banking system regulations and norms are based on legislation<sup>202</sup>, governing credit institutions, the Bank of Finland and the FSA. However, there is some pure self-regulation through Finnish Bankers' Association (hereinafter FBA)<sup>203</sup>.

The FBA promotes banking operations, operating conditions and interbank cooperation. It maintains contacts with the financing institutions, the authorities and the economic organisations. The FBA is represented in several organisations<sup>204</sup> and committees, issues opinions and proposals on matters related to legislative and economic aspects of banking and financing. Its terms and condition include: General Terms for Incoming Foreign Payments<sup>205</sup>, General Terms for Outgoing Foreign Payments<sup>206</sup>, Good Banking Practice<sup>207</sup>, Anti-money Laundering

<sup>196</sup> Travaux préparatoires for Modifying the Securities Market Act und Other Acts Concerning Clearing (HE 209/1997 vp.)

<sup>197</sup> Arvopaperilautakunta: <http://www.arvopaperiltk.net/>

<sup>198</sup> Commission Recommendation for out-of-court and alternative arbitration bodies and methods involved in the resolution of consumer disputes 2001/310/EC.

<sup>199</sup> Finnish Securities Complaint Board Regulations (1.1.2005)

<sup>200</sup> Arvopaperilautakunta: <http://www.arvopaperiltk.net/>

<sup>201</sup> Commission Recommendation for out-of-court and alternative arbitration bodies and methods involved in the resolution of consumer disputes 2001/310/EC. Arvopaperilautakunta: <http://www.arvopaperiltk.net/>

<sup>202</sup> See the end of footnote <sup>176</sup> for references.

<sup>203</sup> [www.pankkiyhdistys.fi](http://www.pankkiyhdistys.fi)

<sup>204</sup> E.g. the FBA is a member of *European Banking Federation* (FBE).

<sup>205</sup> The terms recognise that EU payments are subject to the Regulation 2560/2001/EC on cross-border payments in euro. Source: [http://www.pankkiyhdistys.fi/sisalto\\_eng/upload/pdf/inforeign.pdf](http://www.pankkiyhdistys.fi/sisalto_eng/upload/pdf/inforeign.pdf)

<sup>206</sup> The terms recognise that EU payments are subject to the Regulation 2560/2001/EC on cross-border payments in euro. Source: [http://www.pankkiyhdistys.fi/sisalto\\_eng/upload/pdf/inforeign.pdf](http://www.pankkiyhdistys.fi/sisalto_eng/upload/pdf/inforeign.pdf)

Policy for Banks Operating in Finland<sup>208</sup>, General Instructions for Cashing a Cheque, General Terms for Domestic Payment Transmission, The Filing Code, Terms Governing the Use of Bankcard as a Means of Payment, General Terms and Conditions for Import Documentary credit, Cheques in the National currencies of the Euro Zone and in Other Currencies as of 1 January 2002 and Foreign Cheques as Payment Instruments and General Terms and Conditions for Cashing of Foreign Cheques<sup>209</sup>.

There is also the European Commission initiated self-regulation in the banking industry: More than 3 600 mortgage lending institutions have agreed to comply with a voluntary agreement<sup>210</sup>, the European Agreement on a Voluntary Code of Conduct on Pre-Contractual Information for Home Loans (hereinafter Agreement)<sup>211</sup>. The purpose of the Agreement was to guarantee that consumers receive transparent and comparable information on housing loans in order to encourage cross-border competition. The Agreement was negotiated and adopted by European associations of consumers and the European Credit Sector Associations<sup>212</sup> offering home loans. The Agreement provides backing for a voluntary code of conduct (hereinafter Code) to be implemented by any institution offering home loans to the consumer. The Agreement is divided in two parts: 1) The terms of implementation and monitoring of the voluntary Code<sup>213</sup> and 2) the contents of the voluntary Code regarding pre-contractual information to be provided to consumers.

Over 300 mortgage lending institutions have agreed to comply with the Code in Finland. In a recent study concerning the implementation of the Code the Finnish experience was found to be extremely promising<sup>214</sup>. However, the Finnish credit institutions' compliance to the Code

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<sup>207</sup> No international rules of conduct applicable to credit institution activities exist, but the FSA has established a code of conduct of its own. The *European Bankers' Federation* has drawn up general principles for good banking practices which the Finnish Bankers' Association has used as basis for its code of banking practices. Finnish legal provisions on good banking conduct are contained in the *Credit Institutions Act*. Under these provisions, the FSA may issue binding rules of conduct, but only where customer identification is concerned. Source: [www.rata.fi](http://www.rata.fi) (official site of the FSA).

<sup>208</sup> This policy incorporates the regulations and recommendations at the European and national level concerning money laundering. It does not provide substantial added value, but clarifies the procedures that need to be taken by the banks and demonstrates that banks have taken steps to implement the legislation on money laundering.

<sup>209</sup> These terms are drafted in co-operation with the other banking associations in the euro zone.

<sup>210</sup> See IP/01/1755 in the [www.europa.eu.int](http://www.europa.eu.int) (the official pages of the EU).

<sup>211</sup> It came into effect on September 2002.

<sup>212</sup> Including the FBA.

<sup>213</sup> The implementation is carried out accordingly: The Associations subscribing to the Code made an official public announcement of their commitment to it and sent an official recommendation to their national members inviting them to make an official public announcement that they subscribe to the Code. The Code and the institutions adhering to it were publicised and copies made available in branches of the individual institutions subscribing to the Code. Furthermore, the Associations committed themselves to publish an annual progress report on the implementation of the Code. The European Commission indicated that it monitors the uptake and effectiveness of the Code and ensures that a central register is established indicating which institutions are offering home loans and, if so, which have and which have not adopted the Code. After two years a review the operation of the Code was drafted. Source: *European Agreement on a Voluntary Code of Conduct on Pre-Contractual Information for Home Loans*; IP/02/1397 [www.europa.eu.int](http://www.europa.eu.int) (the official pages of the EU); and Speech by David Byrne for the European Banking Federation Dublin, 26 March 2004.

<sup>214</sup> Lehtinen, Anna-Riitta – Leskinen, Johanna: Monitoring the uptake and the effectiveness of the Voluntary Code of Conduct on Pre-contractual Information for Home Loans Country report Finland, WP National Consumer Research Centre no 78, 2003 and Speech by David Byrne for the European Banking Federation, Dublin, 26 March 2004.

might be explained by other factors than the effective implementation of the Agreement by the European Commission and the Associations – the market was already, at the time of implementation of the Code, very much regulated as well as self-regulated<sup>215</sup>.

#### 4.6. Professional Sports

Professional sports are an area where still a considerable number of pure self-regulators, namely associations, can be found.<sup>216</sup> Sports Act (1054/1998) and Sports Decree (1055/1998) regulate the structure of sports activities in Finland. The purpose of the Act is to promote recreational, competitive and professional sports, and to promote the well-being and health of the citizens. The Sports Act obliges the State and municipalities to create general conditions for sports. The administration of sport remains the duty of the private sport organisations. The Act mainly sets up a structure for state financing and the subsidising of sports activities and sports facilities.<sup>217</sup>

While considerable amount of sports regulation remains in private hands, one should not undermine the possible indirect steering of public authorities via financing decisions. Consider, for example, the Finnish Anti-Doping Committee (Hereinafter ADC), which is a private association funded by the Ministry of Education<sup>218</sup>. It administers and monitors the anti-doping activities in Finland. The ADC has five members: four sports associations and the Finnish state (represented by the Ministry of Education). The members of the association nominate the governing board for the association. Interestingly, the Ministry of Education has the right to nominate half of the governing board<sup>219</sup>.

The tasks of the governing board include: the general administration and issuing the Code of Practise for Anti-Doping in Finland. There is a separate monitoring board, consisting of three

<sup>215</sup> The *Consumer Protection Act* (38/1978) provides, in the Chapter seven, the foundation for the regulation on the pre-contractual information for consumer credit, study loans and housing loans. The Act applies to the offering, selling and other marketing of consumer goods and services by businesses to consumers. The Act applies also where a business acts as an intermediary in the transfer of goods or services to consumers. Furthermore, misleading information or any information against the *code of good conduct* is forbidden by the *Act on Credit Institutions* (1607/1993), and the information which does not include necessary information in relation to the economic safety of the customer is considered inappropriate. Credit institution may not use provisions which are unjust to the customer. After the banking crisis in the 1990's the credit institutions have taken the Acts very seriously. In the worst case non-compliance can result to the annulment of the security for the detriment of the credit institution (In Finland, the creditor always demands a security for the loan). Besides, it has already been stated that *Code of good conduct* has been constructed in the FBA and it counts for self-regulation in banking business.

<sup>216</sup> This is not to say that within the EU or Finland there has been a complete acceptance of the way in which sport has been self-regulated. In the legal systems of the EU Member States, there are several approaches with regard to sports. Two Member States have provisions on sport in their constitutions; eight Member States have a general law on sport. The model of sports legislation in Europe has been characterised as interventionist or as non-interventionist. Central and southern European States favour an interventionist model and western and northern European States (e.g. Finland) favour a non-interventionist model. Asser Institute and Lamsma Veldstra & Lobe Lawyers : "Aren't We All Positive?" – A (socio)economic analysis of doping in elite sport; commissioned by the European Commission, Directorate-General for Education and Culture, to KPMG BE, T.M.C., pp. 88 (January 2002) p. 44

<sup>217</sup> Asser Institute and Lamsma Veldstra & Lobe Lawyers : "Aren't We All Positive?" – A (socio)economic analysis of doping in elite sport; commissioned by the European Commission, Directorate-General for Education and Culture, to KPMG BE, T.M.C., pp. 88 (January 2002), p.45

<sup>218</sup> With the sum of 1.200 000 EUR per year.

<sup>219</sup> Suomen Antidoping Toimikunta ry: <http://www.antidoping.fi/view.cfm?page=148F3869-DF6F-4D6A-8F18-CD068B69E7F5>

doctors and one lawyer, that monitors the compliance to the Code and also, in the case of dispute, decides whether a sportsman is in compliance with the code or not

The rights of injured sportsmen and, consequently, the obligations of sports associations were widely discussed couple of years ago. Self-regulation of sport organisations was seen insufficient as what came to the protection of sportsmen. As a result an Act on the Accident Insurance and Pension for Sportsmen (575/2000) was enacted with which the associations or organisers of sporting competitions were obligated to insure the sportsmen against accidents. However, the tension between public regulation and the self-regulation in the sports sector has remained. The debated question is, what issues should be left to the *private autonomy* of sporting associations. At this point the self-regulation still prevails in many respects.

The co-operation with the Council of Europe<sup>220</sup> and endeavours to keep sports within the sphere of private autonomy contributed to the creation of entirely private, independent dispute resolution system, *Board for Legal Remedies in Sports*<sup>221</sup>, BLRS. It was created by the Finnish federations of sports associations in 1991. The BLRS settles disputes independently from the sports associations. According to the rules of the BLRS<sup>222</sup> a member of a sports association can turn to the BLRS, for example, if she has been suspended or expelled from the sports association, other punitive measures have been taken against her, she wishes to appeal against a decision taken by the association<sup>223</sup>, or if she wishes to appeal against a decision or other actions initiated by the Finnish Anti-Doping Committee<sup>224</sup>. Also district sports associations can bring cases against sports federations on similar matters<sup>225</sup>.

In recent years the impartiality and the significance of the BLRS has been contested by the sportsmen and by some academics.<sup>226</sup> It will be interesting to see whether this lack of trust might eventually trigger a legislative Act in which the BLRS would gain a statutory delegation and public tasks.

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<sup>220</sup> See: [www.coe.int](http://www.coe.int). Finland signed the anti-doping treaty of the *Council of Europe* in 1989. The *World Anti-Doping Agency* (WADA) under *Council of Europe* was formed in 1999. The new code of WADA against doping was agreed in Copenhagen 6.3.2003 which is signed by the Finnish sports federations and the Finnish government. Source: [www.opetusministerio.fi](http://www.opetusministerio.fi)

<sup>221</sup> *Urheilun oikeusturvautakunta* (could be translated as *Board for Legal Remedies in Sports*)

<sup>222</sup> See [www.urheiluoikeudenyhdistys.fi](http://www.urheiluoikeudenyhdistys.fi)

<sup>223</sup> If these measures have been contrary to the rules of the sports association she is a member to.

<sup>224</sup> [www.adt.fi](http://www.adt.fi)

<sup>225</sup> Generally, the BLRS has authority to issue decisions only, if the sports association has given its consent to use the BLRS and the dispute falls into its authority

<sup>226</sup> Huhtamäki, Ari: [www.urheiluoikeudenyhdistys.fi](http://www.urheiluoikeudenyhdistys.fi)