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Summary

The Spanish report outlines the role played by self-regulation as a regulatory strategy within the Spanish legal system. The study of self-regulation from this perspective has only recently been tackled by Spanish legal literature, which has captured this idea under the concept of “regulated self-regulation”.

In order to develop and illustrate this concept, the report is structured in three parts. The first part presents the ideas leading to the concept of “regulated self-regulation”. The second part places the self-regulatory phenomenon within the general legal framework of Spain, covering its constitutional aspects, the institutional forms under which self-regulation takes place and operates, as well as the external effect which self-regulation gives rise to. This general legal framework is finally tested, in the third part, on five sectors where self-regulatory manifestations are important either because of historical reasons or because of the increasing European promotion of self-regulation as a regulatory strategy.

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I. Introductory remarks: Towards a concept of self-regulation in Spanish scholarship

In Spain, DARNACULLETA GARDELLA has defined “self-regulation” (*autorregulación*), in one of the most recent works on this topic, as ‘a word that contains no concept.’¹ Spanish law, unlike European law, does not give any hint about what self-regulation is. This is the reason why this essay will borrow a European law concept of self-regulation in order to approach to the object of this study. Thus, the essay will try to sketch and outline the Spanish state of the art of self-regulation as a regulatory strategy².

From this point of view, Spanish legal literature has not dealt with this phenomenon until recently³. As professor ESTEVE PARDO points out⁴, self-regulation may refer, if approached broadly, to any expression of normative capacity, either general or particular, or to any expression of conflict resolution, mainly through arbitration or mediation. In any case, a defining feature of this approach to self-regulation is its origin within the private domain, under the umbrella of very diverse organisational structures that may range from the family to highly complex entities of several layers.

In this sense, self-regulation would not be anything “new” but a phenomenon whose origin could be traced back many centuries⁵. Nowadays, self-regulation continues to be developed by private entities and organisations, but the “new” aspect about it is that self-regulation is becoming relevant and taken into consideration by third parties, the market and, increasingly, by public authorities.

Thus, self-regulation extends its effect beyond the group of individuals at which the self-regulatory activity was aimed, stepping into a domain that was thought to be exclusive of the State: producing rules with general and external binding effect. The boundaries between “public” and “private” blur since rules produced by private individuals or entities are linked to the achievement and fulfilment of the public interest. As it can be inferred from the European approach to self-regulation, this regulatory strategy seems to aim at improving the participation and responsibility of private individuals in the compliance of public goals, improving at the same time the efficiency and coherence of the legal order.⁶

The Spanish academic work on this topic has attempted to systematise the underlying reasons of the increasing use of this regulatory strategy. Thus, it is argued that the current model of society differs widely from the society existent two centuries ago, its essential distinguishing feature being complexity. Society is no longer formed by individuals standing for their individual interests but formed by groups of individuals with a very developed capacity of self-organisation. At the same time, society is increasingly characterised by the production of risks, due to the trust placed on science as a means of progress. The combination of these fac-

¹ DARNACULLETA GARDELLA M., *Autorregulación y Derecho Público: La autorregulación regulada*, Marcial Pons, Barcelona, 2005, at p. 283.

² COM (2001) 428 final, *European Governance – A White Paper*, Official Journal C287, of 12 October 2001, pp. 1 *et seq.*

³ Apart from the work mentioned in note 1, it is also essential the work by ESTEVE PARDO J., *Autorregulación. Génesis y Efectos*, Aranzadi, Elcano, 2002.

⁴ ESTEVE PARDO J., *Autorregulación...*, at p. 15.

⁵ FROTA M., “Autorregulación: ventajas e inconvenientes”, *Estudios sobre Consumo*, num. 24, 1992, who affirms that self-regulation is a specific domain of corporative regime that was intensively developed in the *Ancien Régime*, i.e. professional associations.

⁶ COM (2001) 428 final, *European Governance – A White Paper*, Official Journal C287, of 12 October 2001, pp. 16-17.

tors is perceived to result in a society highly complex not only from a technical, but also an ethical point of view.

It is contended that self-regulation is a regulatory response to this reality. The State was perceived as the entity empowered to organise society through the promotion and protection of public interest. However, it is argued that social evolution has overwhelmed the State's capacity to do so, lacking the expertise and the means to properly develop its protective role, and that this expertise and means must be provided by those that possess them, that is, private groups that grow these different sectors and domains⁷. Thus, the State is no longer asked to regulate and rule each and every part of social reality; instead, trust is placed on civil society and on the regulation coming from it -and addressed to it- in all those sectors that prove to be beyond the reach of the State's capacity of regulation. This trust is certainly shown by the fact that the self-regulation is taken into consideration by third parties or even public authorities, leaving thereby its strict private domain.

However, Spanish scholars have stressed the point that the increasing relevance of self-regulation does not mean that the State, as a regulator, is weakening⁸. On the contrary, they argue that the State, taking into account self-regulation, is enabled to penetrate some aspects of social reality that would be otherwise inaccessible to it. The State –the argument follows- regulates the framework and context in which self-regulation will appear and will develop its role, what is perceived to be an indirect regulation of the sector regulated through self-regulation. This is the reason why Spanish studies in self-regulation as a regulatory strategy has mainly focus in self-regulation that has some sort of effect outside the private domain in which it appears, phenomenon that has been labelled as “regulated self-regulation” (*autorregulación regulada*).⁹

This is the standpoint from which self-regulation will be analysed in this work, which will be presented in two parts. The first part will give an overview of some general issues related to self-regulation and how it fits within the Spanish legal order. The second part will approach some selected sectors in order to explore the way self-regulation has been used as an implementation of a particular regulatory strategy.

⁷ This is the main argument of ESTEVE PARDO in the first chapter of his book *Autorregulación...*, quoted. The same author has worked on the subject of risks in the technological society. See J. ESTEVE PARDO, *Técnica, riesgo y Derecho: tratamiento del riesgo tecnológico en el Derecho ambiental*, Ariel, Barcelona, 1999.

⁸ DARNACULLETA GARDELLA M., *Derecho...*, Ch. 5.

⁹ Apart from the works already mentioned, see also, CANALS AMETLLER D., *Ejercicio por particulares de funciones de autoridad. Control, inspección y certificación*, Comares, Barcelona, 2003. From the same author, *La jurisprudencia ante el ejercicio privado de la función pública de control técnico por razones de seguridad*, *Revista del Poder Judicial*, 56 (1999), pp. 459ss.; SÁINZ MORENO F., *Ejercicio privado de funciones públicas*, *RAP* 100-102 (1983), pp. 169ss.

II. General issues on self-regulation

This study on self-regulation in Spain must start with a general perspective provided by the constitutional framework. No direct references to self-regulation are to be found in the Spanish Constitution (hereafter SC). However, the essay will try to single out the constitutional provisions admitting to underpin the issue we are dealing with now. This analysis will lead to a discussion about the main legal questions posed by the fitting of self-regulatory strategies within the current Spanish legal order.

Further, the organisation and functioning of the entities developing self-regulatory functions is to be scrutinised. This analysis will outline the different nature and legal regime attributed to the entities performing these functions and will prove the increasing difficulty of defining the boundaries between “public” and “private”.

Finally, the dichotomy between the public and private domain will also be present in relation to the question of liability of self-regulatory bodies. In particular, especial attention will be placed on the analysis of the circumstances that makes the public liability regime provided by the *Public Administrations and Administrative Procedure Act*¹⁰ (hereafter PAAP) applicable, independently of the entity’s legal nature.

II.1 The constitutional framework

There are no specific constitutional provisions that directly or indirectly address the question of self-regulation. However, the Constitution offers a sufficient broad framework to place self-regulation in it. Thus, the theoretical underpinning for self-regulation will be built upon constitutional principles but also, and maybe more importantly, upon legal provisions on the powers and the activity of Public Administration.

In this sense, the Government and its executive arm, Public Administration, are in charge, under arts. 97 and 103 of the SC, of directing the internal and foreign affairs policies, for which they are entitled to exercise the executive and regulatory powers in accordance with the Constitution and the rest of the legal order. In short, they serve the public interest subject to the rule of law and under the principles of objectivity, efficiency, hierarchy, decentralisation, and coordination.

These provisions put the basis for the existence of a public domain, created and ruled by public law. The private domain, in the sense of private autonomy, however, is not so clearly referred to in the Constitution and it must be inferred from other dispositions spread out in that text. Art. 9.2 of the SC is probably the most important reference if construed as an implicit recognition that there is a specific space of private autonomy and freedom since it establishes the following: *‘Public authorities are in charge of fostering the proper conditions for the freedom and the equality of individuals, and of the groups in which they take part, to be real and effective; of removing any obstacle that might impede or hinder their fullness, and of enhancing the participation of all citizens in the political, economic, cultural and social life’*. It could therefore be argued that this article recognises that the individual inherently possesses a space of autonomy and freedom that must be enabled to express itself with fullness. In addition, this article already mentions a crucial element for the analysis of self-regulation, which is the collective aspect of private autonomy and freedom.¹¹ This aspect is directly linked with the fun-

¹⁰ Act 30/1992, of 26 November 1992, modified by Act 4/1999, of 13 January 1999.

¹¹ For a concise and clear approach to the collective aspect of private autonomy see SALVADOR CODERCH P & others, *Autonomía privada, fraude de ley e interpretación de los negocios jurídicos*, available on line in http://www.indret.com/pdf/229_es.pdf.

the fundamental right of association, recognised in art 22 of the SC and developed by the Right of Association Act 2002.¹²

Consequently, one is led to think that there will be a permanent search for defining the borders and balancing both domains: the inherent private autonomy and freedom of individuals and the care and protection of the public interest entrusted, in principle, to the public domain.

This balancing process is already suggested by the Constitution when it shapes the legal principles of several sectors. The economic sector might be one of the most relevant examples in this sense, since the Constitution devotes some articles to guarantee a core content for both the private and public domain in this field.¹³ Art. 38 of the SC guarantees the freedom to conduct a business, establishing a system of social market economy and standing for a restrictive interpretation of public intervention in this field. However, public intervention is not ruled out by this provision. On the contrary, art. 128 of the SC establishes that the wealth of the State, in all its manifestations, and whoever the holder is, is subordinated to the general interest. Therefore, the public interest becomes the core content and the compulsory justification of any public initiative in the economic sector. As it will be seen below, the sectors analysed in Part II of this work will all have an economic aspect upon in which public intervention is often justified and perceived to be necessary in order to protect the public interest.

Similar arguments could be made in relation to other fields that will be examined in the sector-oriented analysis carried out in Part II. Thus, as it has already been mentioned, art. 9.2 of the SC provides with a general clause through which citizens enjoy private autonomy and freedom to participate in political, economic, cultural and social life. One manifestation of this participation can clearly be seen in the field of sports, where private initiative has always been the origin of the sectoral ordering. However, the Constitution also entrusts to public authorities the enhancement of physical education and sports,¹⁴ granting the status of “public interest” to the promotion of sporting activities and allowing for public intervention in this field.

In other fields, in contrast, explicit areas of autonomy are guaranteed by the Constitution, as it is clearly the case with Universities¹⁵ and also Professional Orders,¹⁶ in whose case the constitutional text also requires a statute to define and detail the extension and features of these areas of autonomy.

Finally, the necessary degree of autonomy required to make possible the existence of self-regulation comes also, as it has already been suggested in relation to the right of association, from fundamental rights and freedoms. Thus, in relation to the media sector, the main source of private autonomy is art. 20.1a) of the SC, which establishes the right to express freely any thought, idea and opinion through words, documents or any other means of reproduction. However, the same constitutional provision establishes that this autonomy will find its limits in the respect of the other fundamental rights and freedoms and, particularly, of the right to honour, to private life and image and of the protection of youth and childhood.¹⁷ The borders

¹² Ley Orgánica 1/2002, de 22 de marzo, reguladora del Derecho de Asociación. BOE num. 73, de 26 de marzo 2002.

¹³ For detailed accounts on Public Economic Law see, for all, MARTIN MATEO R., *Derecho Público de la Economía*, CEURA, Madrid, 1985; MARTIN-RETORTILLO S., *Derecho Administrativo Económico*, La Ley, Madrid, 1998.

¹⁴ Art. 43.3 of the SC.

¹⁵ Art. 27.10 of the SC

¹⁶ Art. 36 of the SC

¹⁷ Art. 20.4 of the SC

between private autonomy and public intervention will depend, then, on the result achieved through the balancing process undertaken in a case-by-case basis.

II.2 Type, nature and legal regime of entities with self-regulatory functions

Exploring the entities that are considered to undertake self-regulatory functions will provide very useful insights in relation to the phenomenon of self-regulation from both a theoretical and a practical point of view.

As ESTEVE PARDO has already noted,¹⁸ the self-regulatory phenomenon has usually been linked to the so called Independent Administrative Authorities or Agencies. These entities are perceived to be the key element within a particular regulatory strategy, in which it is intended to place these regulatory entities in a neutral position, equidistant between the State and society, between the public and the private. It is argued that their organisation and composition, which are characterised by the presence of the actors intervening in the relevant sector and therefore by their expertise, contributes to place the regulatory activity outside eventual political pressures while keeping it safe from capture, through the application to these entities of public law, which is thought to best protect the public interest.

This is clearly the case of some entities that will be analysed in Part II of this work, such as the Spanish Radio and Television (*Radio Televisión Española*) or the National Commission of Securities Market (*Comisión Nacional del Mercado de Valores*). These entities enjoy certain normative autonomy due to their independence from Public Administration strictly speaking and its main feature is the legal regime applied to them since it can be public or private law depending on the activity concerned.¹⁹ The public nature of these entities seems to be broadly accepted by Spanish scholarship, although their activity may present some difficulties to this respect as it will be explained below.²⁰

¹⁸ ESTEVE PARDO J., *Autorregulación...*, pp. 46 *et seq.*

¹⁹ On the use of private and public law by public administrations see for all *Derecho Público y Derecho Privado en la actuación de la Administración Pública*, Marcial Pons, Barcelona, 1999; M.N. DE LA SERNA BILBAO, *La privatización en España. Fundamentos constitucionales y comunitarios*, Aranzadi, Pamplona, 1995; S. GONZÁLEZ-VARAS IBÁÑEZ, *Derecho Administrativo Privado*, Montecorvo, Madrid, 1996; L. PAREJO ALFONSO, *Crisis y renovación en el Derecho Público*, CEC, Madrid, 1991.

²⁰ About these independent administrations in Spain, see M. BACIGALUPO SAGGESE, *La Administración institucional del Estado tras la LOFAGE: Cuestiones para el debate*, Actualidad Administrativa, 3 (1998), pp. 707ss. A. BETANCOR RODRÍGUEZ, *Las administraciones independientes*, Tecnos, Madrid, 1994; E. GARCÍA LLOVET, *Autoridades Administrativas Independientes y Estado de Derecho*, RAP 131 (1993), pp. 61ss.; L. MARTÍN REBOLLO, *Las nuevas fórmulas de Administración autónoma y las empresas públicas en las relaciones de colaboración entre las CCAA*, in “Las relaciones interadministrativas de cooperación y colaboración (Seminario celebrado en Barcelona el 7 de mayo de 1993)”, IEA, Barcelona, 1993, pp. 87ss.; M. NAVAJAS REBOLLAR, *La nueva administración instrumental*, Colex, Madrid, 2000; J.M. SALA ARQUER, *El Estado neutral. Contribución al estudio de las llamadas Administraciones independientes*, REDA 42 (1984), pp. 401ss. There are old pieces of work which are though worth mentioning, as they show how the system has evolved: G. ARIÑO ORTIZ, *Sobre el concepto y el significado institucional de la expresión Establecimiento Público*, Documentación Administrativa 155, pp. 7ss.; *ibidem*, *La Administración institucional. Bases de su régimen jurídico. Mito y realidad de las personas jurídico-públicas en el Estado*, IEA, Madrid, 1972; M. BAENA DEL ALCÁZAR, *Administración Central y Administración Institucional en el Derecho español*, Instituto de Estudios Administrativos, Madrid, 1976; J. ESTEVE PARDO, *Organismos autónomos de carácter comercial, industrial, financiero o análogos y entidades de Derecho público que por ley hayan de ajustar sus actividades al ordenamiento jurídico privado*, RAP 92 (1980), pp. 353ss.; T.-R. FERNÁNDEZ RODRÍGUEZ, *Derecho Administrativo: Sindicatos y autoadministración*, IEAL, Madrid, 1972; A. GALLEGU ANABITARTE, *De los Establecimientos Públicos y otras personas jurídico-públicas en España*, en F.J. JIMÉNEZ DE CISNEROS, “Los Organismos Autónomos en el Derecho Público español: Tipología y régimen jurídico”, INAP, Madrid, 1987; F. GARRIDO FALLA, *Un tema de seguridad jurídica: La*

Another classical type of entities that have been linked to the self-regulatory phenomenon are those entities called Corporate Bodies, such as Professional Orders or Chambers of Commerce, which perform certain public functions although having a private structure and basis. It is not surprising, therefore, that the legal nature of these entities is still discussed in the scholarship. The classical doctrine has argued that they are public bodies as long as they fulfil public functions. At the same time, they maintain their private nature in their ordinary private activity.²¹ A more modern theory canvasses that they are entities acting according to private law except in certain cases where due to the more general impact of their activities, their acts are conferred a public character, being thus legally binding for everybody, and subject to public law.²²

These theoretical difficulties about the legal nature of a certain bodies are not present, however, where the entity acting as a self-regulator is clearly a private association subject to the legal regime provided for them. This is clearly the case in the sector of advertising. This field has experienced the appearance of private associations such as the Association of Self-Control in Advertising (*Asociación de Autocontrol de la Publicidad*) that develops an extremely important role in the regulatory strategy of the sector and its legal regime is the general regime of private associations.²³

This is partially the case in other sector examined in Part II of this work: the sports sector. In this field, one can find private associations with certain amount of autonomy to organise and manage the sports activities of its members as a cultural and social manifestation. However, when these activities go beyond the mere personal practice of sports as a spontaneous, ludic and altruistic activity, public intervention increases its intensity and requires the adoption of other legal forms, such as Sports Federations, whose configuration no longer allows for placing them under the category and legal regime of private associations. As it will be explained in more detail below, the Spanish Constitutional Court²⁴ has defined them as *private associations of legal configuration*, whose legal regime seems closer to corporate bodies ruled by public law than actual private associations.

The interesting insight provided by the analysis of the entities undertaking self-regulatory functions is the fact that self-regulation challenges the traditional distinction between what is

regulación de los Entes instrumentales, REDA 79 (1993), pp. 389ss.; A. NIETO GARCÍA, *Valor actual de los establecimientos públicos*, in “Perspectivas del Derecho Público en la segunda mitad del s. XX. Homenaje al Profesor Enrique Sayagués-Laso”, IEAL, Madrid, 1969, pp. 1053ss.; J.A. SANTAMARÍA PASTOR, *Las Administraciones territoriales. La Administración institucional*, Universidad Complutense de Madrid-Facultad de Derecho, Madrid, 1982. Explaining how the system works in the United States, and comparing it with the Spanish situation, see E. CARBONELL PORRAS/J.L. MUGA MUÑOZ, *Agencias y procedimiento administrativo en Estados Unidos de América*, Marcial Pons, Madrid, 1996; J. V. GONZÁLEZ GARCÍA, *El alcance del control judicial de las Administraciones Públicas en los Estados Unidos*, McGraw-Hill, Aravaca, 1996; A.M. MORENO MOLINA, *La Administración por Agencias en los Estados Unidos de Norteamérica*, Universidad Carlos III-BOE, Madrid, 1995.

²¹ This has been proposed by E. GARCIA DE ENTERRÍA/T.R. FERNÁNDEZ RODRÍGUEZ, *Curso de Derecho Administrativo*, Civitas, Madrid. They assume in their textbooks the propositions of one of the co-authors, exposed in T.R. FERNÁNDEZ RODRÍGUEZ, *Derecho administrativo, sindicatos y autoadministración*, Madrid, 1972.

²² About this kind of bodies, see L. CALVO SÁNCHEZ, *Régimen jurídico de los Colegios Profesionales*, Madrid, 1998; S. DEL SAZ, *Cámaras oficiales y cámaras de comercio*, Marcial Pons, Madrid, 1996; A. FAN-LO LORAS, *El debate sobre colegios profesionales y cámaras oficiales*, Civitas, Madrid, 1992 (which in pages 31 to 38 discusses the legal nature of these entities); G. FERNÁNDEZ FARRERES (dir.), *Colegios profesionales y Derecho de la competencia*, Civitas, Madrid, 2002.

²³ Right of Association Act 2002.

²⁴ STC 67/1985 of 24 May.

public and private domain and, therefore, what is a private or public actor, in other words, what is “Administration” and what is not. Traditional theories run into difficulty, for instance, when trying to keep the label “private” in relation to a body whose membership is *de facto* compulsory or that has the power to impose sanctions and restrict rights with *erga omnes* effect.²⁵

These theoretical problems, however, present also some practical aspects in relation to the legal regime that must be applied to these entities. With more or less intensity, all these entities are entitled to exercise some public powers such as enacting binding rules or inflicting sanctions on individuals, but this exercise is in some cases not coupled with the necessary guarantees attached to these powers because there is uncertainty about the legal regime applicable to that activity, i.e. principle of legality in relation to disciplinary matters with external effect.²⁶ Also the liability regime is different depending on the legal regime applicable to the self-regulatory entity, topic that will be approached in the following section.

II.3 Liability of self-regulatory bodies

In relation to the liability of self-regulatory bodies, the starting point of the analysis is the existence of distinct legal regimes of liability depending on whether the tortfeasor is a private individual or is assimilated to Public Administration. Art. 106.2 of the SC guarantees the individual’s right to be compensated for any harm caused by the normal or abnormal running of public services, which is a legal regime different from that provided for private individuals under art. 1902 of the Spanish Civil Code (hereafter SCC).

This distinction becomes extremely relevant since the entities object of this study present serious difficulties in relation to their actual legal nature and, therefore, to the legal regime applicable to them. Consequently, the liability regime reflects this uncertainty and changes depending on whether the entity is seen as a private or public body.

The liability regime applicable to Public Administration is established by arts. 139 *et seq.* of the PAAP 1992, and its main difference from the general regime of liability contained in art. 1902 of the SCC is its configuration as an objective liability, overlooking any idea of fault (*culpa*). There is no need for proving the Administration’s faulty behaviour; instead, it is only necessary to prove the existence of harm causally imputable to a public body.²⁷

²⁵ This is the case of corporate bodies such as Professional Orders or sports associations such as Sports Federations or Professional Leagues.

²⁶ For an enlightening discussion about regulation and private autonomy see SALVADOR CODERCH P., *Autonomía privada, fraude de ley e interpretación de los negocios jurídicos*, available on-line in <http://www.indret.com/>

²⁷ On public liability in Spain see, M. BELADÍEZ ROJO, *Responsabilidad e imputación de daños por el funcionamiento de los servicios públicos*, Madrid, 1997; R. BOCANEGRA SIERRA, *Responsabilidad de contratistas y concesionarios de la Administración Pública por daños causados a terceros*, REDA 18 (1978), pp. 397ss.; T. COBO OLVERA, *El procedimiento para la exigencia de responsabilidad patrimonial a las Administraciones Públicas*, Barcelona, 2ª ed., 1999; M. CUETO PÉREZ, *Avances y retrocesos en la responsabilidad de las Administraciones Públicas tras la Ley 30/1992*, RAP 152 (2000), pp. 269ss.; E. DESDENTADO DAROCA, *Reflexiones sobre el artículo 141.1 de la Ley 30/1992 a la luz del Análisis Económico del Derecho*, REDA 108 (2000), pp. 533ss.; E. GARCÍA DE ENTERRÍA, *Los principios de la nueva Ley de Expropiación Forzosa*, Madrid, 2ª ed., 1984; E. GARCÍA-TREVIJANO GARNICA, *Plazo para exigir la responsabilidad extracontractual de las Administraciones Públicas*, Madrid, 1998; F. GARRIDO FALLA, *La constitución de la responsabilidad patrimonial del Estado*, RAP 119 (1989), pp. 7ss.; J. JORDANO FRAGA, *La reforma del artículo 141, apartado 1, de la Ley 30/1992, de 26 de noviembre, o el inicio de la demolición del sistema de responsabilidad objetiva de las Administraciones Públicas*, RAP 149 (1999), pp. 321ss.; J.C. LAGUNA DE PAZ, *Responsabilidad de la Administración por daños causados por el sujeto autorizado*, RAP 155 (2001), pp. 27ss.; L. MARTÍN REBOLLO (ed.), *La responsabilidad patrimonial de las*

The crucial issue becomes then the scope in which this liability regime is applicable in detriment of the private liability regime. Certainly this is the liability regime applicable to public bodies, even when they act within a private law relationship, as it is established by art. 144 of PAAP 1992. This situation would perfectly fit Independent Administrative Authorities or Agencies such as the National Commission of the Securities Market or the Spanish Radio & Television, since these entities are created as public bodies although their legal regime allow them to use private law for certain legal transactions.

In the other side of the spectrum, this liability regime would not be applicable to private associations. In effect, private associations could not be included in art. 2 of the PAAP Act 1992, in which the Act establishes its subjective scope. Therefore, self-regulatory bodies such as the Association of Self-control in Advertising (*Asociación de Autocontrol de la Publicidad*) would be liable in accordance with the legal regime provided by art. 1902 of the SCC.

Difficulties arise, however, in relation to other self-regulatory bodies whose legal nature is not clear such as Professional Orders, or, even more, Sports Federations. Some case law in relation to Professional Orders seems to follow the reasoning that has been put forward in the section above: the entity is applied the legal regime applicable to the nature of the activity or function that the entity is performing in the relevant situation.

The case 2093/1991, before the High Court of Valencia,²⁸ put forward the question of public liability and professional orders. The Court insisted on the twofold nature of the activities and the organisation of Professional Orders, but it estimated that the function performed in that case belonged to the public dimension of Professional Orders, dimension which is subject to public law and, therefore, the system of public liability also applies.

III. The regulation of self-regulation: A sector-oriented approach

Self-regulation in Spain, as it occurs in other legal orders, is a phenomenon that has been examined mostly through a sector-oriented approach. This means that it is fairly difficult to find common elements that could contribute to a definition of self-regulation, such a definition being able to derive only from the analysis of the most relevant sectors in which this regulatory technique is applied. In doing so, it could be possible to identify the coincidences in regime and organisation. The sectors selected to undertake this analysis have been chosen in order to confront the legal techniques that are used in sectors where private autonomy has always played a central role such as Professions or Sports, on the one hand, and legal techniques used in sectors where self-regulation has been fostered as a regulatory strategy only recently and specially from the International and the European level, as it could be the case in relation to Media, Advertising and Financial Markets, on the other.

Administraciones Públicas, Madrid, 1996; L. MARTÍN REBOLLO, *Ayer y hoy de la responsabilidad patrimonial de la Administración: un balance y tres reflexiones*, RAP 150 (2000), pp. 317ss.; J.L. MARTÍNEZ LÓPEZ-MUÑIZ/A. CALONGE VELÁZQUEZ (eds.), *La responsabilidad patrimonial de los poderes públicos*, Madrid, 1999; O. MIR PUIGPELAT, *La responsabilidad patrimonial de la Administración. Hacia un nuevo sistema*, Civitas, Madrid, 2002; J.V. MOROTE SARRIÓN, *La responsabilidad solidaria de las Administraciones públicas en los procedimientos bifásicos*, RAP 154 (2001), pp. 95ss.; J.L. MUGA MUÑOZ, *El plazo para reclamar la responsabilidad de las Administraciones Públicas. Una propuesta de política legislativa*, RAP 152 (2000), pp. 167ss.; A. NAVARRO MUNUERA, *La ampliación de la responsabilidad patrimonial de la Administración a los daños ocasionados por sus funcionarios o agentes actuando al margen del servicio público*, REDA 60 (1988), pp. 603ss.; F. PANTALEÓN PRIETO, *Responsabilidad patrimonial de las Administraciones públicas: sobre la jurisdicción competente*, REDA 91 (1996), pp. 403ss.

²⁸ Ar. 1994/89, STSJ Comunidad Valenciana (Sala de lo Contencioso-Administrativo, Sección Primera), of 28 October 1994.

III.1 Sports Sector

Spanish scholars²⁹ share the view that sports have their origin in society, which, at the beginning, structured and organised those activities privately, that is, through techniques of self-management and self-regulation, public intervention being simply non-existent.³⁰

Private associations were the key element in that system. These entities, at national level, elaborated their own regulatory regimes, generally inspired by and imported from private associations of international domain such as the International Olympic Committee or the relevant International Sports Federations, whose regulations became the only texts of reference for national associations that carried out sporting activities.

The expansion of the sports phenomenon and the increasing economic dimension of this activity led to the inclusion of art. 43.3 into the Spanish Constitution, which establishes the obligation for public authorities to promote and foster physical education and sports. This constitutional mandate has been read by the majority of authors as an obligation for public authorities to collaborate with private actors upon whom the sports reality rests.

How this collaboration is organised is the object of the Sports Act 1990,³¹ which is the central legal text of this field's regulatory framework. Thus, after acknowledging that the practice of sports is free, voluntary and based in society, the Preamble of the Act states that promoting this sector means *'to take care of it and its effect; ordering its reasonable development; to participate if necessary in its organisation, and to contribute in its funding.'*

The type and the intensity of public intervention contemplated by this Act depend on the different expressions through which the sports phenomenon materialises. Thus, public regulation appears whenever the sporting expression goes beyond the mere personal practice of sports as a spontaneous, ludic and altruistic activity. Consequently, public regulation acquires a greater importance than it could be thought at a first sight, leaving a relatively reduced scope to self-regulatory techniques.

III.1.1 The public regulatory regime

The Sports Act 1990 represents the general regulatory framework within which the development of sporting activities must take place. It regulates this sector from both the organisational and the functional perspective.

The organisational regulation

Art. 7 of the Sports Act 1990 provides for a public body, the Supreme Council of Sports, which is in charge of carrying out the public functions attributed by the Act to Public Administration, except for the delegations explicitly contained in the Act. This public body is regulated by arts. 7 to 11 of the Sports Act 1990 as well as by the Royal Decree 286/1999 of 22 February, and it is entrusted with very wide powers, becoming the highest expression of public intervention in this field.

Among its powers, it is noteworthy the authorisation and revocation of Sports Federations as well as the approval of their by-laws and regulations. It is also the competent authority to recognise a new modality of sport and to qualify a competition as "official", with all the conse-

²⁹ See Preface of BERMEJO VERA J., in TEJEDOR BIELSA J.C., *Público y Privado en el Deporte*, Bosch, Barcelona, 2003, pp. 11-14.

³⁰ The first relevant normative manifestation in Spain is traced back to 1961, BERMEJO VERA J., *Derecho Administrativo. Parte Especial*, Civitas, Madrid, 2001, at p. 223.

³¹ Act 10/1990, of 15 October, of Sports. BOE num. 249, of 17 October; rect. BOE num. 173, of 20 July 1991.

quences that this label implies. It also enjoys wide powers in relation to the management of public funds that must be applied among private sports entities. The scope of its powers is in some cases astonishingly vast for it is enabled to suspend in their office any member of the Management Board of Sports Federations, Professional Leagues or other Clubs' Associations, or even to authorise or refuse expenses of these entities. Thus, it seems clear that this public body is entrusted with very wide monitoring and enforcement powers over the sports regulatory regime, as it is explicitly stated in the last paragraph of art. 8 of the Sports Act 1990.

In addition, the Act also provides for the creation of other public authorities that are given monitoring and enforcement powers within specific areas such as anti-doping, violence and disciplinary matters. Art. 57 of the Act establishes, in this sense, the creation of the National Commission Anti-Doping, which is regulated in detail through the RD 1313/1997 of 1 August, and the National Commission against Violence,³² or the Spanish Committee of Sports Discipline, the latter playing a central role in the complex disciplinary regime.³³

On the other hand, the Act also regulates the legal framework for private associations whose object is '*the promotion of one or more modalities of sports, their practice by the members as well as the participation in sports activities or competitions.*'³⁴ The Act classifies thereby these associations in different categories, upon which the intensity of public intervention varies depending on the role foreseen by the Act for each category.

The lowest level of intervention corresponds to the category of "Elemental Clubs", whose creation is very similar to the creation of an ordinary private association.³⁵ The intensity of intervention, though, increases proportionally to the scope of the association's activities. Thus, if the Club intends to participate in an official competition, the Act requires the Club to be registered in the relevant Federation. In addition, if the official competition is at national or international level, the Club must adopt the legal regime of "Basic Clubs", whose creation requires the compliance with many other conditions that are established in art. 17 of the Act. Finally, the Act imposes the legal form of a Limited Liability Company to the Clubs, or their professional teams, which participate in an official competition of professional nature and at a national level.³⁶ These companies are highly regulated not only by the Sports Act 1990 but also by the general legal regime of commercial companies and the securities market where applicable.³⁷

The Act confirms its will to regulate the professional dimension of sports imposing the creation of "Professional Leagues" wherever there is an official competition of professional nature and at a national level. These Leagues are also shaped as private associations, although their actual nature is strongly discussed since their membership is both exclusive and compulsory for all the Clubs participating in the relevant professional competition.³⁸

Finally, the key element in the articulation between public and private in this field seems to be Sports Federations, which are defined by art. 30 of the Act as: '*private entities of national*

³² Regulated by RD 75/1992 of 31 January

³³ RD 1591/1992 of 23 December on Sports Discipline.

³⁴ Art. 12 of the Act.

³⁵ Art. 16 of the Sports Act 1990, to be compared to the Right of Association Act 2002.

³⁶ Art. 19 of the Act.

³⁷ Fifth Final Disposition of the Sports Act 1990.

³⁸ As it will be discussed below, this fact poses several problems in relation to the right of association and, therefore, to the real nature of these entities. For a detailed account on the legal regime of Professional Leagues see, TEROL GOMEZ R., *Las Ligas Profesionales*, Aranzadi, 1998.

scope that carry out their own functions, as well as delegated public functions of administrative nature, acting in those cases as Agents of Public Administration.'

Sports Federations have been defined by the Spanish Constitutional Court³⁹ as “private associations of legal configuration” created after compulsory authorisation of the Supreme Council of Sports. There can only be one Federation for each sporting modality and it will represent Spain in international competitions.

Their legal regime is contained in the Act, in the Royal Decree 1835/1991 of 20 December, as well as in their own by-laws and regulations, whose minimum content is already established in the RD 1835/1991. The high level of public intervention on the legal regime of Federations has led to a debate about the actual legal nature of these entities. Some authors have expressed their inclination for considering them public bodies since they develop very important public functions. However, other authors prefer to stick to the private nature attributed to them by law, although acknowledging the application of public law where they are exercising public functions. Therefore, the regulation of functions and their attribution to the different actors intervening in the sports field becomes the most important aspect to be analysed in order to grasp the actual relationship between public and private in this sector.

The functional regulation

The Sports Act 1990 carries out a detailed distribution of functions amongst the different public and private entities intervening in the sports field. The regulation established in the Act, and in the more than twenty statutory instruments developing it, reveals the important public intervention experienced in this field. When this regulatory framework is analysed, it is clear that the main monitoring and enforcement functions are reserved to the public sphere.

As it has already been mentioned, the Supreme Council of Sports is the competent authority to determine when a new modality of sport exists. This decision is crucial in order to make a sporting activity relevant to the entire regulatory framework here described. Only after this recognition a Sports Federation can be created or an official competition can be organised. Thus, it seems clear that any expression of sports going beyond the spontaneous, ludic and altruistic practice of it is placed under the Administration's control.

The Supreme Council of Sports holds some normative powers in relation to the use of illegal substances when practising sports and it has enacted a statutory instrument⁴⁰ listing a number of prohibited products and practices to this effect. As it has already been said, the National Commission Anti-Doping is in charge of monitoring and enforcing the regulations on this matter although these functions are carried out with the collaboration of the Sports Federations.⁴¹

Finally, the Act also creates a public body to solve the conflicts arising from disciplinary matters, the Spanish Committee of Sports Discipline, which will be the last administrative resort in this topic before going to judicial review. However, the functions of monitoring and enforcement in this matter are also carried out in collaboration with private actors such as Professional Leagues and Sports Federations.⁴²

It appears then that the spheres of public and private are not isolated but interconnected, as it is already suggested by the Act when establishes that Sports Federations perform, in some

³⁹ STC 67/1985 of 24 May.

⁴⁰ Resolution of 10 December 2002.

⁴¹ Art. 33.1.d) of the sports Act 1990.

⁴² Art. 33.1.f) of the sports Act 1990.

cases, public functions despite being qualified as private associations in the Act. It is now turn, then, to examine the role left to private ordering in the sports sector.

III.1.2 The role of self-regulation

The role played by self-regulation in this field is determined by the functions that the Sports Act 1990 and the statutory instruments developing it attribute to private associations and particularly to Sports Federations. In this sense, art. 3 of the RD 1835/1991, developing art. 30 of the Act, establishes that ‘*Sports Federations, besides their own functions of administration, management, organisation and regulation of their relevant modalities of sports, they exercise some public functions under the co-ordination and control of the Supreme Council of Sports.*’ However, the apparent distinction between “functions of their own” and “public functions” is not as clear as it would seem from the wording, being necessary to explore the scope of the functions entrusted to Sports Federations in order to ascertain the real nature of those functions.

Functions performed by Sports Federations.

The functions attributed to Sports Federations and labelled as “functions of their own”⁴³ represent an actual normative power in relation to their members and the activities organised by them. Thus, regarding their members, Sports Federations regulate the formation and qualification of referees and trainers⁴⁴ of the relevant sports modality as well as the way of monitoring the activities developed by their members. In relation to the activities organised by the Federations, the latter regulate the organisation and control of official competitions, the way of participating at international events as well as the organisation of activities addressed to the public at large.

However, the attribution of these functions does not imply the exclusion of any other eventual intervention on these matters coming from other actors. On the one hand, public authorities may be entitled to intervene via their own powers, as it will become apparent below and; on the other hand, private actors may also develop sports activities outside the federative structures.

The other functions of Sports Federations are labelled as public functions and they are exercised under the co-ordination and control of the Supreme Council of Sports. Among these functions, which are enumerated in art. 33 of the Act and art. 3 of the RD, stand out the following:

- The qualification and organisation of official activities and competitions at a national level, except for the case where the competition has professional nature, whose organisation is entrusted to a Professional League.
- The collaboration with public authorities in order to prevent, control and punish the use of prohibited substances and methods in the practice of sports.
- The exercise of the disciplinary power in accordance to the legal regime provided by the Act and the statutory instruments developing it.

As it becomes apparent, the borders between “public functions” entrusted to Sports Federations and “functions of their own” are not clear-cut, facilitating the interference of public intervention in areas that could seem, at first sight, falling within the proper competence of the Federation.

⁴³ TEJEDOR BIELSA J.C., *Público y Privado en el Deporte*, Bosch, Barcelona, 2003, pp. 145 *et seq.*

⁴⁴ See, for instance, RD 1913/1997, of 9 December, on Academic and Professional Degrees.

The analysis of the disciplinary regime is maybe the best example to illustrate how self-regulatory techniques fit in the regulatory framework as a whole. Firstly, art. 75 of the Sports Act 1990 gives wide normative powers to private associations –mainly Sports Federations and Professional Leagues- in order to establish and exercise disciplinary rules and powers. Thus, these entities must elaborate a typified system of infractions that must be classified depending on their seriousness. They must provide for a table of sanctions that must be proportional to the offences. They must also provide for a system of aggravation, extenuation or exemption of the offender’s liability as well as for the procedures to be followed in order to impose a sanction, including a system of appeal. Private entities can also determine the internal bodies in charge of performing this function, although their regulation must always observe the basic principles attached to any disciplinary regime such as the observance of the principles of *non bis in idem*, non-retroactivity of new sanctions or the application of new provisions that are more favourable.

Public authorities, subsequently, assume this private regulation, as it has been acknowledged by case law.⁴⁵ The Spanish Committee of Sports Discipline will use this regulation, in addition to the public regulatory framework, in order to solve any eventual appeal, as the competent courts will in order to adjudicate in the case the Committee’s decision is challenge under judicial review. Thus, private associations regulate, under the general principles established by the Act and developing regulation, the specific disciplinary regime for the relevant modality of sport and they are in charge of exercising this power at a first instance. Their decisions can be appealed before the competent administrative authority whose decision, in turn, can be challenged under judicial review. The acceptance of this private regulation by the public structures is justified since it is considered that Sports Federations and Professional Leagues perform in this case delegated public functions. This conceptual scheme, however, presents some difficulties in order to fit it within the general legal order, as it will now be explored.

The difficulties presented by the use of self-regulation

It was initially said that public intervention was relatively recent in this field and, as some authors have pointed out,⁴⁶ this public intervention has been carried out through a process of “making public” the most important functions and powers in relation to the “official” side of sports. Then, once the competence is reserved to the public field, the exercise of some of these functions is delegated to private structures already existent, making them exercise these public functions.

This is the sense in which arts. 7.1 and 30.2 of the Sports Act must be construed when they establish that Sports Federations will exercise delegated public functions, becoming then collaborating agents of Public Administration.

However, legal scholarship have noted⁴⁷ that this delegation does not fit within the general regime of delegation provided by Public Administrations and Administrative Procedure Act 1992 (PAAP Act 1992). Art 13 of the latter provides with a general regime of delegation of competence that must be followed by public authorities, which might take place between different public authorities or between different public bodies within the same public authority. The delegation provided by art. 30.2 of the Sports Act must be construed, however, as a delegation between a public authority and private entities, which falls therefore outside any public legal regime of delegation. Consequently, this kind of articulation between public and private

⁴⁵ STS of 1 June 2000.

⁴⁶ TEJEDOR BIELSA J.C., *Público y Privado en el Deporte*, Bosch, Barcelona, 2003, pp. 19-26.

⁴⁷ TEJEDOR BIELSA J.C., *Público y Privado en el Deporte*, Bosch, Barcelona, 2003, pp. 145-153.

has led some authors⁴⁸ to talk about a *sui generis* type of delegation that impinges on the administrative sphere although being carried out by the legislative power to private entities.

This peculiarity, however, involves a wider discussion about the legal regime applicable to Sports Federations in its ordinary activity. Some authors⁴⁹ have defended an application by analogy of the First Transitory Provision of the PAAP Act 1992 on the law applicable to other corporate bodies subject to public law, such as Professional Orders. This provision establishes that these entities will be governed by their own rules and by the PAAP Act 1992 in the absence of applicable rule within their particular legal regime. This position is supported by the fact that art. 84.2 of the Sports Act, on disciplinary matters, explicitly invokes the general legal regime of Public Authorities as supplementary legal regime. In addition, they alleged that these entities, where exercising public functions, are also subject to administrative control and are mostly funded by public money.

However, other authors⁵⁰ affirm that the Act explicitly establishes the private nature of these associations and, therefore, the general principle must be that in the absence of applicable rule, only general rules of private law must be applicable. This general principle accepts exceptions –they follow- depending on the type of function that Sports Federations perform since in the exercise of public functions they will apply, at least partially, public law.⁵¹

At this point, the crucial issue becomes to define the private or public nature of the activities performed by these entities. This qualification will determine the path through which a given act will be reviewed. If the activity is considered to fall within one of the delegated public functions, it will be subject to administrative review by the relevant public body. The latter will issue an administrative act either admitting or rejecting the appeal, which in turn will be subject to judicial review before administrative courts. On the contrary, if the activity is considered to be private, that is, outside the delegated public functions, it must be challenged before civil or labour courts as the case might be.

A first point of reference in order to define the nature of a concrete act should be found in the statutes and regulations⁵² that delimit the delegated public functions performed by private associations. However, the vagueness of these provisions has made the courts run into difficulties when settling criteria to define the proper nature of the act.

One of the clearest examples is the case law about the expulsion of clubs' members. The Supreme Court⁵³ seems to accept that this kind of decision falls within the private activity of any association and therefore, must be adjudicated by civil courts. However, the same Court does not find any obstacle to admit the public nature of a club member's expulsion when this decision is the result of a disciplinary procedure initiated because of the violation of rules regarding the practice of the relevant sport, rather than organisational rules of the association. Since disciplinary matters fall within the functions that are classified as public, the exercise of disciplinary powers will be considered public and subject to judicial review before administrative courts.

⁴⁸ OSORIO ITURMENDI L., "El ejercicio de funciones públicas por las Federaciones deportivas españolas. Régimen aplicable", *Revista Española de Derecho Deportivo*, núm. 4 (1994), p. 274.

⁴⁹ AGIRREZCUENAGA ZIGORRAGA I., *Intervención pública en el deporte*, Civitas-IVAP, Madrid, 1998, pp. 264-275.

⁵⁰ TEJEDOR BIELSA J.C., *Público y Privado en el Deporte*, Bosch, Barcelona, 2003, at p. 149.

⁵¹ This view seems supported by the recent judicial decision of the Constitutional Court STC 259/2000.

⁵² Mainly art. 33 of the Sports Act 1990 and art. 3 of the RD 1835/1991.

⁵³ STSS of 30 October 1989 and 10 April 2001.

A similar situation appears in relation to electoral matters. Certain case law from lower courts⁵⁴ have declared the public nature of private associations' decisions taken in this issue whereas the Supreme Court has recently ruled that this matter had a private nature and had to be adjudicated by civil courts. Some authors⁵⁵ have explained this apparent contradiction arguing that the associations involved in these cases were of different nature. Thus, the courts defending the public nature of this issue supported their decision in the fact that the associations involved were a Sports Federation and a Club participating in a professional and official competition. As it has already been mentioned, these are the sort of private associations that can exercise delegated public functions. In addition, the statutory instrument developing the regulation of Sports Federations devotes detailed provisions to this issue, creating a specific public body to control and solve any conflict in relation to it. Therefore, the public nature of this issue regarding, at least, Sports Federations seems to be drawn by the regulation itself. On the contrary, the case ruled by the Supreme Court involved a basic Club, which is not entrusted with any public function, and whose electoral regime is not regulated by the public regulatory framework. Thus, this issue falls completely under the private autonomy of the association and its members. This fact should be the reason why the Supreme Court affirms that any electoral conflict arising within the club must be dealt with as an internal issue of any private association, and therefore, before civil courts.

III.2 Professional Orders

The exercise of professional activities has always been a good example of the interconnection between the State and society. Thus, every member of society, as the Spanish Constitution establishes in art. 35, has the right to work and to choose freely her profession. On the other hand, as some authors⁵⁶ have already stressed, the relevance of certain professions to the actual structure of our societies implies the appearance of a public interest dimension in them and, therefore, the need for some sort of regulation.

This regulation is already present in the Constitution, whose art. 36 states that a statute will regulate the legal regime of Professional Orders as well as the exercise of professions that require an academic title.

Some authors⁵⁷ have construed this article as an open door for the legislator. The argument establishes that the State, as the ultimate guardian of the public interest, could choose between a direct intervention in this field, enacting *command & control* type of regulation and entrusting the supervision and enforcement of it to Public Administration or rather, an indirect intervention through Professional Orders.

The latter seems to be the chosen model and it has been built up from the pre-constitutional Professional Orders Act 1974⁵⁸ as amended mainly by the Acts 74/1978⁵⁹ and 7/1997.⁶⁰ This Act establishes that Professional Orders are public law Corporations (*corporaciones de derecho público*) with full legal capacity for the exercise of their functions. Some authors, in spite

⁵⁴ SAP Zaragoza 10 May 1999 and STSJ Madrid 16 March 1999.

⁵⁵ TEJEDOR BIELSA J.C., *Público y Privado en el Deporte*, Bosch, Barcelona, 2003, pp. 205 *et seq.*

⁵⁶ See Presentation of GAY MONTALVO E., in CALVO SANCHEZ L., *Régimen Jurídico de los Colegios Profesionales*, Civitas, Madrid, 1998, pp. 33-35

⁵⁷ FANLO LORAS A., "Encuadre histórico y constitucional", in MARTIN-RETORTILLO L., *Los Colegios Profesionales a la luz de la Constitución*, Civitas, Madrid, 1996, at p. 79.

⁵⁸ Act 2/1974, of 13 February, on Professional Orders. BOE of 15 February 1974.

⁵⁹ Act 74/1978, of 26 December, on the modification of the Professional Orders Act. BOE of 11 January 1979.

⁶⁰ Act 7/1997, of 14 April. BOE of 15 April 1997.

of the provision's tenor, have defended the private nature of these entities⁶¹ arguing that their main function is protecting the private interests of their members notwithstanding they exercise some public functions by delegation. However, a wider part of scholars⁶² argue for the public nature of Professional Orders, not only because this is the way the Act describes them but also because these entities are entrusted with the functions of regulating their professions and representing them under an exclusivity regime. These features, they follow, imply some consequences that are incompatible with the ordinary regime of private associations established by art. 22 of the Constitution and, therefore, deny any possible categorisation as private entities.

In particular, this view put forward three main arguments to defend the public nature of Professional Orders. In the first place, it is argued that these entities are provided with a legal regime that is not compatible with the legal regime applicable to private associations under art. 22 of the Constitution and the recent Right of Association Act 2002.⁶³ In this sense, Professional Orders cannot be created freely and voluntarily by their members. Their creation is subject to the enactment of a statute and it is also the law that determines their configuration. In addition, only these entities can represent their profession, with exclusion of any other entity. Consequently, there can only be one Professional Order in a given territory. Finally, most of the Professional Orders establish a compulsory membership, what clearly goes against the right of association in its negative dimension, that is, the right not to associate.

In the second place, positive law seems also to corroborate this view since art. 1 of the Professional Orders Act 1974 defines these entities as public law Corporations. In the same way, the main legislative pieces of administrative law in Spain allow for their application to these entities. Thus, the Public Administrations and Administrative Procedure Act 1992 establishes that it will be applicable to these Corporations whenever their specific legal regime appears to be incomplete. Likewise, the Administrative Jurisdiction Act 1998 establishes that public courts will be the competent jurisdiction whenever the dispute involves these entities in the exercise of their public functions. The crucial issue appears to be, then, the nature and relevance of these entities' functions.

The functions attributed to Professional Orders are the final argument to defend the public nature of these entities. Art 1 of the Professional Orders Act 1974 establishes that the main functions of these Corporations are the regulation of the profession's exercise, the exclusive representation of it and the defence of the professional interests of their members. Although the last function is typical of private associations, being used as the main support for those who defend the private nature of these entities, the opposite view argues, instead, that the two first functions are the defining functions of Professional Orders. These functions are, precisely, the functions that affect the public interest as it will be now examined.

The regulation of the profession is the main function entrusted to Professional Orders. In order to carry out this function, these entities are attributed the main regulatory powers as it becomes apparent under art. 5 of the Act 1974. In particular, they have wide normative powers in relation to the exercise of the profession and they are also given the power to supervise and enforce this legal regime through a disciplinary procedure.

⁶¹ GARCIA DE ENTERRIA y FERNANDEZ RODRIGUEZ T. R., *Curso de Derecho Administrativo*, t. I, 6ª ed., Civitas Madrid, 1993, pp. 377-383.

⁶² See for all FANLO LORAS A., *El Debate sobre Colegios Oficiales y Cámaras Oficiales. La Administración Corporativa en la jurisprudencia constitucional*, Civitas, Madrid, 1992, pp. 33 *et seq.*

⁶³ Ley Orgánica 1/2002, de 22 de marzo, del Derecho de Asociación. BOE de 26 de marzo de 2002.

In relation to their normative power, Professional Orders enjoy different levels of freedom depending on the issues that must be regulated. Thus, with regards to the internal organisation of the entities as well as to their functioning, the Act 1974 defines in some detail the aspects that must be contained in the Corporations' by-laws. In addition, these statutory instruments must receive the approval of the Government through the relevant Ministry. Professional Orders enjoy, in contrast, a vast autonomy to regulate all the aspects related to ethical standards, protection of individual rights and any other issues regarding the profession's dignity. This different level of public intervention in relation to the normative power of Professional Orders has also consequences regarding the formal status that these provisions acquire. Thus, these entities' by-laws take the form –since they are approved by the government- of a Royal Decree, that is, a statutory instrument. Therefore, this norm will be published in the Official Bulletin of the State and will produce all its effects as a statutory instrument. Any eventual Code of Conduct or any other ethical norm produced by the Professional Order, in contrast, are simply decisions and agreements taken by the competent bodies of the Orders. These rules are certainly binding upon the Order's members, as it is clearly stated both by the Act 1974 and by case law.⁶⁴ However, they have been contested on the grounds of legal certainty since these norms might impose obligations whose disregard may give rise to a disciplinary procedure and a subsequent sanction, but the way they are published, however, does not always match the minimum guarantees that a disciplinary regime requires.⁶⁵

As it has already pointed out, the regulatory autonomy of Professional Orders is also shown by the attribution of disciplinary powers to these entities. Art. 5 of the Act 1974, for instance, states that they will exercise this power among their members and art. 8 reinforces this autonomy establishing that any decision of the Professional Orders in the exercise of public functions –as the disciplinary regime is- will be subject to judicial review before the relevant courts without any previous administrative control.

The exercise of this power by Professional Orders has presented a recurrent problem in relation to the principle of legality that the Constitution requires to be respected by any disciplinary regime that may affect the individual's rights. As it happens in other fields where self-regulatory strategies are put in place, the provision of behavioural standards, as any other type of standard setting, is usually produced by internal acts and decisions adopted by the entities in charge of that regulation. However, the enactment of those rules does not follow the formal procedures and the validity requirements of public regulations, such as statutory instruments and others. The conflict then arises in relation to art. 25 of the Constitution, which requires any sanction to be imposed under the strict observance of the principle of legality. It is, at least, doubtful whether this principle is respected in cases where the conduct that allegedly violates one of those behavioural standards is described in internal documents of the Order or even, as the case might be, is not described in written form at all.

Case law seems to have favoured the validity of the sanction in order to preserve the credibility of the disciplinary system. Thus, the Supreme Court finds no obstacle⁶⁶ to uphold a sanction where the infraction and the sanction are provided by a Code of Conduct, even though this document does not take the form of a statutory instrument. The same Court, however, has gone further to assert in some cases that there is no need for an express provision that con-

⁶⁴ Art. 5 t) of the Act 1974 and STS 15 October 1998.

⁶⁵ For a comprehensive analysis see REQUERO IBAÑEZ J. L., *Los Colegios Profesionales; Administración Corporativa*, CGPJ, Madrid, 2001.

⁶⁶ STS 27th December 1993 and STC 219/1989.

templates a specific conduct when that conduct is so evident that the “intention and self-sufficiency” of other provisions could cover the conduct in question.⁶⁷

III.3 Financial Sector

The most liberal positions have traditionally perceived the economy as a part of social reality whose functioning should be left to society, or more precisely, to private actors intervening in it. These views, however, are tempered under the Welfare State model, which presents public intervention as a means of correcting any kind of inequality or imbalance that the free operation of the market might produce. The dialogue and tensions between these two ideas give rise to a favourable scenario in terms of using self-regulatory techniques as a part of the regulatory strategy. As some authors have pointed out,⁶⁸ the economy presents some features that characterise the spaces or sectors in which the use of self-regulatory techniques is more frequent. In this case, the economic sector presents a high level of technical and ethical complexity, which calls for a cautious public regulation that must take into account all the interests at stake, and for which the collaboration of the actors intervening in it is thought to be essential.

Within the Spanish legal system, the search for this compromise is already suggested by the Constitution, whose art. 38 announces the freedom to conduct a business within the framework of a market economy but it also allows for public intervention if the general interest so requires, as it becomes clear under art. 128 of the constitutional text. Thus, the freedom to conduct a business will have to be exercised within the limits defined by other constitutional principles, such as the defence of competition or the protection of consumers amongst others.

For the purpose of this study we will focus on a very concrete part of the economy: the Stock Exchange.⁶⁹ This sector is a clear example of technical and ethical complexity, whose public regulation already acknowledges⁷⁰ the important role that self-regulatory techniques must play in its ordering.

The current Spanish regulation of this sector and, particularly, the role that self-regulation performs in it respond to the European⁷¹ and International⁷² evolution in this area. The European influence on the Spanish Stock Exchange’s regulation is explicitly acknowledged by both the legislator and the Spanish Council of State.⁷³ They explain the introduction of self-regulatory techniques in the Spanish regulatory model as a way of complying with the European will to ‘*create a common set of professional ethics in an ever-changing field [that] will considerably facilitate the process of harmonisation in this sector.*’⁷⁴ The Council of State sees this European strategy as an attempt to integrate into a common model of organising the Stock Exchange two different traditions, the Latin and the Anglo-Saxon traditions, which have been evolving through different regulatory techniques. On the one hand, the Latin model based in public intervention through mandatory rules of monitoring and enforcement and, on

⁶⁷ STSS 3 March 1990 and 18 July 1990.

⁶⁸ ESTEVE PARDO J., *Autorregulación...*, p. 70 *et sec.*

⁶⁹ For the purpose of this work, I will exclude other economic sectors such as commercial regulation or, within the financial sector, the banking sector.

⁷⁰ Art. 78 of the Securities Market Act 1988, of 28 July. BOE of 29 July 1988.

⁷¹ For instance, Recommendation 77/534/CEE of 25 July and Directive 89/592/CEE.

⁷² Also the *Principles of Conduct applicable to financial intermediaries* elaborated by IOSCO were taken into account, as it is acknowledged by the Council of State in its mandatory report num. 1643/1992.

⁷³ Num. 14 of the Preamble of the Securities Market Act 1988. Also, Council of State, Dictamen num. 1643/1992, *Recopilación de Doctrina Legal*, 1993, num. 254, BOE. Madrid, 1994, pp. 1298 *et sec.*

⁷⁴ Recommendation 77/534/CEE of 25 July.

the other hand, the Anglo-Saxon model of regulation that fosters the idea of self-regulation, that is, promoting actors intervening in the market to regulate themselves through behavioural rules.⁷⁵

This conceptual construction can be seen in the Securities Market Act 1988 –the central Spanish regulatory piece in this sector- and in the numerous statutory instruments developing it.⁷⁶ Thus, part of the regulation carried out by the Act and the statutory developments could be categorised as traditional *command & control* regulation, since it sets standards and provides for their monitoring and enforcement through the imposition of sanctions if necessary. This regulatory framework, however, also reserves an important role to self-regulation through the use of codes of conduct, to which the Act grants some sort of binding effect. This type of articulating public and private regulation is what has led some authors⁷⁷ to talk about “regulated self-regulation”, and which will be analysed after the examination of the aspects entrusted to public regulation.

III.3.1 The public regulation of the Stock Exchange

The Spanish legal system undertakes the most important reform of the Stock Exchange through the enactment of the Securities Market Act 1988, which aims at a comprehensive and coherent organisation of this market. The legislator’s main objective⁷⁸ is to reconcile a high level of efficiency in the market’s functioning with the due protection that investors must enjoy in order for them to operate in it with the highest possible level of confidence. The challenge of this sector’s regulation is, therefore, to allow for a sufficient space of freedom and flexibility, in order for private actors intervening in the market to find the most efficient formula to run it, while issuing the necessary mandatory rules in order to make the market’s functioning transparent and reliable enough to the public.

This Act represented the legislator’s will to prepare the Spanish Stock Exchange for the, in those days, imminent appearance of a common market of capitals within the European Community, reason why European provisions on this subject influenced importantly the regulatory model built up by the Act. The central pillar of this model is the National Commission of the Securities Market, a public body created by the Act and entrusted with wide public powers in order to monitor and enforce this sector’s regulation.

The main regulated aspects

Art. 1 of the Act defines the object of the statute as ‘*the regulation of the Securities Market, establishing to this end the principles of its organisation and functioning, the norms ruling the activity of the individuals operating in it as well as its supervision regime.*’ Thus, the scope of the Act seems to pay attention to all regulatory functions, from the provision of normative standards to the inspection and enforcement of those standards.

As long as the normative aspect is concerned, two main features characterise the regulation of the Act. On the one hand, the extensiveness of issues regulated by the Act; due to the Act’s vocation for providing with a comprehensive regulation of the sector, this statute covers a vast range of aspects concerning the Stock Exchange. On the other hand, the regulation contained in the Act offers very different degrees of detail depending on the aspect concerned. Thus, some issues –of which the disciplinary regime and, particularly, the description of infractions

⁷⁵ Council of State, Dictamen num. 1643/1992, p. 1306.

⁷⁶ The main statutory instrument for the purpose of this essay being RD 629/1993, 3 May.

⁷⁷ DARNACULLETA GARDELLA M., *Derecho...*, Ch. 5.

⁷⁸ See num. 7 of the Preamble of the Act.

is a good example-,⁷⁹ are thoroughly regulated in order to satisfy the principle of legality that the Spanish Constitution requires for disciplinary matters and other restrictions of rights.⁸⁰ On the contrary, there are certain issues in which the Act only presents very broad principles and accepts –even promotes- that detailed regulation come from the actors that must be regulated. This is the case on behavioural or conduct standards,⁸¹ topic that will be developed in the second part of this section.

However, the Act is characterised by the large number of issues whose complete regulation is referred to subsequent statutory instruments that the Government must issue. This feature has led some scholars⁸² to present this Act as a framework statute, what matches perfectly with its condition of being the central pillar of this sector's regulation. This regulatory technique is justified in the Preamble of the Act and it is seen as the result of trying to reconcile two ideas. On the one hand, the need for keeping certain regulatory aspects away from the rigidity inherent in a statute, given the important evolution that the national and the international financial market was experiencing at the time the Act was enacted and that was expected to experience in the future. On the other hand, the extension of the Act's scope made many eventual administrative interventions through statutory instruments foreseeable, and they would need to be embedded in a legislative text. It is in this way that the Securities Market Act 1988 provides for further developments coming from the Government or the relevant Ministry as the case may be.

This is the case, for instance, of the legal regime that the undertakings operating in this market must observe. The Act establishes in its art. 66.2 some requirements that must be complied with, such as:

- the undertakings must adopt the form of a limited liability company,
- they cannot have any other corporate purpose than the provision of investment services,
- they are obliged to possess some minimum share capital,
- their internal structure is also regulated with regards to both the number and the experience of the corporation's Management Board.

All these aspects and many others are compiled and detailed in the Royal Decree 867/2001 20 of July on Investment Services Undertakings, which regulates in detail this aspect of the Market, replacing the old Royal Decree 276/1989 on Securities Companies & Agencies.

A similar situation can be observed in relation to the internal management of the Stock Exchange itself. Under art. 48 of the Act, the organisation and management of the Stock Exchange is entrusted to a limited liability company, which is specifically created for the fulfilment of this purpose and whose shareholders are exclusively the undertakings accepted to operate into the relevant market under the requirements mentioned above. These entities are extensively regulated not only by the Act but also by the Royal Decree 726/1989 23 of June, which regulates in detail their functions and powers. Although they are private companies, art. 15 of the RD 726/1989 establishes that any individual operating in the Stock Exchange, be it or not shareholder of the relevant management company, is bound by these entities' decisions, extending to third parties the effect of the regulatory functions that these entities are entrusted with. This feature explains that these decisions are not only subject to the judicial control es-

⁷⁹ Arts. 84 to 107 of the Act.

⁸⁰ Art. 25 Spanish Constitution.

⁸¹ Arts. 78 to 83ter of the Act.

⁸² FERNANDEZ-ARMESTO J. & CARLOS BERTRAN L., *El Derecho del mercado financiero*, Civitas, Madrid, 1992, at p. 55.

established by the Limited Liability Companies Act 1989⁸³ to this type of corporations, but also to an administrative review exercised by the National Commission of the Stock Exchange. Exercising its supervisory function, the National Commission may suspend, ask for modifications or leave without effect any decision coming from these entities that is perceived to disrupt the correct and transparent functioning of the market.⁸⁴

Once some examples of the normative aspect of the regulation have been exposed, it is now turn to briefly examine the monitoring and enforcement aspects of it, in which the central role played by the National Commission of the Securities Market has already been suggested.

The National Commission of the Securities Market

Arts 84 to 107 of the Act deals with the supervision, inspection and sanction regime applicable to the Stock Exchange, entrusting the most important part of these functions to the National Commission of the Securities Market.⁸⁵

The National Commission of the Securities Market is created by art. 13 of the Act. This provision shapes it as a public body subject to the specific legal regime provided by the Act and to any other provision completing this regime. Thus, this public body is categorised by administrative law scholars⁸⁶ as an Agency or Independent Administrative Authority, whose functioning must be guided by the principles of neutrality and independence from both, the State and private actors that must be regulated. The main goal of the entire regulatory framework is the achievement of an efficient market in this sector, to which the National Commission must contribute through the supervision of a transparent functioning of the market where prices are fairly formed and investors properly protected.

As a typical example of an Independent Administrative Authority, its legal regime is characterised by the application of both public and private law.⁸⁷ Whenever it exercises its public functions, the Agency must observe the general public regime applicable to all Administrations. On the contrary, the Act expressly provides for the application of private law where the Agency undertakes any type of patrimonial transactions. In a similar way, the Act establishes that its employees are subject to the general regime of labour law, although its selection process must observe principles such as merit and capacity, typical of the public recruitment process for civil servants.

For the purpose of this study, the most relevant aspect of the National Commission of the Securities Market is the analysis of the functions that are entrusted to it by the Act and the rest of the regulatory framework. Art. 15 of the Act recognises some normative powers to the Agency, enabling it to issue provisions that complement the statutory instruments enacted by the Government and the Ministry for the Economy, although express entitlement of the latter to do it is always necessary. However, its normative capacity is not the most relevant role played by the Agency. On the contrary, the Act shapes the National Commission as the pillar of the monitoring and enforcement processes in this field. In this sense, arts. 13 and 84 of the Act establish that the Agency is in charge of supervising and enforcing the legal regime of the Securities Market.

⁸³ Arts 115 to 122 of the Limited Liability Companies Act 1989.

⁸⁴ Art. 15.2 RD 726/1989.

⁸⁵ Art. 84 of the Act.

⁸⁶ FERNANDEZ-ARRESTO J. & CARLOS BERTRAN L., *El Derecho...*, p. 335 – 342.

⁸⁷ On the law applicable, art. 14 of the Act.

In order to carry out its functions, the Agency enjoys very wide powers that, in turn, are exercisable over almost any individual in contact with this market. Just to mention a few, the Agency is in charge of different registries whose main function is to keep records of information considered to be relevant for the correct functioning of the market. Consequently, it has the power to ask for any relevant information to any individual or undertaking operating under its jurisdiction. As it has already been mentioned, it also exercises a day to day control over the legal activity of the companies running the Stock Exchange. Thus, it must approve their by-laws and any subsequent modification of them; any new designation in their Management Board must also receive the Commission's assent. It also enjoys many other powers in relation to the securities transacted in the Stock Exchange.⁸⁸

Finally, the National Commission is also in charge of the disciplinary regime, having the power of imposing sanctions to any operator that infringes the normative system of this field. When exercising these powers, the Agency is subject to the public law regime applicable to all public bodies and, therefore, its decisions will be subject to judicial review before the administrative courts⁸⁹.

As it has already been mentioned, the Securities Market Act 1988 contains very detailed provisions on this topic, in order to satisfy the constitutional requirements on disciplinary matters, which impose that punishable conducts and behaviours must be typified in a text with legislative rank. From a legal point of view, this is one of the most interesting aspects that the use of self-regulatory techniques presents. Codes of conduct contain binding behavioural standards whose infraction could be punished by the Independent Authority; however, this situation would be of uneasy reconciliation with the constitutional requirements mentioned above. This aspect, amongst other issues about the role of self-regulation in this field, is what will be now analysed.

III.3.2 The role of self-regulation

It has already been said that the introduction of self-regulatory techniques in the Spanish regulation of the Stock Exchange is strongly influenced by the International and, more precisely, the European guidelines in this sector. It is especially enlightening the analysis undertaken by the Spanish Council of State, which after acknowledging the harmonising function that self-regulatory techniques might perform, introduces the argument whereby self-regulation appears to be the most adequate response to the challenge that the technical and ethical complexity of this sector represents. The Council of State, in its mandatory report on the Royal Decree 629/1993 about standards of ethical behaviour, presents self-regulation as a means of '*respecting the dynamics of the financial market and the business activity.*' At the same time, it acknowledges that its use clearly indicates the '*difficulty to transfer the demand for compliance with these standards of ethical behaviour from the ethical to the legal domain.*'⁹⁰

This approach seems to follow the position expressed by the European Commission in its Recommendation 77/534/EEC. In it, the Commission already points out to the difficulty of ascertaining the appropriateness of certain behavioural standards and acknowledges that only practice could show whether those standards contribute to any actual improvement of the market's working or, on the contrary, become a source of disruption.⁹¹ The argument should therefore be completed by saying that, before this uncertainty, self-regulation is preferred to

⁸⁸ Arts. 32 *et seq.* of the Act

⁸⁹ Art. 16 of the Act.

⁹⁰ Council of State, Dictamen num. 1643/1992, at p. 1309.

⁹¹ Num. 11 of the Recommendation 77/534/EEC.

public intervention because of its flexibility and its proximity to the expert knowledge that private actors possess.

These arguments also shape the underlying reasoning of the most recent literature on self-regulation in the Spanish legal system. In very broad terms, these authors⁹² argue that the high degree of expertise required to regulate certain fields of social reality is far beyond the real capacities of the State, which entrusts this regulation to private individuals acting in it. The next step appears to be that public intervention is no longer concerned by the substantive regulation of a given sector; instead, the objective becomes to regulate the conditions under which self-regulation takes place in order to preserve as efficiently as possible the general interests at stake. This way of articulating public and private regulation has been labelled “regulated self-regulation” since public intervention is devoted to regulate the conditions under which self-regulation will appear as well as the effect that this self-regulation will have within the public regulatory framework. This conceptual framework will become apparent in the Stock Exchange sector in relation to both, the substantive domain reserved to self-regulation as well as the effect conferred to it by the public regulatory framework.

The domain of self-regulation

The Spanish legislator in 1988 was aware that the Stock Exchange, as a system, rested on the conduct of the actors intervening in it. Therefore, it seemed appropriate to establish some minimum behavioural standards. This is translated into the Securities Market Act 1988 through arts. 78 to 83, which form Title VII of the Act, headed as “Norms of Conduct”. However, the Act also takes account of the arguments exposed above and foresees the important role to be played by self-regulation, establishing that any actor intervening in this market will respect any code of conduct that might be applicable to it.

The ensemble of norms of conduct are oriented to build up a transparent and reliable market where investors and savers feel adequately protected, as the best way of promoting efficiency. Thus, the Act shapes some general guidelines about different aspects that are perceived to be especially relevant for this purpose, the treatment of information being the main source of concern amongst other issues such as the avoidance of conflicts of interests or the enhancement of equal treatment among shareholders.

On the one hand, the Act establishes some positive obligations in relation to the treatment of information. Art. 82 of the Act states, in this sense, that every company whose securities are dealt in on the market must publish without delay any fact or important decision capable of having an appreciable effect on the price of securities. There are other types of information that must also be published periodically, such as the auditor’s reports on the financial state of companies operating in the market. In relation to the transactions carried out within the market, art. 53 of the Act imposes an obligation to inform of any transaction resulting in the transfer of a holding conferring control as well as of the volume of securities of its own that a company possesses.

On the other hand, information is also the object of restrictions in certain occasions. Thus, art. 81 of the Act establishes the obligation to keep secret any information about the Stock Exchange that is not considered to be public by the Act. To be sure, the use of privileged information could amount in certain circumstances to a criminal offence.⁹³ In a similar way, art 83 of the Act provides for the establishment of what is known as “Chinese walls”. Financial intermediaries are obliged to keep secret as between different departments and services of the

⁹² ESTEVE PARDO J., *Autorregulación...*, pp. 21-42.

⁹³ Arts. 285 and 286 of the Spanish Criminal Code.

same organisation price-sensitive information that they acquire in the course of their duties and which is not yet public.

These are just some examples of the type of conducts regulated by the Act, which also define the domain where self-regulation will develop its regulation. The relationship between public and private regulation and the effect of the latter is what we now turn to analyse.

The effect of self-regulation

In order to understand the legal relevance of each type of the regulatory instruments, it is important to bear in mind the legal structure established by the legislator in the Securities Market Act 1988. Thus, art. 78 of the Act provides that individuals having any kind of contact with this market must observe the following norms of conduct:

- the norms contained in the Act,
- the codes of conduct developing the norms contained in the Act and enacted by the Government or, with the latter's express authorisation, by the Minister of Economic Affairs on proposal by the National Commission of the Stock Exchange,
- the norms contained in their internal codes of conduct.

Exercising the powers conferred under this article, the Government enacted the Royal Decree 629/1993 of 3 May, which establishes a General Code of Conduct for the Stock Exchange. Some scholars⁹⁴ see this statutory instrument as the key piece in the articulation of public and private regulation on behavioural standards.

On the one hand, the substantive content of the General Code of Conduct has binding effect to those operators already obliged by the norms of conduct contained in the Act. As the Spanish Council of State expressed in its mandatory report, this General Code of Conduct develops the norms contained in the Act in order to '*adapt their application to the specificity of the elements that integrate this market: the market's organisation, the securities dealt with in it, the companies operating in it and the clients.*'⁹⁵

On the other hand, the Royal Decree draws up in its art. 3 the legal framework in which private regulation will take place. In the first place, the entities to which this Royal Decree is applicable must elaborate and issue their own Code of Conduct, which will be binding to their management boards, employees and agents. The Royal Decree, however, does not only impose the obligation to enact these codes of conduct, but it also provides for the effect that these codes will have. In this sense, it states that the violation of the internal codes of conduct, insofar they develop the Act's norms of conduct and the Decree's General Code of Conduct, may result in the imposition of administrative sanctions through the disciplinary process provided for by the Act.

As it has already been suggested, the effect attributed to the violation of the internal codes of conduct may present some difficulties in terms of respect for art. 25 of the Constitution, which establishes that only a provision of legislative rank can typify a conduct as amounting to a criminal or administrative offence. The Constitutional Court case law accepts that statutory instruments may detail the conducts described in a statute, which, in any case, must contain the essential or substantial elements of the behaviour considered as an offence.⁹⁶ The internal codes of conduct, however, are not statutory instruments in any respect since they are

⁹⁴ ESTEVE PARDO, *Autorregulación...*, at p. 78.

⁹⁵ Council of State, Dictamen num. 1643/1992, at p. 1304.

⁹⁶ STC 60/2000 of 2 March.

not enacted by the entities competent to do so nor are they elaborated through the procedures provided by law for this purpose. Scholars have therefore expressed their doubts on the lawfulness of private norms being able to describe any behaviour susceptible of being object of an administrative sanction.⁹⁷

Another feature characterising the use of self-regulatory techniques can also be observed in the legal structure here presented. The Royal Decree, apart from enacting a General Code of Conduct, also regulates intensively the way in which self-regulation must take place. We have already seen the public law effect that is attached to the violation of the internal codes of conduct, but the public regulation of self-regulatory instruments goes further. Thus, art. 3.1 of the RD 629/1993 imposes the obligation to issue a code of conduct to a large number of actors intervening in this market and it also imposes a minimum content that these codes must refer to. Art. 3.4 of the same statutory instrument also provides for a previous control by the National Commission of the Securities Market over these codes of conduct, which must be modified, where necessary, in the direction suggested by the National Commission. The highest degree of public intervention over these self-regulatory instruments appears in art. 3.5 of the Royal Decree, which reserves to the Ministry of Economic Affairs and, with express authorisation of the latter, to the National Commission of the Securities Market, the power to develop or refine the content of any of these internal Codes of Conduct. Consequently, this legal regime exemplifies the argument exposed above whereby public regulation changes its object from the substantive regulation of the sector to the regulation of the framework under which self-regulation will take place and will display some sort of public effect. Arguably, the establishment of minimum contents or the imposition of previous controls by the Agency could be seen as safeguards in order to protect the general interest and thus legitimise the regulation issued by private actors. It is within this context where the concept of “regulated self-regulation” acquires its full meaning.

III.4 Media sector

In December 2004, the Spanish Government, through its First Vice-President and its Minister of Industry, Tourism and Commerce, and the main four broadcasting operators within the Spanish territory (the public TVE, and the private Antena3, Tele5 and Sogecable) signed the ‘Agreement for the Promotion of Self-Regulation in relation to Broadcasting Contents and Childhood.’⁹⁸ This document is one of the most recent manifestations of the increased use of self-regulatory strategies in very diverse sectors, amongst which media has always had a long tradition in governing certain aspects of its activities by means of the voluntary acceptance of behavioural standards laid down in normative texts by the same professionals which the rules are addressed to.⁹⁹

These kind of regulatory strategies, though, have found in the last decade a renewed impulse coming from the European level, where Directives such as D. 97/36/CE modifying D. 89/552/CEE have led the Spanish legislator to introduce the promotion of self-regulation as one of the objectives to be promoted by public authorities within the media sector and particularly in relation to the contents of broadcasting activities.

⁹⁷ ESTEVE PARDO, *Autorregulación...*, at p. 84

⁹⁸ In June 2006, agreement has also been signed by other four new broadcasting companies.

⁹⁹ I am aware of the wide range of activities that one could include under the umbrella of the concept ‘media’, such as journalism, advertising, etc, as well as the variety of self-regulatory instruments present in those, such as editing rules, deontological codes and so on. This work, however, will only focus on broadcasting activities.

This sector also presents the features that Spanish scholars have identified as characterising the social reality where self-regulation can best perform its function, that is, regulating a specific sector, or certain aspects of it, whose level of complexity limits the intensity and efficiency of the traditional “command and control” type of regulation. The media sector presents a marked ethical complexity derived from the presence of several and distinct interests, whose enhancement and protection requires the search for a balance between them. It is this usually uneasy search for equilibrium what is perceived to be better achieved by the collaboration of all the actors intervening on the field through self-regulatory instruments rather than by using “command and control” type of regulation, which in turn tends to find serious restrictions because of the constitutional nature of the interests involved, as it will be seen below.

Thus, the complexity of this sector can already be discerned by looking at the constitutional provisions that play a role in this field. Any regulatory strategy within the media sector must therefore take into account that several fundamental freedoms and rights are at stake, such as freedom of expression,¹⁰⁰ freedom of press and the right to give and receive information.¹⁰¹ The Constitution already points to the idea of balance when stating that these rights and freedoms find their limits in the respect for the rest of freedoms and rights constitutionally protected, and especially for the right to privacy, honour, and the protection of childhood and youth.¹⁰²

The Spanish Constitution also provides with some general guidelines about how actors intervening in this sector must be regulated. In this sense, it establishes some positive conditions such as the regulation by statute of the organisation and the parliamentary supervision of media entities dependent on the State or its Administration. The statute must also guarantee the access of the main social and political groups to such media entities with respect for society’s pluralism and language diversity.¹⁰³ The constitutional text, however, also limits the regulatory intervention on this field, stating that the exercise of these freedoms and rights cannot be subject to any kind of *a priori* censorship¹⁰⁴ and that any confiscation of publications, recordings or other media information can only take place through a court’s decision.¹⁰⁵ These imposed restrictions on the regulation that can be issued by public authorities together with the importance of the interests that must be protected call for an active involvement of all the actors intervening in this particular sector in order to regulate it in a way where prudent and responsible behaviour should appear as a suitable alternative to deterrence regulation through restrictions and sanctions. In order to better understand the role played by self-regulatory instruments in this field, the general regulatory framework and the actors intervening in broadcasting activities will be examined. These analyses will provide the appropriate context to explore the regulation of broadcasting contents, aspect in which self-regulation performs its main function.

¹⁰⁰ Art. 20.1a) of the SC.

¹⁰¹ Art. 20.1d) of the SC.

¹⁰² Art. 20.4 of the SC.

¹⁰³ Art. 20.3 of the SC.

¹⁰⁴ Art. 20.2 SC.

¹⁰⁵ Art. 20.5 SC.

III.4.1 The regulatory framework

The Spanish legislator has regulated the media sector within the boundaries of the constitutional framework described above. Thus, it has enacted several statutes¹⁰⁶ that build up a regulatory framework characterised by the following features:

- Without prejudice of the powers attributed by the legislation to specific public bodies, the Government enjoys a general and residual power to develop the current legislation and regulate this sector, as an inherent power to its exclusive competence in broadcasting services.¹⁰⁷
- The management and provision of broadcasting services are assured by the Administration in a direct way through an independent administrative authority (RTVE) or in an indirect way through the granting of public concessions to private companies.
- The principles guiding the way broadcasting activities must be run and carried out are equally applicable to public and private entities¹⁰⁸ and can be summarised as follows.¹⁰⁹
- Objectivity, veracity and impartiality of information.
- Separation between information and opinions.
- Respect for politic, religious, social, cultural and linguistic pluralism.
- Respect for all freedoms and rights recognised in the Constitution.
- Childhood and youth protection.
- Respect for the value of equality as recognised in the Constitution.

Therefore, broadcasting is conceived as an essential service that must be placed under the exclusive competence of the State¹¹⁰ in order to assure its public function of protecting and promoting pluralism as well as enabling access to culture. This is the ideological basis to build up a legal framework where broadcasting is considered a public matter where private actors can only intervene under a regime of public concession.

III.4.2 Legal nature and functions of broadcasters

As it has been seen above, the Government holds the main regulatory powers on broadcasting, but the material provision of the broadcasting service itself is entrusted to both public and private entities. We will now turn to examine their legal nature as well as the powers they possess to carry out their activities.

The Independent Administrative Authority (RTVE)

The Statute 4/1980 entrusts the direct management and provision of the broadcasting service to an independent administrative authority (RTVE),¹¹¹ which is a public body governed by the Statute and its complementary instruments. The Statute also establishes that this public

¹⁰⁶ Amongst the most relevant statutes to our study one should mention the following: Statute 4/1980, 10th of January, establishing the Radio and Television Statute; Statute 46/1983, 26 of December, regulating the Television's Third Channel; Statute 10/1988, 3rd May, on Private Television.

¹⁰⁷ Art. 1.2 and Final Provision of the Statute 4/1980. Similar statements can be found in the other relevant Statutes.

¹⁰⁸ See art. 3 Statute 10/1988, in relation to art. 4 Statute 4/1980.

¹⁰⁹ Art. 4 Statute 4/1980.

¹¹⁰ Art. 1 Statute 4/1980.

¹¹¹ Art. 5.1 Statute 4/1980.

body will be subject to private law in relation to its external legal relationships as well as its acquisitions and contractual activities.¹¹² This distinction of legal regimes depending on the legal nature of the activity performed will also determine whether a particular act or decision will be subject to judicial review under public law or rather it will be subject to the ordinary control of private law courts.

The main governing bodies of this entity are the Board of Directors, whose members are designated by the Parliament amongst prestigious professionals of the sector and the Managing Director, who is designated by the Government after consultation of the Board of Directors. Their main functions relate to the organisation and management of the Independent Administrative Authority as well as the broadcasting activities carried out by it, such as regulating advertising or allocating share quotas between political parties. Thus, their competences do not go beyond the competences attributed to the public entity and their exercise must be directed to the compliance of the guidelines and principles set up in art. 4 of the Statute 4/1980.

Private broadcasters

Technically, private broadcasters are providing a public service under a legal regime of administrative concession¹¹³ granted through a tender process. Therefore, the provision of this service is governed by public law rules that set up a traditional command and control regulatory framework where the Administration holds the powers of rule-making, supervision and enforcement (through coercive powers and sanctions).

The Statute 10/1988 on Private Television imposes some conditions¹¹⁴ on the companies willing to participate in the public tender. They must adopt a concrete legal form (limited liability corporation); they must have a minimum amount of capital and the shares of the company must be nominative. The Statute also establishes that their activity must follow the principles established in Statute 4/1980 for public broadcasters, and the corporate purpose cannot be other than broadcasting activities.

The Statute also limits to three the number of concessions to be granted, and the competence to grant and to revoke them is entrusted to the Government, which in addition have all the powers to supervise and sanction the private operators.

III.4.3 The regulation of broadcasting contents

It has been shown so far that both public and private operators must provide their services within the same regulatory framework and under the principles that legislation establishes also for both. A similar situation is found when one turns to explore how the contents of the broadcasting activities are regulated. The regulation on this matter applies equally to both private and public operators and is characterised by the strong influence that European legislation has had not only on the contents of such regulation but also on the regulatory strategies adopted to implement it. Thus, we will observe that whereas some content requirements are trying to be achieved through a regulatory strategy of command and control, others are approached through the promotion of self regulation amongst the actors intervening in this field.

¹¹² Art. 5.2 Statute 4/1980.

¹¹³ Art. 1 Statute 10/1988.

¹¹⁴ Art. 18 Statute 10/1988.

Command & Control regulation

The statute 25/1994, 12 July, implements the Directive 89/552/CEE on the exercise of media activities and establishes some requirements regarding the promotion of European cultural productions, such as the obligation to reserve a 51% of the broadcasting time to European productions.¹¹⁵ It also establishes some limits and prohibitions in advertising activities on television¹¹⁶ in relation to some products such as tobacco, alcohol or drugs requiring medical prescription as well as regarding the maximum time that can be devoted to advertising.

The functions of supervision and control are explicitly entrusted to the Government, which is empowered to inflict monetary sanctions as well as to revoke the concession to broadcast. These powers must be exercised following the general provisions governing the activity and procedure of the Administration.¹¹⁷ This type of regulation, however, coexists with the explicit mandate to promote self-regulation that the Statute gives to public authorities and that we turn now to analyse.

Promotion of Self-Regulation

The Statute 25/1994 contains a general statement¹¹⁸ entrusting to public authorities the promotion of self-regulation. They must foster within this sector the constitution and development of self-regulation organisations, which must be open to all interested stakeholders. In particular, the Statute encourages broadcasters to reach an agreement on a uniform system of classifying programs in relation to their contents and their appropriateness for youth and childhood. In case of failure to do so, the Government will be entitled to regulate this aspect as it sees fit.¹¹⁹

It is then under the principle of youth and childhood protection where several self-regulatory experiences have taken place. In 1999, the main public and private broadcasters signed a Convention through which a uniform system of signposting about programs' classification in relation to their appropriateness for youth and childhood was established. Some operators, however, did not join the Convention, and the Government enacted in 2002, under the power conferred to it by the Statute, a Decree¹²⁰ to transform the content of the Convention into legally binding rules applicable to all operators.

Notwithstanding the existence of this regulation, in December 2004 a new 'Agreement for the Promotion of Self-Regulation in relation to Television Contents and Childhood' was signed by the main four broadcasters but also by the First Vice-President and the Minister of Industry, since the collaboration between them is perceived to better contribute to a more efficient planning of broadcasting contents in relation to, and for the benefit of, minors. This agreement establishes a complex structure of collaboration between very diverse parties: public bodies, broadcasters, consumers, parents and representatives of youth and childhood associations. It is this complexity that hinders its analysis from a legal point of view.

Regarding its legal nature, this agreement seems to be a private convention, since it is structured in clauses and its final clause states that any party will be able to repudiate the conven-

¹¹⁵ Art. 5 Statute 25/1994.

¹¹⁶ Arts. 8 to 13 Statute 25/1994.

¹¹⁷ Art. 20 Statute 25/1994 in relation to the Statute 30/1992, 26 November, on Legal Regime of Public Bodies and Common Administrative Procedure.

¹¹⁸ Third Additional Provision of the Statute 25/1994.

¹¹⁹ Art. 17.3 Statute 25/1994.

¹²⁰ Royal Decree 410/2002, 3 May.

tion after a three months notice.¹²¹ In addition, the Agreement establishes that any other operator of the sector can join it at any time. The private nature of the Agreement can also be derived from the vocabulary used in its clauses, especially in relation to the role of the Administration, which makes it particularly difficult to fit under any other category of sources of law. In this sense, the Agreement uses expressions such as ‘the Administration acknowledges the utility of the code of conduct’; ‘the Administration supports the Code’; ‘the Administration collaborates with the broadcasters’; etc. Thus, it is clear that there is no public intervention in the sense of “command and control” regulation but rather a collaboration agreement reached by several parties acting on equal footing. This vocabulary, although lacking any actual legal meaning in terms of legal consequences or effects attached to it, will make more sense when we will study the Code itself.

As regards the contents of the Agreement, it must be noted that it actually contains two different instruments: the Agreement itself and the so-called Code of Self-Regulation (hereafter “the Code”), which takes the same title but is only signed by the broadcasters and not by the Administration.

As far as the content of the Agreement is concerned, it sets up several instruments in order to achieve the purported goals. It acknowledges the utility of the Code signed by the broadcasters as an appropriate regulatory strategy in this particular issue within the media sector. This utility is implicitly inferred from the fact that the Code provides for concrete procedures in order to supervise and control the implementation and application of the Code amongst the operators. To this end, the Agreement already reveals that the Code provides for the creation of a Follow-up Committee that will be integrated by representatives of all the interests involved, and it also establishes its functions. Finally, the Agreement also sets up a Joint Follow-up Commission for the Agreement itself, which will be integrated by four members, designated two by the Administration and two by the broadcasters.

It is important to note the complementary character of this Agreement, idea that is repeatedly stressed within the Agreement, both in its motivation and in its clauses. Thus, it is declared that this Agreement pursues the establishment of a framework of relationships that reinforces self-regulation in this particular field without prejudice of the Government’s competences and powers on it. Likewise, Clause I of the Agreement describes itself as a mechanism complementary to the administrative and judicial procedures and declares its compatibility with them and the rest of current legislation. Finally, Clause II literally asserts that the Administration “supports” the Code of Self-Regulation signed by the broadcasters, as an implementing manifestation of the mandate given to it by Statute 25/1994 to promote self-regulation, without this affecting any of its powers on broadcasting services.

The Code of Self-Regulation

First of all, it must be noted that the Code of Self Regulation is a document, as it was pointed out above, only signed by broadcasting operators. Thus, it appears as a manifestation of “pure self-regulation”, meaning by this concept the regulation that private actors provide with to themselves and by themselves. This idea is confirmed by the Final Provision of the Code that declares that the signatories of the Code will present it to the competent authorities. Therefore, it is to be inferred that the elaboration of the Code was previous to the elaboration of the Agreement signed by the Administration, which attaches the Code as an Annex. Certainly, it is easier to understand why the Agreement uses unusual words such as ‘*acknowledging*’ or ‘*supporting*’ when referring to the relationship between the Administration and the Code if

¹²¹ Clause VIII of the Agreement.

we bear in mind that this document is elaborated exclusively by broadcasters and only afterwards is presented to the Administration in order to fit it within the framework of a collaboration agreement. The question that could then arise is whether this unorthodox administrative intervention –supporting or acknowledging the utility- has any legal effect on the nature of the Code. It seems probable that no change in the legal nature of the Code takes place by integrating it within a collaboration Agreement between private operators and the Administration. However, I am of the opinion that this administrative intervention does acquire some legal relevance if these statements are put in relation to statutory provisions such as art. 17.3 Statute 25/1994. This article gives the opportunity to the regulatees to come up with an agreement about the regulation of a particular issue and establishes a time limit after which the Government will be entitled to regulate on this issue if no agreement has been reached. It is in this sense that the words used in the Agreement acquire some legal relevance, as the Administration's declaration of conformity with the solution that regulatees have put forward and its intention not to regulate unless and until there is evidence that the self-regulatory instrument does not reach the goals aimed at.¹²²

We are, therefore, before a private agreement elaborated by the same individuals which the Code is addressed to. This consensual character is already made explicit in the Preamble of the Code, where the signatories assert that the content of such an instrument must be acceptable to all the parties taking part in it. However, the content and the structure of it are closer to those of a rule of general application (statutes or statutory instruments) than to those of a private agreement, typically the contract. It might well be for this reason that the Code tries to explain its nature and its function in a long preamble before establishing the material regulation of the issue. Apart from the consensual character of this instrument, the preamble declares that this Code takes shape as a minimum standard and does not represent any obstacle to broadcasters in keeping their own deontological rules or in establishing higher standards of conduct as they might wish. It is also made explicit a function of private codification. Thus, it is said that the Code tries to put together a set of rules which are already in force although dispersed amongst several disconnected regulations. In this sense, it is curious to see that the preamble takes the trouble in mentioning international and constitutional provisions in order to frame and somehow link its (private) regulation into the current legal (public) regulation. At this point, the Code expresses its main aim, which is finding a balance between some essential and frequently opposed values that define the modern State under the rule of law, such as freedom of expression, right to the free development of the own personality, interdiction of discrimination, protection of youth and childhood and so on. This aim is to be achieved through the establishment and implementation of two objectives:

- Restricting the type of contents broadcasted in certain time zones, perceived as having to be especially protected (protected time zones)
- Improving the current system of qualification and signposting of programs in order to facilitate the exercise of parents' or tutors' responsibilities on minors under their charge.

Therefore, the content of the Code must be analysed from the standpoint of the suitability of the measures adopted in relation to the objectives to be achieved. Firstly, I will explore the substantive provisions on the issue and this will be followed by an analysis of the measures intending to provide these provisions with the necessary effectiveness.

¹²² This is the case of Decree 410/2002 on Uniform criteria of classification and signposting of broadcasting emissions.

Substantive regulation

The substantive regulation within the Code is structured around three sections.

The first section deals with the contents of programs broadcasted within the so-called protected time zone, which is defined as the time zone going from 6am to 10pm. It establishes the general principles that must guide the contents of the programs broadcasted within this time zone such as avoiding violence, sex, discrimination or drugs consumption, amongst many others, where these contents lack any educative or informative purpose. This section also restricts certain conducts in relation to contents where minors are the object of the content. These restrictions affect the content of all kind of programs including news and advertisements.

The second section is devoted to establish ‘reinforced protected time zones’. This reinforced protection is established between 8am and 9am and between 5pm and 8pm during week as well as between 9am and 12am during weekends and certain bank holidays. This reinforcement is justified by the argument that during these time zones, it might be more likely that minors –especially under 13 years- are consuming broadcasting products without the supervision of adults, parents or tutors. The same argument is used to establish a declaration of intention in relation to periods of school holidays by which broadcasters engaged to take into account the special circumstances of those periods although the ordinary time framework is applicable also to these periods.

Finally, the third section deals with the classification, signposting and emission of programs. In relation to the first issue, the Code refers to an annex whereby some criteria are established to classify programs regarding its appropriateness to youth and childhood. The issue of signposting is referred to the current legislation in force, which is the Decree 410/2002, 3 May.

In any case, it is provided for the prohibition of broadcasting programs classified as not suitable for minors under 18 within the protected time zone and programs classified as not suitable for minors under 13 within the reinforced protected time zones. Thus, one could argue that the normative conducts established in this Code are very similar to statutory provisions since they design the conducts considered acceptable as well as those that must be avoided or even prohibited. The question then arises in relation to the effectiveness of such rules. As we know, this Code is at most a private agreement that does not provide for any specific sanctions for the signatories which eventually do not observe its content. In theory, only general rules on breach of contract would be applicable, where appropriate, in case of in compliance by any of the parties. In addition, only broadcasters adhered to the Code are actually bound by it and, therefore, it is assumed from the outset that part of the broadcasting sector might remain outside of the scope of the regulation. This is why the Code puts special attention to the issue of the effectiveness of its content, devoting a section to the supervision and control of the Code’s application and implementation.

Measures ensuring the effectiveness of the regulation

The Code shows its interest to ensure the effectiveness of its contents already in the Preamble. It could be argued that the Code is aware of the weaknesses of this kind of regulation in terms of enforceability but, at the same time, it states its conviction that self-regulation is more appropriate than command and control regulation to achieve the aimed goals. This is clearly seen when the Preamble mentions the satisfactory results that they have achieved within the

field of advertising activities through a strategy of self-regulation.¹²³ It is then assumed that the appropriateness of this strategy stems from the credibility and the public confidence that the system proposed by the Code must build up. Credibility and public confidence should in turn compel the broadcasters to comply with the contents of the Code that they have themselves agreed upon as a matter of their own reputation.

These are the principles underlying the creation of two bodies that are in charge of the supervision and control of the compliance with the provisions of the Code.

The first body is the **Self-Regulation Committee**, whose main functions are a) the interpretation of the provisions of the Code; b) dealing with the eventual complaints coming from the stakeholders involved such as parents, educators, consumers and so on; c) Reporting periodically to the Joint Follow-Up Commission about its activity. The members of the Committee are designated amongst the professional involved in broadcasting activities such as journalists, producers and broadcasting firms themselves.

The second body is the **Joint Follow-Up Commission**, whose composition reflects the interest in involving stakeholders in the process of supervising the compliance with the regulation in order to achieve the above mentioned credibility and public confidence. This commission is integrated by four members from the Self-regulation Committee, as the representation of the broadcasting sector, and four members elected amongst representatives of associations of parents, consumers, educators and others related to the protection of youth and childhood. The Administration is also present in this commission as holding the Secretary office, although it will have no vote in the decision-making process. The Commission's main function is watching over the compliance of the Code as well as analysing all the aspects related to its effective implementation. In order to carry out its functions, the Commission will issue an annual public report about the results achieved through the application of the Code as well as reports, which can also be public, on the operators' compliance with the provisions therein. Finally, the Commission will deal with the complaints addressed to the Committee, as a second instance, when the complaint, or its solution, has been disregarded by the broadcasting operator involved. In this respect, the Commission may decide to make public the incompliance and even to communicate it to the competent authorities in case the compliance is seen as constituting an infringement of the administrative regulations.

Thus, it is clear that the Code emphasises the role to be played by public opinion and by broadcasters' reputation as an alternative method of compelling the regulatees to comply with some rules whose inobservance does not attach, in principle, any legal sanction to the infringer. Reputation and public opinion are therefore at the bottom line of this kind of regulatory strategies, and this is the reason why broadcasters mutually engage in spreading the existence of this Code and its contents in order to provide the users and consumers of broadcasting activities with the appropriate information about their rights and tools too protect them. Coming analyses in this issue will have to focus in the actual performance of such regulatory strategy.

III.5 Advertising sector

The current regulatory framework in the area of advertising could be seen as the result of the European regulation enacted on this topic. Thus, the Advertising Act 1988,¹²⁴ which is the

¹²³ Convention of 13 June 2002, signed by the same broadcasters signatories of this Code, FORTA, the Association for Self-Regulation in Commercial Communication (AUTOCONTROL) and the Spanish Association of Advertisers.

¹²⁴ Act 34/1988 of 11 November. BOE num 274, of 15 November 1988.

first post-constitutional Act in this field, implements into Spanish law the European Directive 84/450/CEE¹²⁵ on misleading advertising. This regulation has been developed and extended in relation to advertising within broadcasting activities by Directives 89/552/CEE¹²⁶ and 97/36/CE,¹²⁷ which have been implemented in Spain through the Acts 25/1994¹²⁸ and 22/1999.¹²⁹

This regulation sets some standards regarding the type of advertising activities that are considered unlawful. Art. 3 of the Advertising Act 1988, for instance, declares unlawful the following advertising activities: those that are misleading, disloyal or subliminal and those attacking humans' dignity or the values, freedoms and rights recognised the Spanish Constitution, especially those in relation to childhood, youth and women. Likewise, art. 8 of the Act 22/1999 establishes that in addition to the conducts provided by the Advertising Act 1988, it will be unlawful any of the following broadcast advertising activities:

- those enhancing harmful behaviours to health, security or the environment,
- those attacking humans' dignity, religious faith or political ideology,
- those discriminating on the grounds of birth, race, sex, religion, nationality, opinion, or any other personal or social circumstances,
- those inciting to violent or anti-social behaviour,
- those inciting to cruel treatment to humans or animals as well as those inciting to the destruction of cultural or environmental patrimony.

These provisions reveal the high level of complexity, both technical and ethical, that this field entails. On the one hand, advertising activities have been related to the exercise of fundamental freedoms. Although there is no unanimous opinion about the fundamental freedom within which advertising must be embedded it is clear that advertising activities must be carried out with full respect to the other fundamental freedoms and rights. In addition, scholars¹³⁰ have stressed the extreme relevance that advertising has in sociological and economic terms, which increases the inherent risks that this activity represents to the rights of consumers or competitors.

On the other hand, the standards laid down by this regulatory framework refer to concepts with an important ethical content, which makes even more difficult the task of defining the borders between a licit and an unlawful use of advertising techniques.

These arguments have led some authors¹³¹ to assert that Public Administration does not possess the expert knowledge to properly deal with these issues. Therefore, public intervention

¹²⁵ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.

¹²⁶ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities.

¹²⁷ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

¹²⁸ Act 25/1994, of 12 July. BOE num. 166, of 13 July.

¹²⁹ Act 22/1999, of 7 June. BOE num. 136, of 8 June.

¹³⁰ See for a comprehensive account on this topic, SANTAELLA LOPEZ M., *Derecho de la publicidad*, Civitas, Madrid, 2003.

¹³¹ DARNACULLETA GARDELLA M., *Derecho...*, at p. 331.

gives way to self-regulation produced by advertising professionals that must guarantee the respect of fundamental values through a process of self-control.

III.5.1 Self-regulatory structures in advertising

The Spanish regulation of self-regulatory techniques is also framed by the European provisions in this field. Thus, among the provisions of directive 84/450/CE, it is noteworthy the content on supervisory and control measures it imposed on Member States. In particular, art. 4 established that Member States should provide with a competent authority to watch over the proper application of the legal regime on misleading advertising. However, this article did not specify the nature of that authority, giving to the Member States the freedom to choose the administrative or judicial nature of such control. The Spanish Act on Advertising did not create an administrative authority, providing instead for an especial procedure before civil courts.¹³²

However, this public system of control did not exclude the recognition of voluntary systems of control of misleading advertising by self-regulatory bodies.¹³³ In this sense the professionals in this field decided to create in 1995 an association (*Asociación de Autocontrol de la Publicidad*) that has currently acquired an extremely relevant role on the regulation and supervision of advertising matters.

This entity takes the form of a non-profit private association ruled by the Right of Association Act 2002. Art. 5 of the Association's by-laws describes its main objective as 'making commercial communication a useful instrument for the economic process with due respect for the ethics of advertising activities as well as for the rights of the addressees of these activities and excluding any kind of protection for professional interests.'

In order to fulfil this objective, the Association declares among its functions those of elaborating codes of conduct, the resolution of advertising conflicts, bringing proceeding before courts in its own name and any other advisory or collaborating functions for both private and public entities.

Membership is allowed to individual or collective associates insofar they belong to the advertising filed, excluding consumers from it. Under art. 14 of the by-laws, members must comply with all the resolutions and documents approved by the different bodies of the Association, be those codes of conduct, conflicts' resolutions or the like. In order to enforce this regulatory framework, the association also provides with a disciplinary regime applicable to its members.

Apart from the management bodies in charge of the actual running of the Association, it also provides for a specific body, granted with full autonomy and independence, which is in charge of the advertising disciplinary regime: the Advertising Jury. This body is considered to be the highest expression of the expertise that underlies the existence of the Association. This body intervenes, for this reason, in the main procedures related to the regulation of the sector, both in their adjudicative aspects -through the resolution of conflicts- as well as in their normative aspects, for it must give its approval to the projects of codes of conduct that will reach the management bodies of the Association for their enactment.

The Association enacted its Code of Conduct in 1996 and its content reproduces and specifies the more complex ethical aspects of the legal regime in this area. This Code is therefore

¹³² Art. 28 of the Advertising Act 1988.

¹³³ Art. 5 Directive 84/450/CEE and Preamble of the Advertising Act 1988.

elaborated taking into account the existent legal regime, itemising and applying it, performing an executive function of the law.

The Code also establishes that codes and rules on advertising of particular professional sectors will also be observed when applying this code as well as the International Chamber of Commerce's Code of Advertising Practice, which will be applicable by default of applicable provisions in the Association's Code of Conduct.

The disciplinary procedure provided by the Code has deserved the inclusion of this Association in the list of bodies complying with the Commission's Recommendation 98/257/CE on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.

This procedure might finish either by a settlement or by a decision of the Jury acting as an arbitrator. In the first case, the settlement might be the result of an acceptance by the party called into question or the result of mediation carried out by the Jury's Secretary. In the second case, the Jury will examine the file and will issue a decision, always under the duty to give reasons, declaring the (un)lawfulness of the advertising practice, warning the appropriate party or asking the cessation or correction of the relevant practice. Disputes are usually dealt with at first instance by a chamber of the Jury, what allows for an appeal of the decision before the Plenary of the Jury.

The decision is communicated to the parties and to all the members of the association. It is also published in the Association's bulletin. The decision is binding upon the parties to the conflict but also upon the rest of the members of the Association, as it is explicitly established in Rules 3 and 7 of the Code of Conduct on the duties of the associates.

Art 14 of the Association's by-laws typifies as a fault the case in which members disregard this duty. This fault would be punished with one of the following sanctions:

- warning,
- temporary suspension of any management office the member may hold,
- temporary suspension of the member's electoral rights,
- expulsion from the Association.

In its function as an arbitrator, the Jury acts following the provisions of the Arbitration Act 2003 and some authors consider that it could also follow the special procedure of the Consumers Arbitration System contained in RD 636/1993.¹³⁴

Finally, it is also worth mentioning the preventive function performed by the Association since it offers an advisory service called "copy advice" consisting in a report on the projected advertising activity before it is broadcast or otherwise put into circulation. Given the high level of the Association's prestige, all these measures contribute to make this sector more professional and to make this regulatory strategy highly successful.

¹³⁴ BARONA VILAR S., *Tutela de los consumidores y usuarios en la nueva Ley de Enjuiciamiento*, Tirant lo Blanch, Valencia, 2002, at p. 191.

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