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Summary

This project on regulatory strategies and governance in European private law is part of a wider integrated research on New Modes of Governance. The wider research brings to bear an interdisciplinary, comparative perspective on the study of contemporary transformations of instruments, methods, modes and systems of governance in Europe. New modes of governance include a wide range of different policy processes such as open methods of coordination, voluntary accords, standard setting, regulatory networks, regulatory agencies, regulation through information, bench-marking, peer-review, mimicking, policy competition, and informal agreements. They also cover new mixes of policy process involving public and private actors. This is where the project on regulatory strategies and governance in European private law fits in and hopes to contribute to a wider reflection on new modes of governance. The deliverable is identical with the project outline included in the new Implementation Plan for the period months 13-30.

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Which governance structures for European private law?

I. Regulatory strategies and governance in European private law

This project on regulatory strategies and governance in European private law is part of a wider integrated research on New Modes of Governance, coordinated by the European University Institute. The wider research brings to bear an interdisciplinary, comparative perspective on the study of contemporary transformations of instruments, methods, modes and systems of governance in Europe. New modes of governance include a wide range of different policy processes such as open methods of coordination, voluntary accords, standard setting, regulatory networks, regulatory agencies, regulation through information, bench-marking, peer-review, mimicking, policy competition, and informal agreements. They also cover new mixes of policy process involving public and private actors. This is where the project on regulatory strategies and governance in European private law fits in and hopes to contribute to a wider reflection on new modes of governance.

The current debate on desirability and modes of formation of European private law is engaging a wide number of scholars and institutions. Current work concerns the search for common core of European private law, rationalisation of *acquis communautaire*, design of a European Civil Code. These ongoing projects raise at least two related questions concerning the challenges to Europeanisation of private law:

- What is the often implicit definition of private law standing behind the debate about the creation of European Private law?
- Does the process of creation of European private law need some type of governance structure?

Comparative legal analysis suggests that even acknowledging the differences between and within legal families a workable definition of private law at national level has been reached. This definition however often presupposes a clear distinction between public and private law and between State and market. However, these distinctions are differently framed at the European level, assuming that they play a relevant role whatsoever.

At least two different phenomena have arisen that question this definition even at national level and pose new challenges at European level

- the emergence of the regulatory function of private law
- the increasing contribution of public and private regulators to the production of legal norms concerning private law. They relate to contracts, property and torts but they also affect fundamental rights.

By regulatory functions of private law we mean the ability of private law in particular contract, torts and property to address market failures. As to the production of private law rules by Independent authorities and administrative agencies we refer to sector regulation that designs predominantly contract law and property rights consistent with the regulatory goals that have to be pursued. These phenomena play an even more relevant role at the European level.

On the one hand the relation between market integration and market regulation has influenced legislation in such fields as consumer protection or environmental protection reinforcing their regulatory function. When pure negative integration has shown to be inadequate, the link between positive integration and regulation has become significant. Integration of European private law systems has therefore often been associated with a stronger (than in national system) regulatory function.

On the other hand often the lack of direct regulatory competences or weaknesses of the institutional framework has led to preference for contract and tort legislation instead of traditional administrative regulation.

To a lesser extent and with more emphasis in the last period of time new modes of regulation moving from command and control to responsive regulation or economic incentive based regulation have promoted the use of private law instruments to pursue regulatory goals.

The process of harmonisation has often proceeded by keeping separate private law and international private law. The ‘substantive’ role of IPI and its regulatory functions have only recently been acknowledged. If adequately considered in a multilevel system they can affect the design of European private law and the definition of its core and boundaries. These changes pose a set of relevant questions concerning the definition of what is European private law for the purpose of the harmonisation debate.

The creation of a European private legal system has been and will be based on a multilevel structure where the different legal systems of member states will coexist with a uniform European system of private law. Such a structure will imply the necessity of a higher level of vertical and horizontal coordination among different layers of the involved legal systems. But differences will have to be governed; otherwise there is a serious risk that the goal of harmonisation will be seriously undermined.

Furthermore the development of the European legal system does not occur in a vacuum but it is stimulated or prevented by globalisation of legal rules, particularly strong in the realm of private law. Institutional and economic factors that operate at transnational level influences the modes and the content of harmonisation. The relationship between world trade rules, *lex mercatoria* and international conventions are only few examples. The interplay between these phenomena and the activity of European harmonisation requires strong coordination as well.

Coordination can not be limited to law-making, leaving to the judiciary the task to verify the correct implementation of European law in member states and the consistency between national administrative and judicial interpretation and European law. The physiological development of differences correlated to existing different legal and socio-economic cultures of the relevant actors will have to be governed by a more complex mechanism than that employed in the last two centuries by European member states.

Even if we acknowledge different definitions of European private law for the purpose of determining the necessity or desirability of harmonisation the question of governance has to be addressed. In the research project we intend to focus particularly on two questions:

First, does European private law need a governance structure that will accompany its formation, consolidation and changes? If the answer to the first question is affirmative, is there a relation between the governance design and the definition of European private law? We believe that even if one takes the most conventional perspective concerning the definition of private law, the traditional governance structure employed by national legal systems will not be adequate to manage European legal integration of private law.

But if we take into consideration the internal transformation of private law and its increasing regulatory function in addition to the role of private law in regulated sectors we witness several phenomena that require to be considered in the governance design.

- The system of sources in private law has changed. This change has to be translated into a governance system able to coordinate new and old institutions. The relationship between law-making and adjudication and legislative power and judiciary does not fully represent the relevant actors. Public and private regulators play a very relevant role and may be powerful engines to promote or to prevent European harmonisation of private law.

- The creation of European private law system is a process that could never be crystallized in a single comprehensive piece of legislation- The procedural nature of Europeanisation might require a governance system that may reflect the structure of this process. Therefore, in connection with a newer regulatory definition of private law, the appropriate governance structure might change accordingly.

II. Self-Regulation as a Regulatory Strategy: A Comparative Law Perspective

Theme

European legal and political science is paying growing attention to the circumstance that the European Community (EC) is increasingly promoting self-regulation as a regulatory strategy in order to implement supranational policies. As a matter of fact, well beyond the classic example of the «new approach» to standardisation, the EC is nowadays developing a differentiated typology of interventions based, directly or indirectly, on self-regulation at the Member States' level. Such development of the European legal order is certainly impressive in quality and marks a new orientation in the shaping and management of the Community policies. Moreover, its emergence has to be situated in a more general tendency towards the identification, within the Nation-States, of new mechanisms of regulation based on a stable combination of public and private action, as well as in the tendency to the strengthening of juridical pluralism in the global legal space. Conceptually original as it can be, the increasing recourse to self-regulation as a regulatory technique in the European context is nevertheless highly problematic and certainly in need for a great deal of systematic legal investigation, both at the empirical and theoretical level.

So far, the debate has focussed either on specific sectors where self-regulation has been traditionally experienced or on certain general issues, such as the simplification of the rule-making process and the definition of the function and the mode of self-regulation as a European regulatory technique. As for the first issue, it has been registered a remarkable transformation in the law-making process, which is moving towards co-regulation, delegated self-regulation and purely private self-regulation ex post recognized by public powers. As for the second, new modes of governance not based on legislation or involving private actors in policy formulation have been advocated as a panacea for speeding up European decision-making.

And yet, the reflection on self-regulation as a tool for European integration is only at its very first stage and it is far from clear that the promise of self-regulation which is made by the Commission will be positively kept and developed in the next future. Actually, most of the statements at the European level disregard the often deep differences among the various national traditions and the simple fact that the promotion of self-regulation might not have the same impact from one country to the other. In this sense, a serious problem of effectiveness of EC law is connected with the development of self-regulation as a European regulatory technique. This pushes back to the study of the status of self-regulation in the national laws of the Member States before the intervention of the European institutions and to the careful analysis of the processes of impact, reaction and adjustment taking place after the EC move. Understanding and evaluating the supranational dimension implies the reconstruction of the existing national structures and procedures, which ultimately determine the shape and character of European self-regulation.

Problems

The project is centred around two macro-questions. The first relates to the reasons why self-regulation is used as a general regulatory technique, rather than as an instrument specific to one single sector. The second question concerns the role, the structure and the dynamic of

self-regulation as a regulatory technique. In line with what has been above explicitated, national rapporteurs should, in addressing the mentioned general questions, pay particular attention to the inter-play between EC law and national law. If national experiences pre-exist to the supranational intervention and could be meant as independent of the EC developments, the EC dimension is essential in so far as it turns those experiences towards the achievement of EC objectives, thus putting into relation a variety of different traditions and legal environments.

The project aims at identifying the legal framework applicable to self-regulation in different national systems operating under the direct or indirect influence of EC institutions. Its intention is to create a database for a set of countries, containing the relevant aspects to be found in private and public law and then to proceed to a comparative law analysis of the results.

The purpose is not to demonstrate a certain hypothesis, which we set from the start. Rather, we intend to shape the questions and problematic in such a way that the outcome might be open. The various dimensions that we will take into consideration are points of departure that might not have the same relevance for all national legal systems. A general and not questionnaire based inquiry appears to be more suitable as we do not want to put labels on the different systems but we want to extract the essential features and consequences attached to self-regulation and self-regulatory bodies. The outcome of the comparative law analysis should be a coherent conceptualisation of self-regulation which opens the way to further consistent approaches.

Three dimensions of self-regulation should be considered in the national reports.

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

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

- Does self-regulation require a certain constitutional structure or have an impact on it?
- Does self-regulation have a constitutional underpinning (e.g. general constitutional values like private autonomy, freedom of association, etc.) from which a postulate of self-regulation might be inferred?
- Is there any direct or indirect link between self-regulation and constitutional values? Would it be possible to identify any strategy aiming at upholding rationality, relevancy, proportionality in the context of self-regulation? To which extent are fundamental rights upheld in the context of self-regulation?
- Does the Constitution impose any duty to the State with regard to self-regulatory mechanisms, such as, for example, an obligation to monitor their activity, to control their internal organisation and procedures, to supervise their interaction with third parties, to intervene in case of failure to respect fundamental rights, etc?
- To what extent is self-regulation compatible with the rule of law?

- Does the constitutional framework define the areas that might be subject to self-regulation? Does it reserve specific issues to rule making by the Parliament or by the political majority?
- Would it be possible to reconstruct a number of constitutional limits to self-regulation (e.g. principle of non discrimination)?
- In which way are all the previous questions affected by the influence of European constitutionalism on the national legal order? In which way does the latter contribute to the development of the former?

The *second* dimension is that concerning the determination of the nature of the regulatory body as well as the nature of its activity. These two aspects constitute an essential profile of the understanding of self-regulation within the European States, both in conceptual and practical terms, given the number of legal implications deriving from the choice of one regulatory scheme or another. Thus, the recognition of a public or private nature of the regulatory body and of the activity that such body carries out might be decisive in order to verify the application of a public, private or mixed law regime to its action and functioning. More in general, self-regulation is directly connected with the phenomenon of the increasing differentiation of the intersections between administrative law and private law instruments.

A number of issues should be therefore systematically dealt with in each national reports.

- Which are the legal criteria for determining the public or private nature of a regulatory body? Which is the specific relevance of the source of power of the regulatory body when determining its legal nature? Does the existence of formal/informal delegation of regulatory powers impinge on the nature of the self-regulatory body?
- Does the monopoly position of a regulator affect the determination of its legal nature?
- Does the characterisation of a body as public or private entail the application of a certain set of substantive and procedural rules? Does it trigger the jurisdiction of different courts?
- Does the «public» label applied to a body established under private law trigger the same consequences as for a body established under public law?
- Does the private nature of a self-regulatory body imply respect of private autonomy, so that the self-regulatory body may freely make, interpret and apply its own rules and determine its membership? Or are there any public law restraints to this freedom? What are the criteria used for identifying the nature of the activity of a self-regulatory body? Does it have to be determined on a case-by-case basis or the nature of the body impinges also on the nature of its acts? Does the identification of a public element in the activities of the self-regulatory body trigger any change in the legal nature of that body?
- Does self-regulation tend to coincide with the codes or different types of rules may be adopted? If so, what is the specific relevance of administrative acts? Is it possible to identify a true and proper typology of self-regulatory measures?
- Can an influence of European law be registered in this field? Does the Europeanisation of national administrative law and the development of a corpus of supranational administrative law affect the internal legal order as far as the nature of the regulatory body and of its activity is concerned?
- To what extent do the subjects of regulation (the regulatees) matter when assessing the nature of the activity of a self-regulator? Which is the legal relationship between regulatees and self-regulatory bodies?

- Does control/intervention of the State in the activities of a self-regulatory body depend on or differ according to the private/public nature of the body or its activities? What kind of control is that? Which are the powers of the controller?
- Which is the legal framework applicable to purely private self-regulators? Are such regulators tolerated/encouraged by the State?

The *third* and final dimension relates to the way in which national law would discipline the liability of regulatory bodies.

- Does the same liability regime apply both to public and private regulators? Which is the rationale for possible differences in the legal treatment of the two hypotheses?
- Under which conditions a self-regulator is hold to be liable?
- What happens in case that a self-regulatory body fails to act, despite its explicit/implicit obligation to regulate?
- Which are the consequences when the self-regulatory body acts by violating the rules according to which it had to regulate or other public interests?
- Which are the parties that can act against the violation? How can we assess the current legal regime? Could the standing be positively extended?

18 month detailed implementation plan

I. Regulatory strategies and governance in European private law

The project will begin with a preparatory paper, presenting these various issues in more depth. Research will then go ahead in two stages, each of which will give rise to a closed seminar, respectively in Paris, 21-22 October 2005, and Florence in April 2006. Participants in each of these seminars are encouraged to attend the other part. Draft papers will be circulated in advance so that discussion can focus on the most sensitive issues.

The first part will be devoted to the issue of whether an integrated regulatory strategy is necessary in the field of private law. It explores this issue in four fields belonging to tort and contract, that is, products liability, environmental protection, services contracts and e-commerce. This choice of subject-matter is linked to the existence of commonalities between these fields in terms of issues regarding regulatory approach and governance. First of all, they are all specifically concerned with either market design or curing market failures. Secondly, they are all fields which may be fairly settled in terms of content, but hitherto relatively little explored from the perspective of the relationship between private law and regulation. Thirdly, they are all fields which have been importantly affected by Community secondary law. Finally, from a conflict of law perspective, they are areas in which the impact of the principle of origin in cross border situations has been mooted by Community legislation or at least hotly debated within the legislative process, giving rise to specific questions about the absorption of private (international) law by a specifically regulatory tool.

Each theme will be discussed by a panel from three perspectives: private law, regulation and conflicts of laws.

The first part will be a two-day seminar (Paris, Fall 2005) divided into four panels covering four different fields, two relating mainly to tort (products safety, environment), and two to contract (services, electronic commerce). The choice of these fields is dictated by the fact that they seem to exemplify difficulties in articulating regulatory strategies, both from a private law perspective and from a conflicts point of view, and thus present the richest methodological issues.

Once the regulatory structure of these fields explored and the need for an integrated regulatory strategy determined, the second part will be devoted to the potential implications of such a need in terms of governance. Panels, which will cover various perspectives dealing with governance structures, civil procedure, self-regulation and conflicts of laws, will be devoted to three distinct issues. Firstly, if an integrated regulatory strategy is found to be necessary, is there a need for a governance structure? Secondly, what are the current existing models of governance? Thirdly, linking up the two conferences, what is the appropriate system of governance for European private law?

The governance part will then take place in April 2006 so as to maintain impetus and ensure early publication. The idea is to approach the subject in two steps. The first is to show why an integrated regulatory strategy may be necessary in the field of European private law. (Is it problematic to talk about “private law” here?). The second is to look at its implications for governance. The first step has already been worked on, in particular by Hugh Collins, but it is felt that if the second part is to have any impact outside a small circle of initiated readers, it may be difficult to take for granted that it is clear for everybody that lack of a coherent regulatory strategy (or rather, juxtaposition of private law strategies and strategies originating in the field of regulation) is problematic. The project is also to associate private lawyers with an interest in comparative law, and private international lawyers, who could bring interesting com-

plementary insights from the changing landscape of the conflict of laws, where the subject is very new and needs exploring.

The idea is to associate people who have already worked on these themes, particularly within the regulatory part, with more mainstream lawyers. We'd also like to ensure representativity of different legal cultures within Europe, and the presence of a political science and economics perspective. It may also be extremely useful to reach out to institutions (Luxembourg judiciary, for example), to include some special guests. The approach to the two parts is slightly different. The first part on regulatory strategies will comprise four panels of three speakers, each representative of a different approach (private law, regulation, conflicts) in the various fields we have selected. Here, it is perfectly possible to mix mainstream lawyers with recognised expertise in their field, with people who have already thought out some of these themes, such as Anthony Ogus. On the governance part, the idea is more to appeal to speakers who have already thought about the regulatory issues, and it is probably here we could include an economist and a political scientist.

Output

The idea is to publish the contributions to this research in two distinct volumes, each containing the contributions to one of the two conferences. To this end, participants in the first conference would be encouraged to have a draft ready by that date, and to hand in their final paper in April 2006, which would also be the deadline for the papers for the second conference, so as to allow for speedy publication. Each volume will include a background paper, setting out the issues and analyzing the conclusions of the various panels. Instructions as to length and format of the published contributions will be given to participants well in advance of the first conference.

II. Self-Regulation as a Regulatory Strategy: A Comparative Law Perspective

During the next 18 months, it will be the objective to a. describe different national systems of SR and b. to compare the different systems and to draw implications for a European strategy.

A conference with national rapporteurs and discussants will be held at the EUI in Florence on 7-8 October 2005. The national rapporteurs will work on a unitary scheme for their reports. A second conference will be held in Florence or Paris in the year 2006.

The draft national reports and the introduction concerning the comparative methodology which has been used, will be revised and eventually turned into Working Papers. A final report will cover both national reports and a comparative analysis. The research might also be published in an edited volume.