REPORT

TO: ECONOMIESUISSE

FROM: PROF. DR. ANDREA MINTO

RE: SELF-REGULATION REPORT

DATE: 07/09/2022

CC: MR. ERICH HERZOG, MS. SANDRINE RUDOLF VON ROHR

BACKGROUND

Economiesuisse (hereinafter “**the Client**”) is the federation of Swiss businesses which is committed to maintaining Switzerland as a strong business location based on liberal free market principles.

I have been informed by the Client about its interest in exploring and examining the policy and regulatory advantages of self-regulation (“**the Project**”) to the benefit of its constituencies (i.e. Swiss entrepreneurs).

In light of the above, my professional assistance has been requested, from a policy and legal perspective, in order to support the Client in the different phases of the Project relating to self-regulation, its application and experiences in several jurisdictions.

Specifically, the aim of the Project is to demonstrate the advantages of self-regulation in a well-grounded fashion encompassing a theoretical and a practical perspective of the phenomenon. To achieve this result, the analysis is two-fold and thus composed of: *i)* a theoretical section on the pros of self-regulation, and; *ii)* an extensive practical section where specific jurisdictions and explanatory examples will be taken into account.

Section II focuses on the jurisdictions of selected countries, as requested by the Client, namely:

(a) *The European Union;*

(b) *The US;*

(c) *Singapore;*

(d) *Canada;*

(e) *UK;*

(f) *Brazil.*

EXECUTIVE SUMMARY

Subject to the analysis made in the following paragraphs of this Report, the main findings can be summarized as follows:

Having regard to the legal and law and economics scholarship on the wide array of regulatory strategies and policy-making choices, as well as having critically examined some experiences in the selected jurisdictions, we are of the opinion that self-regulation is a successful and vital component of the overall law-making process of advanced and thrive market economies.

More specifically, to keep up to innovative, fluid and dynamic market practices, the regulatory frameworks taken into account in this Report showed to have evolved along trajectories that emphasise self-regulation and the relevance of market participants' contribution. In this perspective, ad hoc venues for self-regulation have been opened up, as a way to better adapt to the rash developments occurring in the market and so to properly respond to the intensified potential market failures and negative externalities. The "command-and-contro"l rules-based and principles-based techniques have thus been taken over and/or enriched by self-regulation, consisting of self-imposed or self-enforced rules.

In that respect, we are of the view that traditional top-down regulation and self-regulation have quite often become intertwined and mutually reinforcing, up to the point that they are "bond to co-exist": This would make self-regulation an "add on" in respect to external regulation and it would be capable of bringing about additional gains in social welfare, which would not be made, however, compulsory by external regulation.

Over the last years, rule-making has become a dynamic process composed by 'knowledge-based' actors and constituencies whose collective role provides a form of governance that is perceived as legitimate and credible because of the knowledge base, professionalism and rationality in operation and action.

This Report posits that traditional "command-and-control", "top-down" regulation has been replaced or integrated, to varying degrees, by new forms of collaborative governance which emphasizes a dynamic cooperation between public (governments, regulators) and private (regulated) parties.

This Report provides strong evidence (collected from both theory and practice) that the regulatory effectiveness depends on the regulator-regulatee mode of interaction and, thus, on the tools through which governance is effectuated. Against this backdrop, self-regulation clearly proves to serve as a strategy that responds to the increasing complexity of modern forms of social organisations.

Section II provides practical examples of self-regulation in some jurisdictions.

In the EU self-regulation complements the regulations and directives laid down by the legislator, and the Parliament, the Council and the Commission recognise the need to use, in suitable cases or where the Treaty does not specifically require the use of a legal instrument, alternative regulation mechanisms, so that the use of self-regulation is always consistent with Community law. Therefore, the Single Market Observatory (SMO), in collaboration with the General Secretariat of the European Commission, has developed a database dedicated to European self-regulation and co-regulation initiatives.

Self-regulation and co-regulation initiatives help to remove often complex barriers to the functioning and the completion of the Single Market, by agreeing on the same common professional rules at European level or arranging the mutual recognition of national rules. In addition to this, standing in contrast to traditional legal-centric paradigm, living will regulation in the ambit of the BRRD is premised upon an iterative, dialogic relationship within which regulated actors are invited to play a potentially important role within the process of generating regulation.

At the same time, EU officials are provided with a crucial set of transparency norms for their interactions with interest groups. This regulatory system, including both norms for EU officials and selective incentives for interest groups, is grounded on a participatory governance approach, is typical in supranational institutions, and is different compared with the nation state regulatory model consisting in a top-down approach based on binding rules, controls, and sanctions.

The EU model is then compared with the North American (U.S. and Canada) interest groups regulation format, based on a compulsory registration of interest groups and rules of reporting and sanctions.

In the US, however, the sharing of regulatory authority with private actors (i.e. private ordering) has occurred in many ways in the business, commercial and financial sectors (see the ISDA's role as a transnational private regulator resulted in the standardization of contracts for OTC derivatives transactions).

In Canada, the Mutual Fund Dealers Association of Canada (the MFDA) proposes the creation of a new Self-Regulatory Organization (SRO) responsible for the prudential regulation of registrable activity in the securities industry; self-regulation in the context of the Canadian debates also refers to the delegation of power to the professions to regulate themselves: in Canada, professions are regulated at the provincial level, and each

of Canada's ten provinces regulates professions slightly differently. In practice the educational, admission, practice, and ethical standards of each profession are largely determined and administered by its own regulatory body.

In Singapore, the emphasis is on the decentralization of regulation in online world, that allowed Go-Jek and its competitors, Uber and Grab, to enter into the Singaporean market in the last few years, offering online platforms to meet supply and demand for transportation services.

Moreover, in order to promote a high standard of ethics in advertising through industry self-regulation, the Consumers Association formulated the Code of Advertising Practice (SCAP).

Differently, in the UK self-regulation is regarded as involving the delegation of public powers to professional communities via a formal authority that is generally conferred by statute.

Lastly, in Brazil self-regulation generates greater moral adhesion than the law because codes and guidelines are voluntarily developed: the self-regulation system has proven to be highly efficient and advantageous to generally all parties affected. While government regulation has not been completely replaced, at least in the advertising industry, government laws yield to the self-regulation practices (in fact, the CONAR guarantees the credibility of the decisions).

Against this backdrop, in conclusion, the proven advantages of self-regulation prompt us to advocate for its adoption and in particular for: (i) increased participation of, and power sharing with, private actors; (ii) public adoption of rules negotiated by non-state stakeholders; (iii) promotion of competition and diversity as a structural component of regulation; (iv) dynamic, responsive and dialogic law-making process as a response to dynamic regulated markets; (v) composite and multi-level legal ordering; (vi) use of broad legal frameworks integrated by flexible, revisable rules and standards.

SECTION I // THEORETICAL UNDERPINNING OF SELF-REGULATION

1. The public law debate: an alternative to traditional regulation

Governments regulate and intervene in the daily lives of citizens and businesses "in the public interest", that is, at its simplest, a type of regulation projected at the good functioning of society and the economy. That markets are far away from producing either economically optimal or socially desirable outcomes has been elaborated in a well-known and voluminous literature[1]. The main justification for public-policy intervention lies hence in the inadequacies of markets as measured against the criteria of "efficiency" and "distributional equity". Market outcomes can be termed efficient if the same level of total benefits which they generate cannot be obtained at a lower cost (productive efficiency) or, alternatively, if greater bene- fits cannot be generated at the same level of costs. Either way, the resulting total benefits must exceed the total costs if the outcomes are to be deemed efficient. Distributional equity is a yardstick as to examine the formulation, evaluation and implementation of alternative public policies.
From the perspective of policy analysis, any time a market failure exists, there's justification for policy intervention by means, e.g., of ad hoc regulatory tools.
Typical examples of market failure which have led to government regulation and intervention include: i) the existence and abuse of market power; ii) information asymmetries between regulator and regulated: that means government cannot know as much about industry as industry does about itself[2]; or iii) externalities and spillovers (that is, when one or more of the parties involved in a transaction do not take into account the full effects of their decisions on others).
The first response by governments to a perceived policy issue is to regulate, but it may be appropriate to ask whether traditional regulation is the best possible course of action. Indeed, in many situations there may be a range of options other than traditional "command and control" (CAC) regulation available, including more flexible forms of regulation.
Therefore, since the 1980s, a new type of rulemaking has increasingly appeared to be an alternative to the "standard rule-making" approach, based on a new "need for regulation". During the 1990s, the shift in the role of the State led to a proliferation of various instruments belonging to the "soft law" type, such as guidelines, agreements, declarations, compromises, codes of conduct: the codes drawn up by commercial companies or associations are only some of the main examples that can be encountered in most business sectors[3].
The specific types of instruments or mechanisms that may be created under a self-regulatory regime are similar under a co-regulatory framework, but co-regulation entails explicit government involvement: it is the degree of government involvement and legislative backing that determines the difference between the two. Self- and co-regulatory approaches are frequently used in the professions and by industry associations (where detailed technical knowledge is likely to be important).
However, the regulator may not have the skills or knowledge necessary to adequately design and implement an alternative policy instrument. For this reason, self-regulation typically involves a

[1] See, e.g., Bator, The Anatomy of Market Failure, 1958; Aranson, Theories of Economic Regulation: From Clarity to Confusion, 1990; Baron, Regulation and Legislative Choice, 1988; Barzel, Measurement Cost and the Organisation of Markets, 1982; Vickers, Government Regulatory Policy, 1991.
[2] N. Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge, 1999) 4; P. Grabovsky, "Counterproductive Regulation" (1995) 23 *Int.* J. *of Sociology of Law, 347;* D. McBarnet and C. Whelan, "The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control" (1991) 54 *MLR* 848; L. Hancher and M. Moran, "Organizing Regulatory Space" in L. Hancher and M. Moran (eds.), *Capitalism, Culture and Regulation* (Oxford, 1989).
[3] D. Sinclair, "Self-Regulation versus Command and Control? Beyond False Dichotomies" (1997) 20 *Law and Policy* 529, 541. Other examples of such bilateral regulation are the agreements entered into between the main financial institutions involved in selling derivatives and the Federal Reserve Board concerning conduct of business standards when advising on and selling complex products: see J. Black, "Perspectives on Derivatives Regulation" in A. Hudson (ed.), *Modern Financial Techniques, Derivatives and Law* (Dordrecht, 2000).

group of economic agents or bodies, such as firms in a particular industry or a professional group, voluntarily developing rules or codes of conduct that regulate or guide the behavior, actions and standards of its members (the group is responsible for developing self-regulatory instruments, monitoring compliance and ensuring enforcement: the so called "corporate social responsibility" or "CSR"). As such, it should be distinguished from what may be termed "individualized regulation". The two may co-exist, but they are analytically distinct and raise significantly different public law issues: individualized regulation is in fact regulation which is tailored to the individual firm. When used in the right circumstances these instruments can offer significant advantages over traditional command and control regulation, including: greater flexibility and adaptability; potentially lower compliance and administrative costs[4]; an ability to address industry-specific and consumer issues directly; and quick and low-cost complaints handling and dispute resolution mechanisms. Both self and co-regulatory approaches have the potential to be very efficient policy instruments because of their flexibility. They can be tailored to the specific issue they are designed to address and can change quickly in response to changing circumstances. These features lend themselves well in a business world that is characterized by increased complexity and interrelation between market players, as overtly pointed out by the legal and economics scholarship.
The OECD defines self-regulation as the "process by which an organized group regulates the behaviour of its members"[5]. According to Teubner and Baldwin, "self-regulation is the new challenge in a 'post-regulatory' world"[6]. Essentially, self-regulation is a system whereby the industry actively regulates itself[7].
Despite those stark qualities, self-regulation may suffer a certain degree of skepticism. The perception of risk and skepticism on the part of policy makers and the public on the success of self-regulation results, in part, from: i) a lack of knowledge of the circumstances in which it has been successful; ii) a lack of understanding of how alternative mechanisms work; and iii) a fear that alternative instruments could result in a loss of control by governments over the problem being addressed.
In 2002, the OECD has noted that "the choice of policy instrument tends to be based more on habit and institutional culture than on a rational analysis of the suitability of different tools to addressing the identified policy problem".
In the decentred understanding of regulation, regulation happens in the absence of formal legal sanction: it is the product of interactions, not of the exercise of the formal, constitutionally recognized authority of government. Essentially, decentred regulation involves a shift (and recognition of such a shift) in the locus of the activity of "regulating" from the state to other, multiple, locations, and the adoption on the part of the state of particular strategies of regulation. The prescription is that regulation should be indirect, focusing on a process of coordinating, steering, influencing, and balancing interactions between actors/systems, and of creating new patterns of interaction which enable social actors/systems to organize themselves[8].

[4] R. Baldwin and M. Cave, *Understanding Regulation* (Oxford, 1999), ch. 10; C. Scott and J. Black, *Cranston's Consumers and the Law* (London, 2000).
[5] OECD, *Meeting on Alternatives to Traditional Regulation* (Paris, 1994).
[6] G. Teubner, "After Legal Instrumentalism: Strategic Models of Post-Regulatory Law" in G. Teubner (ed), *Dilemmas of Law in the Welfare State* (Berlin, 1986); R. Baldwin, "Regulation: After Command and Control" in K. Hawkins (ed.), *The Human Face of Law* (Oxford, 1997),
[7] See the *International Guide to Developing a Self-Regulatory Organization*, 2017.
[8] OECD, *The OECD Report on Regulatory Reform: Synthesis* (Paris, 1997), the federal governments of Australia: Productivity Commission, Office of Regulatory Review, *Guide to Regulation* 2nd edn. (Canberra, 1999), and Canada: *Regulatory Affairs Guide, Assessing Regulatory Alternatives* (Ontario, 1994), and of the UK: Better Regulation Taskforce, *Alternatives to State Regulation* (London, July 2000); Better Regulation Taskforce, *Self Regulation: Interim Report* (London, October 1999), Oftel, *Encouraging Self- and Co-Regulation in Telecoms to Benefit Consumers* (London, June 2000).

2. The failure of regulatory strategies

There is a significant strand literature (e.g. the doctrine of Julia Black) analyzing the 2007-2009 financial crisis as a starting point to critically considering the advantages (or disadvantages) of self-regulation and its successful application in many countries.
The financial crisis, as well as the various other crises that we have gone through over the decades (economic, environmental and health), called for the development of a multi-dimensional approach to law, which builds on the constituencies' and market actors' knowledge. Alternative instruments offer options that complement traditional "hard law", considering that public authorities alone can no longer provide solutions, given the complexity of the international context.
In that financial crisis, failings were made both by state and non-state regulators and by market actors at the global, EU and national level, ranging from transnational regulatory committees to financial institutions and their internal corporate governance structures. Many of the riskier products and activities were shifted to the "shadow banking" sector, which is not as closely regulated as banks. Firms engaged in "rule entrepreneurship" and creative compliance, for example by using special purpose vehicles as ways of reducing their apparent risk exposure and therefore their capital requirements. At the same time, risk weightings of assets created perverse incentives (for instance with respect to securitization and sovereign risk).
The crisis illustrated the potential for regulation to create endogenous risk and negative feedback loops. In addition, there were also negative spillovers: deep-rooted failures of national financial regulation (of mortgage brokers in the US) were transmitted to other countries by global financial systems. Julia Black comments on this scenario by observing that failures can create points of vulnerability in the complex and multi-dimensional activity of regulation.
Regulation by State is the means by which it "seeks to encourage or direct behaviour which it is assumed would not occur without such intervention" and as such should be seen as distinct from the operation of the markets, even though the latter are underpinned by legal rules[9].
However, governments happen to often lack of sufficient knowledge to be able to identify the causes of problems, to design solutions that are appropriate, and to identify non-compliance (implementation of the regulation is inadequate and/or that those being regulated are insufficiently inclined to comply).
The decentred understanding of regulation is based on slightly different diagnoses of regulatory failure, diagnoses which are conceived on, and give rise to, a changed understanding of the nature of society, of government, and of the relationship between them.
Even if CAC is still prevalent in financial regulation in many places, at least in the UK and at the global level, financial regulation contains a lot of examples of "new governance" regulatory techniques favoured in the literature[10].
An important criterion for choosing among alternative policy instruments is their effectiveness in achieving the desired objective: where there are a number of policy options open to policy-makers they should assess which is the most efficient instrument available to meet their objectives. The most efficient instrument is that which maximizes benefits it creates while minimizing the costs it imposes. Equity and fairness considerations also have a bearing on the choice of policy response. Not only different instruments can result in different levels of benefits and costs, but the perceived distribution of the benefits and costs can differ between groups in society and/or between geographic areas.
Under self-regulation, regulators do not prescribe how regulatees should comply, but require them to develop their own systems for compliance and to demonstrate that compliance to the regulator. The arguments in support of the technique are that it gives firms greater flexibility, enables them to

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[9] A. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford, 1994), 1.

[10] J. Braithwaite, "The New Regulatory State and the Transformation of Criminology". (2000) 40 *British Journal of Criminology* 222; J. Black, "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World" (2002). 54 *Current Legal Problems* 103; C. Scott, "Regulation in the Age of Governance: The Rise of the Post Regulatory State" in J. Jordana and D. Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Cheltenham: Edward Elgar, 2004); C. Ford, "New Governance, Compliance and Principles-Based Securities Regulation" (2008), 45 *American Business Law Journal* 1.

design systems and processes which are better suited to ensuring compliance within their own organizations than could be done by generic, prescriptive rules, and that it places the onus and responsibility on firms themselves to demonstrate compliance, rather than placing the onus on regulators to demonstrate non-compliance[11]. In fact, regulators are always reliant on firms' internal systems to ensure compliance.

In the financial sector, for instance, a specific regulatory technique was adopted under the capital adequacy rules, where firms were allowed to use their own internal risk models to provide the basis for setting their capital requirements. The key regulatory instrument, referred to globally as Basle II, defined the parameters of the models they were to use, which then had to be approved by the regulators. The crisis on the financial markets has raised a number of questions about the validity or the justification of the autonomy of the banking sector as far as "regulating" it is concerned. In fact, this sector is largely de-regulated – or the rules have not been applied. However, the "need to take control" is not necessarily desirable in some areas.

However, the ever-growing and detailed EU regulation, with its increasing number of mandatory rules, also poses challenges for Swedish self-regulation and requires the market to either find alternative solutions to EU regulation or to devise ways to implement EU regulation in the field.

Although some areas traditionally covered by Swedish self-regulation have now been superseded and are now covered by European legislation, new forms have also been developed to utilise self-regulation within these new European frameworks. For example, regulatory tasks in the securities area have been delegated by the Swedish Financial Supervisory Authority, (Finansinspektionen), to the Swedish Securities Council and the Swedish Accounting Standards Board, which underlines the strong position of self-regulation in Sweden. For example, it is in the interest of listed companies, their owners and their advisers to contribute to the development and maintenance of good ethics in the securities market. This is best achieved by the business community and other stakeholders together designing and agreeing on rules and what is good and generally accepted practice. Self-regulation is also an important instrument to prevent overly detailed legislation. The Swedish Corporate Governance Code and the Takeover Rules are examples of areas where Sweden has preferred self-regulation to legislation. The main advantage of this is that the market's foremost expertise, with its wealth of practical experience, participates actively in the formulation and substance of the rules, which in turn leads to strong, broad support and high levels of compliance among those who are to apply the rules. Moreover, self-regulation probably results in lower costs for companies compared with legislation developed remotely from the market.

On the other hand, regulatory issues lead to uncertainty in the financial markets, such as those regarding "the promise and perils of crowdfunding" (Armour and Enriques, 2018)[12]. To prevent this, crowdfunding associations across Europe have created Codes of Conduct (CoC). These CoCs complement existing rules by bringing more clarity as to how regulation should be implemented and by introducing new standards of behaviour for crowdfunding platforms.

The practice of drafting and implementing CoC is commonly denoted in the literature of law and economics as private ordering. The voluntary association of firms to control their collective behaviour is also known in the social science literature as industry self- regulation. Crowdfunding platforms have been experimenting with different business models and products, including different financial instruments, tools to pre-select projects and govern investments after the completion of a campaign. Regulatory delay in approving new business models and products may stifle these innovative efforts. This incentivises industry members to develop self-regulatory rules in the form of CoCs, which are more flexible and easily revised, allowing to keep pace with industry developments. Therefore, self-regulation in crowdfunding, which preempts government

[11] C. Parker, *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge: CUP, 2002); C. Coglianese and D. Lazer, "Management-Based Regulation: Prescribing Private Management to Achieve Public Goals" (2003) 37 *Law and Society Review* 691; Coglianese and E. Mendelson, "Meta-Regulation and Self-Regulation" in R. Baldwin, M. Cave and M. Lodge (eds), *Oxford Handbook of Regulation* (Oxford: OUP, 2010).

[12] See Armour, J. and Enriques, L. (2018), "The promise and perils of crowdfunding: between corporate finance and consumer contracts: the promise and perils of crowdfunding", The Modern Law Review, Vol. 81, pp. 51-84.

regulations, can be attributed to continuous technological change in this industry and the requirement to ask for ex-ante permission from the regulator to introduce new products and services. Different characteristics of the crowdfunding market are able to underpin both "coerced" and "voluntary" theories of self-regulation and explain the widespread reliance on CoCs. Unlike in traditional financial markets, many aspects of the crowdfunding activity are left to platforms to choose, even in jurisdictions which have adopted bespoke crowdfunding regime – which are regulatory regimes that are tailored to the technological specifics of crowdfunding markets. This leeway of platforms is a result of incompleteness of existing regulations, uncertainty regarding inherent risks, or platforms' innovative efforts. it is either savings on "political costs" or "costs of delaying the introduction of new products" that motivate market participants to introduce a self-regulatory regime. In order for the industry to be successful at pre-empting or deferring government regulation, the adopted self-regulatory framework must emulate the framework which a government would create. Deferring state regulation implies that CoCs are introduced before crowdfunding-specific regime, although it is conceivable that "coerced CoCs" appear with the intention of deferring further revisions of the crowdfunding-specific regime. Given that government regulations would be mandatory for all members of the industry, "coerced CoCs" are likely to be open for signing by all platforms.

3. The role of self-regulation

Self-regulation is a type of regulation that complements traditional law-making and operates in a highly insightful fashion – by making market players responsible by means of a "delegation of powers" (subsidiarity) and the provision of adequate rules (proportionality)". Of course, on various occasions there has been overlapping between deregulation ("*laissez-faire*") and self- regulation.
Self-regulation typically involves a group of economic agents, such as firms in a particular industry or a professional group voluntarily developing rules or codes of conduct that regulate or guide the behaviour, actions and standards of those within the group. The group is responsible for developing the self-regulatory instruments, monitoring compliance and ensuring enforcement.
Examples of self-regulation include: codes of practice; industry based accreditation arrangements; and voluntary adoption of standards. Self-regulatory agreements generally cover such aspects as qualifications, training requirements and codes of conduct or ethics.
In the European Union, self-regulatory agreements cover professions such as: engineers; lawyers; travel agents; internet service providers; estate agents; hoteliers; and many others (EESC, 2005, p. 13).
With regard to lawyers, on 25 November 2006 *the Council of Bars and Law Societies of Europe* (CCBE) adopted a Charter of Core Principles of the EU Legal Profession, which contains a list of ten principles which govern the conduct of European lawyers. According to Principle (a), entitled "*The independence of the lawyer, and the freedom of the lawyer to pursue the client's case*", a lawyer "the lawyer must be independent of the state and other powerful interests, and must not allow his or her independence to be compromised by improper pressure from business associates. The lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties and the courts". Therefore, "self-regulation of the profession is seen as vital in buttressing the independence of the individual lawyer". In this perspective, Principle (j) states that "only a strong element of self-regulation can guarantee lawyers' professional independence vis-à-vis the state, and without a guarantee of independence it is impossible for lawyers to fulfil their professional and legal role"[13].

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[13] See also the Code of Code of Conduct for European Lawyers, originally adopted at the CCBE Plenary Session held on 28 October 1988, and subsequently amended during the CCBE Plenary Sessions on 28 November 1998, 6 december 2002 and 19 May 2006. The Code also takes into account amendments to the CCBE Statutes formally approved at an Extraordinary Plenary Session on 20 August 2007. All lawyers who are members of the bars of these countries (whether their bars are full, associate or observer members of the CCBE) have to comply with the Code in their cross-border activities within the European Union, the European Economic Area and the Swiss Confederation as well as within associate and observer countries.*https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf.*

Industry may also develop voluntary agreements relating to product quality or to provide information to consumers. For example, in 1997 the *European Association of Consumer Electronics Manufactures* developed an agreement to reduce the amount of electricity used by electronic products, such as TVs and VCRs, while on stand by mode (BRTF, 2005, p. 55). Industry associations may also establish voluntary accreditation or quality assurance schemes. Under these arrangements, firms may advertise that they are members of the association or scheme and hence comply with some minimum standards. Accreditation is voluntary and the industry association has the role of ensuring that those who are accredited comply with the required standards.

Self-regulation may also involve establishing external dispute resolution procedures. Industry groups may, for example, appoint an independent arbitrator or ombudsman to investigate complaints against members of the industry. Decisions of the arbitrator can be binding on the firm involved and compliance is enforced by the industry association.

Conversely, co-regulation entails explicit government involvement in the regulatory framework. Because this involvement can take many forms, it can sometimes be difficult to make a clear distinction between self- regulation and co-regulation. It is generally considered that co-regulation involves government giving explicit legislative backing in some form for the regulatory arrangements.

The doctrine, starting from Julia Black, distinguished four broad types of relationship of collective self-regulation and government. These are: *mandated* self-regulation, in which a collective group is required or designated by the government to formulate and enforce norms within a broad framework set by government; *sanctioned* self-regulation, in which the collective group formulates rules which are then approved by government; *coerced* self-regulation, in which the industry formulates and imposes regulation but only in response to the threat of statutory regulation (and government may have taken back-stop statutory powers to impose such regulation: sometimes also described as "regulation in the shadow of the law" or "co-regulation"); and *voluntary* self-regulation, where there is no government involvement, direct or indirect, in promoting or mandating self-regulation. The involvement with other associations or groups in the regulatory process, such as auditors, technical committees, community groups, NGOs may take the form of consumer or community representatives, for example, on rule- making or disciplinary panels or agreements with local communities (*stakeholder* self-regulation). Alternatively, it could be *verified* self-regulation, in which third parties are responsible for monitoring compliance (auditors, NGOs, others); or *accredited* self-regulation, in which rules and compliance are accredited by another non-governmental body (e.g. standards councilor other technical committee).

The UK's *Better Regulation Task Force* (BRTF) used a similar definition of co-regulation noting that "co-regulation involves some sort of legal underpinning and can therefore be described as self-regulation with a legislative backstop" (BRTF 2005, p. 26). Anyway, the specific types of instruments or mechanisms, such as codes of practices, voluntary agreements, dispute resolution procedures that may be created under a self-regulatory regime are similar under a co-regulatory framework. It is the degree of government involvement and legislative backing that determines the difference between the two. Consequently, if the codes developed by a group of firms to regulate the behaviour or actions of members were supported by legal backing requiring members to abide by them and imposing penalties in the case of non-compliance, it would be a co-regulatory regime. For instance, Australian law allows for industry developed codes of practice to be prescribed so that they are legally enforceable. Specifically, the Australian *Guide to Regulation* stipulates that once a problem has been identified, self-regulation is the first solution that should be considered[14]. Other OECD

[14] The *Australian Better Regulation Guide* distinguishes between self-regulation, quasi-regulation, co-regulation, and explicit government regulation on the basis of the legal status of the rules that are used and on the relationship of the rule-making function of the industry body to legislative powers given to government agencies. The Guide stipulates that self-regulation refers to industry formulating rules and codes of conduct and being solely responsible for their enforcement. Quasi-regulation refers to non-legal rules which have some form of government "halo", including government-endorsed industry codes of practice, government agency guidance notes, industry-government agreements, and national accreditation schemes. Co-regulation refers to a degree of legislative underpinning of codes or standards, e.g. legislative delegation of power to industry to regulate and enforce codes, expecting or requiring industry to have a code but having back-stop legislative power to impose one, prescribing industry codes as voluntary or mandatory in legislation, legislation

countries also have mechanisms to ensure that self-regulatory regimes can be legally enforced. The Franchising Code of Conduct requires that all potential franchisees are informed of all relevant facts when starting their business, and that they can access a fast and relatively inexpensive way to resolve any disputes. The boundary between self and co-regulation is not always clear cut. For example, there may be government involvement in the development of self-regulatory arrangements without necessarily implying government support or official backing for the scheme. Government assistance might take the form of advice or participation by officials in the discussions establishing the scheme, but with no formal legislative backing or government responsibility for the scheme. Anyway, these instruments have been used in a wide range of situation in OECD countries. Two key areas where the use of self and co-regulation are particularly widespread are in the regulation of the professions, and industry and business standards and codes of practice.

There has been a long history of regulation of the professions in many countries, and this has taken many forms from explicit command and control regulation to self or co-regulation: the overriding objective of professional regulation is generally to protect members of the public who use the services offered by the profession by providing information and ensuring the quality of the services provided, and to protect the reputation of the profession itself. Sometimes, the consumer may be unable to collect the necessary information. It may also be that information on the quality of the service provided can only be assessed after it is consumed. This lack of information regarding the quality and type of service required may lead the consumer to make incorrect or inappropriate choices. Consumers therefore rely on the professional competence of the service provider to inform them of the options and in some cases to recommend appropriate courses of action. A common form of self-regulation in the professions occurs when the profession itself controls entry to the profession or the ability of practitioners to use certain labels (for example to be called an "architect"). Entry to a professional organisation may require candidates to meet minimum qualification levels or adhere to a code of conduct. Membership of the organisation provides information to the potential consumer as to the professional status of the person and their competency to undertake the services offered.

As noted by the *European Economic and Social Committee* (2005) self-regulation of the professions has developed quite rapidly at the European level, not the least within the liberal professions, which had already been widely self-regulating at national level for a long time. A wide range of professions have developed self-regulatory agreements including: engineers; lawyers; advertising agencies; restaurateurs; solicitors; travel agents; internet service providers; estate agents and hoteliers. These agreements tend to focus on qualifications, training and rules of professional conduct.

Self and co-regulation are also widely used by industry groups to promote ethical conduct, product standards, and fair trading. Industry associations also use self or co-regulation to provide more general consumer protection (such as policies on refunds and replacement of faulty goods) and to administer complaints and dispute resolution mechanisms. The specification of product standards and certification is an important area where self and co- regulation play an important role in the regulatory framework in many OECD countries. Industry may develop and enforce quality standards for the products they produce. In some cases, the industry may establish a certification process – either within the industry or using an independent body – to certify that products comply with a particular standard. Products which comply with the standards may display a symbol so that consumers know the product complies with the appropriate standard.

Indeed, in 1998 the OECD developed a set of indicators of product market regulation (PMR) in order to measure a country's regulatory barriers to competition and to track reform progress over time. This set included an economy-wide PMR indicator and a group of indicators that measures regulation at the sector level, which are referred to as PMR sector indicators. The PMR indicators have been updated every 5 years since then.

Over time, the PMR indicators have become an essential element of the OECD's policy analysis toolkit, as they enhance the knowledge of regulatory practices in individual countries and permits

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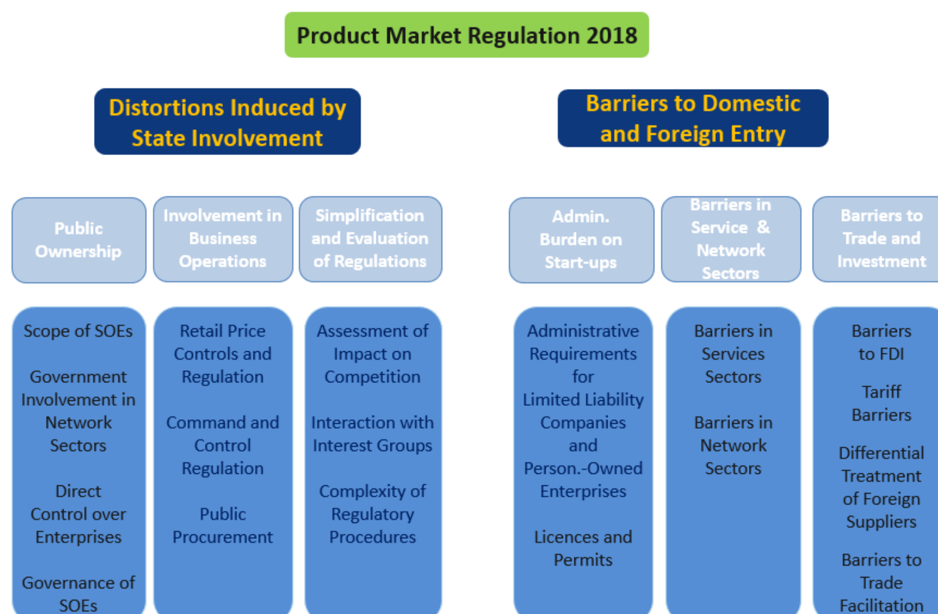
setting minimum standards which industry can improve upon, or enforcing undertakings to comply with a code. See J. Black, "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World" (2008).

to investigate their link with economic performance. The PMR indicators form an integral part of the Going for Growth exercise and OECD Economic Surveys, where they are used to formulate recommendations for policy reforms.



The first high-level component of the economy-wide PMR indicator, Distortions Induced by State Involvement, captures the distortions that can be caused by the involvement of the state in the economy through ownership and control of firms, and other forms of controls and obligations imposed on private firms. It also captures the way in which new and existing regulations are evaluated to minimize the impact on competition, and the nature of rules that discipline the public procurement of goods, services and public works.

Among the 10 low-level indicators there are both *command and control regulation* (measures the extent to which the government uses coercive regulations across key network and service sectors) and *interaction with interest groups*: measures the existence of rules for engaging stakeholders in the design of new regulation to reduce unnecessary restrictions to competition and for ensuring transparency in lobbying activities.

In 2010, the OECD's Committee on Consumer Policy published a Consumer Policy Toolkit, which provides a framework for developing and implementing effective consumer policies (OECD, 2010). The report notes that industry self-regulation (ISR) can play an important role in addressing consumer issues, particularly when business codes of conduct and standards are involved. The Committee on Consumer Policy, which developed the Toolkit, decided that it would be beneficial to examine more closely the potential role that industry could play in addressing problems, through measures which are self-regulatory in nature. It prepared this report, which explores the terms and conditions under which industry measures that correspond to the twelve policy instrument areas could be effective in achieving positive outcomes[15]. At the European level, an example of self-

[15] The consumer policy instruments are:
1. Consumer education and awareness: Measures aimed at developing critical consumer skills and alerting consumers to specific problem areas.
2. Information provision and other disclosure measures: Measures aimed at ensuring that consumers are provided with information which is accurate and which can contribute to their making well-informed decisions.
3. Contract terms regulation: Measures aimed at ensuring that contract terms are fair and reasonable.
4. Cooling-off periods: Measures aimed at providing consumers with the ability to cancel a contract within a specified period.
5. Moral suasion: Measures aimed at persuading businesses to address a problem on their own, without formal government intervention.

regulation is provided by the Charter of the European Advertising Standard Alliance (EASA). EASA is a co-ordination point for bodies with the responsibility to apply codes of standards and practice established by self-regulatory organisations in response to consumer protection issues highlighted by the creation of the European Common Market. Other cases in point are the Responsible Commercial Communications Guidelines for the Brewing Industry of the Brewers of Europe (CMBC) and the Guidelines on the Lifespan of Products of the European Cosmetic and Perfumery Association (COLIPA).
A similar role can be played by codes of conduct, such as the OECD Guidelines for Multinational Enterprises (MNE guidelines) (OECD, 2011). Governments, in consultation with stakeholders, negotiated the guidelines, which establish a set of principles to encourage and enhance socially responsible behaviour by multinational enterprises, in ways that would go significantly beyond simple adherence to national laws and regulations. The guidelines, combined with the complementary guidance contained in the ISO 26000, provide an important benchmark for evaluating the performance of businesses. The MNE guidelines, while voluntary in nature, present an additional feature: stakeholders can make inquiries or raise concerns with a National Contact Point (NPC). The NCPs are government-supported that essentially act as intermediaries when problems arise, seeking to find ways to resolve problems
Moreover, on 17 July 2020 the OECD Council adopted the *Recommendation on Consumer Product Safety on the proposal of the Committee on Consumer Policy* (CCP). The Recommendation outlines the key elements that should be at the core of consumer product safety frameworks at domestic and international levels and promotes a consistent approach to product safety rules. Notably it applies to consumer purchases occurring in-store and via e-commerce and all actors in the supply chain, including those actors involved in product design, manufacture, certification, distribution and maintenance. This in-built flexibility ensures its continued relevance and applicability across a variety of contexts, including in relation to product safety issues emerging from the Covid-19 crisis.
Industry also makes use of self and co-regulation to provide information and ensure other aspects of quality. For example, in many countries internet service providers have developed codes of practice to prevent the dissemination of harmful or inappropriate content on the internet.
In 2001, prompted by the public administrations for consumer and minor protection, the *Spanish Association of Publishers and Dealers of Entertainment Software* (ADESE) approved a self-regulation code for labelling and advertising products for this industry. The code was harmonized with the European system PEGI (*Pan European Game Information*), which was approved in 2003, and developed by the *Interactive Software Federation of Europe* in collaboration with consumer groups, European policy makers and parent organisations and other interested stakeholders. Self-regulation is also widely used to provide information on product standards. The *European Economic and Social Committee* (EESC, 2005) observed that self and co-regulation are widely used to develop technical standards within Europe and encourage standardisation across member countries.

4. The advantages of self-regulatory regimes

6. Codes of conduct and trustmarks: Measures aimed at influencing business behaviour (codes of conduct) or recognising adherence to established principles or standards (trustmarks).
7. Standards: Measures aimed at establishing criteria to ensure that products, services and systems are safe, reliable and that they consistently perform in the way they were intended to.
8. Licensing and accreditation of firms or providers: Measures aimed at ensuring that businesses have the competence to produce or provide acceptable goods and services.
9. Financial instruments: Financial measures aimed at penalising firms for certain conduct or damage, or encouraging consumers or businesses to behave in a certain manner (e.g. through taxes or subsidies).
10. Prohibitions: Measures aimed at banning undesirable products or practices.
11. Dispute resolution and redress mechanisms: Measures aimed at providing consumers with effective
ways to resolve disputes and, when appropriated, obtain compensation.
12. Enforcement strategies: Decisions concerning the types of enforcement actions that can be used in specific instances to achieve desired outcomes.

We are witnessing a hybridisation of the law through an interaction between the public authorities (the legislator) and private actors (civil society). This interaction is, moreover, declined by interest groups that equip themselves with codes of conduct, to the extent that these are applied, for example, to a whole production line and involve the various stakeholders concerned. There may even be some cross-fertilisation when certain codes of conduct or self-regulation initiatives inspire the legislator, who can incorporate them into law.
In 2017, for instance, there were 48 Self-Regulatory Organizations (SROs) in the world, with several markets in the process of setting up a Self-Regulatory System.
Those developments raise questions about the degree of reliance on self-regulation that the World Bank and other policy advisers should recommend in emerging markets' capital markets.
Anyway, most of SROs were represented in the *International Council for Ad Self-Regulation* (ICAS), a global platform aimed at monitoring compliance with voluntary standards. In the advertising sector, it means that market players join forces to promote truthful and responsible advertising, with respect to the principles of fair competition.
Cooperation at the regional level takes different forms and is most institutionalized in Europe where the *European Advertising Standards Alliance* (EASA) has been acting as the coordinating body for European SROs since 1992. The EASA Charter and the EASA Best Practice Model are operational standards of reference for Advertising Self-Regulatory Systems, and the association is actively monitoring compliance with these Standards.

Fig. 1. Geographical split of SROs globally (yellow: Africa and Middle East; green: Asia-Pacific; orange: America; blue: Europe)

In practice, the advertising industry voluntarily agrees to observe Standards or Principles of Best Practice. Compliance with these rules is monitored by an independent Self-Regulatory Organization (SRO) set up for this purpose and funded by the industry itself. Although in some countries advertising is subject to so much detailed legislation that the scope left for Self-Regulation is quite narrow, elsewhere legislation is limited to providing a broad framework, and advertising content is efficiently regulated and enforced by SROs.
The objectives pursued by ICAS include: *i)* exchanging best practices around Ad Self-Regulation; *ii)* facilitating the establishment of SROs in new markets and helping existing SROs grow and consolidate their activities; *iii)* providing expertise and acting as a source of reference on Ad Self-Regulation worldwide; promoting the value of Self-Regulation and highlighting its benefits for consumers, businesses, regulators and society as a whole.
As with all policy instruments, the advantages and disadvantages of self-regulation will depend to some extent upon the problem to which it is applied. This section explores the merits of self-regulation by asking in what circumstances or situations it is likely to be the most effective; efficient and equitable instrument available to achieve the desired policy outcome.

First of all, the effectiveness of alternative policy instruments concerns how well the instrument achieves its desired objective.

When there are multiple objectives, it may be difficult to determine their relative priority – that is, which is the primary objective and which are considered to be of secondary importance. For example, in the case of a code of practice there may be potential conflicts between the objectives of ensuring the profession is of high repute and also protecting the interests of consumers. There may be incentives to "cover up" undesirable practices or unethical members in the interests of maintaining professional reputation but at the expense of protecting and informing consumers. The objectives of the scheme may change over time. The ability of a regulatory scheme to change and adapt to changing circumstances can be a positive attribute when change takes place in a transparent manner and those responsible for the change can be held accountable. However, when the objectives of the regulatory regime are poorly specified when it is introduced, it is possible that subtle changes can take place to favour those who introduced the scheme. For example, the focus of the scheme can change as a result of changes in its administration, or the priority given to different objects can change. The problem is that these changes can occur in a non-transparent manner and those responsible may not be held accountable. A key issue in assessing how well self-regulatory instruments address specific policy issues is to ask what the incentives affecting the behaviour of the industry or profession are. This question is especially important when it is the industry or profession itself which is initiating and developing the regulatory instrument. It is important to ensure that the stated objectives of the scheme are not masking other implicit objectives. For example, a self-regulatory scheme which restricts membership to an association and only permits members to advertise themselves using a particular title such as certified accountant, may have a stated objective of providing information about quality, competence (in terms of being appropriately qualified) and reliability of the members to the public. However, the implicit objective of such a scheme may be to restrict membership in order to limit competition and enhance the competitive position of existing members.

Industry initiated self-regulatory schemes are more likely to be effective when the interests of the industry and the community more generally coincide. In this case the industry acting in its own interests will also be acting in the interests of the community as a whole. In cases where the interests of the community and industry or professional association members differ there may be problems – or at least concerns which must be addressed – with industry initiated self-regulation. A common concern with self-regulatory instruments is the ability of the industry or profession to use self-regulation in an anti-competitive manner. Industry or professional associations can, for example, be used to restrict new entry and thereby reduce competitive pressures or to agree on fixed or recommended prices – to the detriment of consumers, as happened in Norway.

An effective self or co-regulatory regime must also be well integrated and consistent with other existing regulation. The effectiveness of an instrument will be impaired if it is at odds with existing regulation, or is not well integrated and consistent, and therefore adds to the complexity of the overall regulatory system. Such complexity in regulatory arrangements increases uncertainty affects business planning and investment and increases the costs of regulation. In some cases, a self or co-regulatory regime can complement the existing regulatory framework. Therefore, traditional regulation may specify the minimum standard or objective required, but a self-regulatory regime could "lift the bar" higher by putting in place requirements that are more stringent than the minimum required by legislation.

Clearly, the more flexible the instrument, the more industry or sector specific information can be taken into account in determining the best way to achieve the policy's objectives. Indeed, traditional command and control regulation often imposes a prescribed "one size fits all" solution over all those being regulated. In some cases, this may be appropriate, but it fails to take account of differences between those being regulated and the possibility that those being regulated may be able to find lower cost or more innovative ways of achieving the desired policy objective. The risk in giving too much flexibility to those determining their own regulatory structure – is that the regulation may in effect be captured by the industry or professional association and developed in a way which

advances the interests of those developing the regime rather than the interests of the wider community.

Self and co-regulatory instruments have the potential to rate highly in terms of flexibility: they can be tailored to the specific issue they are designed to address and can change quickly in response to changing circumstances. Those responsible for developing the regime should have an intimate knowledge of the industry or profession and the objectives of the regulatory instrument. They are free to consider a range of options to ensure that the objective is met – and if there is an economic benefit for the firms to participate, they will have an incentive to ensure that the objective is met as efficiently as possible. However, there must be adequate protection in place to ensure that the regime is not captured by the industry or professional association and so promote narrow interests rather than the wider community interest. This requires that there be adequate transparency and monitoring of the performance of the regimes. So, a self-regulatory regime should be developed in a transparent manner so that all stakeholders understand why the regulation is required and why self or co-regulation is the best way to address the perceived policy problem. Mechanisms to ensure transparency in the development of the regime include:

- including interested stakeholders on consultation committees, or even committees involved in drafting the regime;
- holding open public discussions on the proposed regime;
- ensuring that the self-regulatory regime is written in plain language to ensure that it can be understood by as wide an audience as possible, including and explanation of why the regulation is needed.

SECTION II // PRACTICAL EXAMPLES OF SELF-REGULATION IN SELECTED JURISDICTIONS

1. Self-regulation in the EU

The social policy provisions of the Maastricht Treaty, the Commission White Paper on European Governance and the 2003 inter-institutional agreement on "Better Lawmaking" (then replaced by "Smart Regulation") have given self-regulation a role, as a complement to the regulations and directives laid down by the legislator. The agreement, concluded on 16 December 2003 between the Parliament, the Council and the Commission, identified and provided a framework for the practices of self-regulation within the Single Market, stating that "the three Institutions recall the Community's obligation to legislate only where it is necessary, in accordance with the Protocol on the application of the principles of subsidiarity and proportionality". Essentially, they recognise the need to use, in suitable cases or where the Treaty does not specifically require the use of a legal instrument, alternative regulation mechanisms. It also states that "the Commission will ensure that any use of co-regulation or self-regulation is always consistent with Community law and that it meets the criteria of transparency and representativeness of the parties involved. These mechanisms will not be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States. In this context, self-regulation is defined as "the possibility for economic operators, the social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements"[16].
Against this background the European Economic and Social Committee (EESC) – which has always been proactive as regards improving the quality of legislation, since it involves organized groups of those who have to comply with the law in the Community decision-making process – decided to promote self-regulation and co-regulation as tools for simplifying the laying-down of rules. It therefore asked its Single Market Observatory (SMO) to devote a large part of its activities to following up and studying the codes of conduct that are in force. In addition to issuing a number of opinions on these alternative instruments, sending its members to take part in various conferences and seminars and including this topic on the agenda for its public hearings, the SMO, in collaboration with the General Secretariat of the European Commission, has developed a database dedicated to European self-regulation and co-regulation initiatives which, after a test phase at the end of 2007, was formally presented and launched on 30 March 2008 at a public hearing entitled "The Current State of European Self-Regulation and Co-Regulation".
However, for a long time, European self-regulation has developed outside any recognised legal framework, with considerable disparities between the various national situations. Some states, which were familiar with these practices, were generally inclined to support them, in particular English-speaking countries, who described them as "soft law". The ambiguities inherent in this "grey" area of Community law, which is controversial and consequently without a statute, have certainly hampered the development of self-regulation and co-regulation at European level. Consequently, although all European associations are instructed by their members to lobby the EU institutions, a few of them still believe that they do not have a mandate to get involved in self-regulation or co-regulation initiatives[17].
The mechanisms for self-regulation and co-regulation must in particular always chime with legislative and legal requirements in Europe, the most important of which are the aims and clauses of the EU Treaty. They must also be compatible with international trade agreements, especially the

[16] Several directives give an idea of the prospects offered by self-regulation (e.g., Reg. UE no. 2016/679 on data protection, Directive no. 2000/31 on e-commerce or Directive no. 2005/29 on unfair trading practices).

[17] See European Economic and Social Committee (EESC), "Self-regulation and co-regulation" (2015), available at: *https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/self-regulation-and-co-regulation.*

provisions of the WTO. They must remain under the control of Community and national jurisdiction.
Self-regulation and co-regulation initiatives help to remove often complex barriers to the functioning and the completion of the Single Market, by agreeing on the same common professional rules at European level or arranging the mutual recognition of national rules. This harmonization or mutual recognition helps to simplify rules in the Single Market in that they automatically have the support of the organizations concerned and therefore have the best chance of being accepted and properly implemented by them. Self-regulation and co-regulation mechanisms generally help to make action more flexible and rapid than legislative channels. The same could be said of alternative dispute settlement mechanisms compared with legal proceedings. Indeed, traditional court-based dispute resolution is often complex and time consuming. In this respect, codes of conduct and trust marks play an important role in sensitising companies to develop good business practices and thus to prevent disputes from arising. If, nevertheless, a dispute arises, in most cases it will be resolved by the company itself. In the case where the compliant is not resolved with the company, consumers should feel safe that they can obtain redress: thus, alternative dispute resolution mechanism (ADR's) have been developed by the industry but also by consumer association. ADRs cover a broad range of mechanism designed to assist parties in resolving disputes; the most common forms of ADRs are: negotiation, conciliation, meditation, arbitration.
For the professions and sectors concerned, they therefore provide an opportunity for adapting more easily to the increasing pace of economic, social, technological and environmental change. Initiatives for self-regulation and co-regulation, just like alternative methods of settling disputes, have already made a significant contribution to the smoother operation of the Single Market, involving social and economic stakeholders more directly in removing barriers. In doing so, they help to achieve potentially significant savings of public money. They also help to ease the excessive workload of legislators and judges and thus enable them to focus on the issues that genuinely fall within the scope of their core competence, whilst giving them the opportunity to exercise their authority if these alternative methods appear to have failed to meet the expectations placed in them or created new problems as regards legislative or judicial rules.
Therefore, in addition to the existing enforcement measures, a number of mechanisms have been established in the EU to facilitate the implementation of effective redress procedures, such as the European Small Claims Procedure, in force since 2009, which reduces costs and simplifies and accelerates procedures, and Directive 2008/52/EC of the European Parliament and of the Council, of May 21, on certain aspects of mediation in civil and commercial matters, which reinforces this alternative mechanism. The Directive 2011/83/EU of the European Parliament and of the Council, of October 25, on consumer rights, addresses the major barrier to the creation of a retail internal market. In any event, it establishes a single set of fully harmonized rules in a specific environment, which will ensure a high common level of consumer protection in the EU and allow merchants to sell to consumers in all twenty-seven Member States, on the same terms as in their national market, using, for example, the same standard contract terms and informational materials.
Moreover, the adoption of the proposal strengthens consumer protection and its enforcement in cross-border e-commerce contracts and will make it easier for mediators to settle disputes out of court.
The Lisbon European Council drew attention to the establishment of ADR systems, in order to encourage consumer trust in e-commerce in the EU: the absence of borders opens up a new dimension in internal market operations. Consumers have access to service providers throughout the entire EU, but the supply and demand of cross-border services can only develop satisfactorily in an environment with legal clarity and certainty that fully protects the interests of consumers and investors. To create that environment, it is necessary to address the questions raised by the development of e-commerce, including the need to encourage this new alternative to traditional justice.
For these reasons, many industry self-regulation agreements include dispute resolution schemes which enable consumers to file complaints and ask for resolution directly with the operating organisations of the ISR (i.e., when it has not been possible for the consumer and the business

concerned to resolve a dispute directly), such as in the case studies on Direct Selling Association Code of Practice and Collision Repair Industry Code of Practice. In most of the cases with dispute resolution provisions, decisions made by the organisations are binding for the member businesses, but not for consumers; therefore, consumers still retain their rights to bring their case to the court or to use other alternative remedies if they are not satisfied with the results (see, for example, the case studies on Financial Ombudsman Service and Telecommunications Industry Ombudsman).
Usually, dispute resolution services are provided to consumers for free (see the case studies on Credit Ombudsman Service Ltd. and Direct Selling Association Code of Practice). In one instance involving product safety standards, consumers are entitled to receive redress from the standards organisation when an accident happens with a product carrying their logo (case study on Safety Toy Mark)[18].
The measures adopted by public authorities and those implemented by self-regulation bodies can be complementary. Indeed, the former would provide the underlying legal and judicial framework and the latter an additional resource for relatively simple cases. Directive 2005/29/EC of the European Parliament and of the Council, of May 11, on Unfair Commercial Practices is a good example of what we are discussing, as it suggests that self-regulation is compatible with administrative or judicial action and clarifies the role that can be played by those responsible for codes of conduct. If the business refuses to comply with the decision made regarding the dispute by the established supervisory body, it could be expelled from the self-disciplinary system of which it is part, which might be publicized, leading to a loss of credibility.
Another considerable advantage of self-regulation and co-regulation initiatives is the way in which they lead to a sense of co-responsibility among economic and civil society stakeholders, genuinely making them full partners in the process of European integration. These initiatives have had a very positive impact on civic education, further training, social dialogue, respect for the environment and on greater attention being paid to consumer issues.
After the financial crisis, EU Commission and Parliament and European interest groups advanced a specific model of regulation. It combines, on one side, lobbyists self-regulation – the codes of conduct for EU lobbying professionals' associations, such as Society of European Affairs Professionals (SEAP) and European Public Affairs Consultancies' Association (EPACA) – with institutional nonbinding or "soft" regulation on the other side – the EU Transparency Register framework for registered interest groups, its code of conduct, the related system of checks, alerts, and complaints. The European Commission set up its own register in 2008, paving the way for the joint TR, launched in 2011 based on an Inter-Institutional Agreement (IIA) between the two institutions. It is worth noting that the Council of the EU did not join the agreement. The Parliament and the Commission converged towards a light, consensual, and open regulatory approach for interest groups. Its focus and intent were to promote active and responsible participation of stakeholders to the EU policy making process and to provide with selective incentives the interest groups voluntarily registering to the TR and subscribing the related code of conduct[19].
There are significant differences between this model and the North American (U.S. and Canada) interest groups regulation format, which is based on a compulsory registration of interest groups and stringent rules of reporting and sanctions. At the same time, EU officials are provided with a crucial set of transparency norms for their interactions with interest groups. This regulatory system, including both norms for EU officials and selective incentives for interest groups, is grounded on a participatory governance approach, is typical in supranational institutions, and is different compared with the nation state regulatory model, which consists in a top-down approach based on binding rules, controls, and sanctions.

[18] OECD, *Industry Self-Regulation: Role and Use in Supporting Consumer Interests,* 23 Mar 2015, available at *https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2014)4/FINAL&docLanguage=En.*
[19] M. C. Antonucci, N. Scocchi, "Codes of conduct and practical recommendations as tools for self-regulation and soft regulation in EU public affairs" (2018).

In the EU, the proper functioning of the soft regulation model depends on interest groups' ability to elaborate autonomous self-regulation tools such as ethical codes and codes of conduct[20].
In the EU, we observe two types of codes of conduct. On one hand, two public affairs associations developed specific codes of conduct (SEAP, 1997, update: March 2016; EPACA, 2005, update: October 2017), to provide their members with clear guidelines on how to interact with EU policy makers. On the other hand, the European Parliament and the European Commission introduced a code of conduct (Inter Institutional Agreement Annex 3 Code of Conduct = IIAA3 Code of Conduct) with a top-down model for the interest groups registering to the TR, defining the standards of behavior for all interest groups representatives interacting with the European Commission and the European Parliament.
These two different types of codes of conduct – the bottom-up codes developed by the public affairs professionals' associations and the top-down code IIAA3 Code of Conduct – are strictly linked in a peculiar regulation model of lobbying in the EU. In this mixed context, public affairs professionals do not adopt a certain behavior because of a set of binding norms, but due to a mixture of self-regulation, through professional associations' codes of conduct, and a set of selective incentives, provided by the IIAA3 Code of Conduct. This double and mixed regulatory model relies upon the specific policy making process of the EU, in which policies are shaped by the interaction between policy makers and interest groups. However, professional associations such as EPACA and SEAP are not the only interest groups interacting with EU policy makers. Law firms, trade and business associations, NGOs, think-tanks, and regional and local organizations interact with EU policy makers as well. The structure of the codes of conduct introduced by SEAP and EPACA shows important similarities. First, both codes state general principles of conduct (integrity, transparency, professionalism, confidentiality, and correctness). Second, they point out specific requirements and forecasts of concrete behavior (respect of institutional role of EC and EP personnel, reputation, and avoidance of conflict of interests); finally, enforcement mechanisms and sanction procedures for non- compliance complete the provisions of both codes of conduct[21].
Moreover, the European Advertising Standards Alliance (EASA), located in Brussels, is a well-established association representing 39 members, including SROs from 25 European countries and several industry associations representing marketers, agencies and the media, whose objective is to provide detailed guidance on how to go about Advertising Self-Regulation for the benefit of consumers and businesses, exchanging best practices around self-regulation and highlighting its advantages for consumers, businesses, regulators and society as a whole[22].

A very interesting case concerning the use of self-regulation in the EU law-making process concerns financial regulation, and more specifically resolution and recovery plans in the ambit of "crisis management regulation" (directive 2014/59/EU - "BRRD"- and directive 2013/36/EU – CRDIV).
In fact, the great financial crisis exerted a profound influence on EU policy- and law-makers concerning how to regulate financial markets and institutions. The pervasive belief in the social desirability of unfettered market was in fact abandoned, since private actors – unregulated –proved to be neither rational nor fully informed as to master risk effectively. They often pursued vested private interests in conflict with the public good and lacked any form of public accountability. Market fundamentalism therefore stopped informing public policy, and a more intrusive form of regulation gathered momentum, especially to account for both the complexity of modern financial

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[20] O.E.C.D. (2009a). Lobbyists, governments, and public trust, volume 1: Increasing transparency through legislation. Retrieved from *https://read.oecd-ilibrary.org/governance/lobbyists-governments-and-public-trust-volume-1_9789264073371-en#page4. http://doi.org/10.1787/ 9789264073371-en.*
[21] Jenkins, R., & Unies, N. (2001). "Corporate codes of conduct: Self-regulation in a global economy".
[22] At the global level, the International Chamber of Commerce (ICC) has historically been leading international efforts to establish Key Principles and Codes of Practice. In 1937, the ICC adopted the first Code of Advertising Practice, which provides a global framework for responsible creativity and ethical commercial communications. The Code and its accompanying Guidelines are prepared by the ICC Commission on Marketing and Advertising Practice, which is composed of experts from ICC member companies, the marketing and advertising industry, legal advisors from industrial and commercial enterprises, private practice lawyers and representatives from a wide range of business organizations and professional associations.

markets and the nature and pace of financial innovation. Over the last decade, in fact, finance has been shifting increasingly from an industry characterised by brick-and-mortar bank branches towards an industry comprised of heterogeneous providers of services that are extended to customers via a multitude of channels and devices. Financial innovation has deeply influenced law-making, ever since it passed from being a "product/service changer" only, to a "game changer".
Complexity and innovation are therefore to be considered root causes of greater and more sophisticated markets failures, since they have combined to generate significant asymmetries of information, exacerbated agency costs problems and moral hazard conducts within financial markets. Besides aggravating already pervasive market failures, they also gave rise to new issues leading up to "too-interconnected-to-fail" situations, the full implications of which we are only just now beginning to understand.
In this context, Decentralised finance (DeFi) represents a novel way of providing financial services that cuts out traditional centralised intermediaries and relies on automated protocols instead. In simple terms, DeFi participants are part of a peer-to-peer network (built on a public blockchain) where assets represented in the network can be transferred automatically (via so-called smart contracts). Most DeFi applications do not provide new financial products or services, but mimic within the crypto-asset ecosystem those provided by the traditional financial system. The main difference is the way DeFi provides services, not relying on centralised intermediaries. This novel method of service provision has its own risks and also presents challenges for the traditional regulation of financial services, particularly due to the lack of intermediaries as regulatory "entry points"[23]. Where regulatory gaps exist, the innovative ways in which DeFi provides financial services will require innovative ways of regulation to close regulatory loopholes: so, DeFi protocols/code must be deployed, governed and upgraded. Regulatory sandboxes, which allow projects to operate in a controlled environment, is a potentially effective way for DeFi developers to work together with regulators.
Generally, it is hoped that regulators and policymakers will choose a technologically neutral approach to balancing the need for promoting innovation and meeting supervisory objectives and a combination of self-regulation and supervisory enforced regulation.
As to keep up to such fluid and dynamic market practices, the EU regulatory framework evolved along two trajectories.
On one side, a comprehensive and detailed new set of harmonised provisions have been produced, both at level 1 (Directives and Regulations) and level 2 (implementing measures released by the ESAs). On the other side, *ad hoc* venues for self-regulation have been opened up, as a way to better adapt to the rash developments occurring in the financial markets and so to properly respond to the intensified potential market failures and negative externalities[24]. The "command-and-control rules-based and principles-based techniques have thus been enriched by self-regulation, consisting of self-imposed or self-enforced rules[25].
In that respect, Marco Lamandini and David Ramos Muñoz have taken the view that external regulation and self-regulation have become intertwined and mutually reinforcing, up to the point that they are "bond to co-exist": "This would make self-regulation an "add on" in respect to external regulation and it would be capable of bringing about additional gains in social welfare, which would not be made, however, compulsory by external regulation"[26].

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[23] See ECB, Decentralised finance – a new unregulated non-bank system?, 2022, available at *www.ecb.europa.eu/pub/financialstability/macroprudentialbulletin/focus/2022/html/ecb.mpbu202207_focus1.en.html*.
[24] K Alexander, N Moloney, Law Reform and Financial Markets, Elgar Law Series, 2011, p. vii of the introduction.

[25] F. Cafaggi, 'Rethinking Private Regulation in the European Regulatory Space', p. 22, classified self-regulation in the following categories as: (i) *mandated private regulation*, where an industry is required or designated by the government to formulate and enforce norms within a framework set by the government; (ii) *sanctioned private regulation*, in which a private body formulate the norms which are then subjected to governmental approval; (iii) *coerced private regulation*, where the industry formulates the norms in response to threats by the government that if it does not it will impose statutory regulation; (iv) *voluntary private regulation*, where there is no active state involvement

[26] M Lamandini, D R Muñoz, EU Financial Law, Padova, 2016, 102. On the same lines, D Awrey, Regulating Financial Innovation: A More Principles-Based Alternative? (November 3, 2010). (2011) 5:2 Brooklyn Journal of Corporate, Financial

Although the financial crisis has led to a resurgence of public regulatory power, no amount of re-regulation could ever elevate the State to a position of substitute for the variety of actors in governance that have arisen, nor is that an ideal position whether from a practical or normative point of view[27].

Thus, the financial sector situates in a multilevel or "decentred" regulatory space[28], which is indeed the result of complexity, fragmentation, interdependencies, un-governability and the rejection of a clear private-public distinction[29]. The European financial regulatory framework extends to a wide array "regulatory tools" which encompass "external regulation, recommendations, guidelines as well as self-regulation/internal regulation. The decentred analysis acknowledges that the financial services industry is a powerful and innovative industry that has been able to exert self-governance over many of its activities, if properly empowered and supervised[30]. Over the last years regulators have in fact been actively encouraging the financial sector to take leadership to develop forms of reflexive regulation to govern the sector's activity, emphasising recourse to market-based solutions instead of the sometimes-inappropriate hand of regulation[31]. However, contrary to deregulation practices, in the current regulatory space regulators arguably remain entrusted with the powers to protect and take care of "public interest" or "public good" (in the economic sense of public goods that are not supplied for failure of collective action on the part of the market)[32]. The "public" character of regulators in the regulatory space is arguably distinct and this is conceptually sustainable even if the regulatory space is decentred.

In recent years, the business community in general has recognized the important benefits of good practices and become aware of the need to develop instruments of good practices that express its position regarding numerous aspects, such as labour, financial, environmental, customer relation, supplier relation and other aspects. The most frequent way used to introduce ethics to the new management of a company, which includes sustainability, is its incorporation and formalization in various written documents.

Thus, sustainable development refers to development that produces a reasonable and stable profitability over time, respects the cultural and ethical values of the communities involved and maintains the fundamental characteristics of the natural system over time in terms of its components and interactions. In general, instruments of good practices, as a manifestation of self-regulation, such as codes of ethics, codes of conduct, corporate governance principles, etc., inform the public of the

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and Commercial Law 273; Oxford Legal Studies Research Paper No. 79/2010. Available at SSRN: https://ssrn.com/abstract=1702457), refers to „"de-centered" understanding of regulation which spans the public-private divide to encompass all forms of social control or influence – whether generated, monitored and enforced via the apparatus of the state or other sources".

[27] Helmut Wilke, Governance in a Disenchanted World (Cheltenham: Edward Elgar 2009).

[28] Julia Black, 'Critical Reflections on Regulation' (2002) 27 Australian Journal of Legal Philosophy 1.

[29] Black indeed argues that decentred regulation is premised on these five preconditions. 'Complexity' refers to the nature of problems that may need to be dealt with. 'Fragmentation' refers to the fragmentation of knowledge, resources and capacity for control in the regulatory space. 'Interdependencies' refers to the dynamics between the participants in the regulatory space, coproducing and co-enforcing norms of governance. 'Ungovernability' refers to the autonomy and unpredictability of actor behaviour in the regulatory space, which will pose challenges to assumptions made by regulatory authorities. In a decentred landscape, there is, some argue, no public-private distinction as all participants contribute to and influence governance.

[30] Julia Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' [2003] Public Law 63; Julia Black, 'Mapping the Contours of Contemporary Financial Services Regulation' (2002) 2 Journal of Corporate Law Studies 253. See also concurring account from the sociological point of view, Laureen Snider, 'The Conundrum of Financial Regulation: Origins, Controversies, and Prospects' (2011) 7 Annual Review of Law and Social Science 121.

[31] Stefano Pagliari, 'Who Governs Finance? The Shifting Public-Private Divide in the Regulation of Derivatives, Rating Agencies and Hedge Funds' (2012) 18 European Law Journal 44

[32] Geoffrey RD Underhill, 'Theorizing Governance in a Global Financial System' in Peter Mooschlechner, Helene Schuberth and Beat Weber (eds), The Political Economy of Financial Market Regulation (Cheltenham: Edward Elgar 2006), 4; Robin P Malloy, Law in a Market Context (Cambridge: Cambridge University Press 2004), 122ff.

nature of the organization or highlight compliance with certain practices naturally extending to sustainability.
In many cases, the existence of a best practice document related to sustainability helps maintain public trust because such a document guarantees that anyone who subscribes it will know, in principle, how to act ethically in this case in the field of sustainability[33]. Therefore, the documents list certain objectives in the business world, such as improving corporate reputation, avoiding regulation, attracting investments, improving the work environment, increasing the organization's efficiency, in significant areas.
While some instruments of self-discipline in the environmental field are not subject to verification by an impartial and independent control body, other instruments are subject to review by external agents. The latter can be carried out either by the company or third-party companies expressly contracted to carry out this work. Notably, once a company voluntarily assumes compliance with good practices in the field of sustainability, their acceptance becomes mandatory[34].
The company standard SGE 21, *i.e.*, Ethical and Socially Responsible Management, for example, has been developed by the Spanish entity Forética and certifies in a comprehensive manner that the Corporate Social Responsibility (CSR) of organizations includes the sustainability sector. This system allows auditing processes and achieving certification in ethical management and social responsibility on a voluntary basis. If companies comply with the established statements, a certificate of ethical and socially responsible management is awarded, which, once granted, is valid for three years. Notably, the aforementioned SGE-21 is one of the few standards derived from self-discipline that includes all possible implications of CSR in the company, highlighting, in this respect, the environment or sustainability.

In contrast to an umbrella model of a CSR standard, some experts believe that it is more appropriate to resort to certifications of partial aspects of sustainable development consistent with the company's risk profile. Thus, for example, ISO 14001 should be applied to companies with a clear environmental risk, as is the case with many industrial sites with a significant impact on the environment.
The objective ISO 14001 aims to provide companies with the necessary procedures to improve their environmental performance. This objective provides a list of the organizational, procedural and substantive aspects in understandable and logical terms that a company must address to incorporate ongoing efforts to improve environmental behaviour in its day-to-day management. Since it is a technical standard, *i.e.*, a self-regulatory instrument designed to facilitate business management, it addresses aspects that form a part of the essential core of the freedom of enterprises, which could be difficult to address through legal rules.
Technical standards are tools that facilitate business self-regulation and can be characterized as instruments of self-regulation since they are developed and approved with the participation of all interested parties by private standardization bodies. The content of technical standards is always the result of experience rather than scientific or technical criteria. The recognition that standardization bodies possess allows companies to trust the benefits of the application of technical standards and gives an important added value to their compliance.

More broadly, the regulatory landscape in the European financial sector has become a composite legal order which comprises many sets of rules at different levels, and a diversified range of actors engaged in producing them.

Such a new legal order has been depicted as a policy and regulatory circle or "wheel" as contrasted to the hierarchical pyramid[35]. Unlike the pyramidal structure, the wheel accounts for the current

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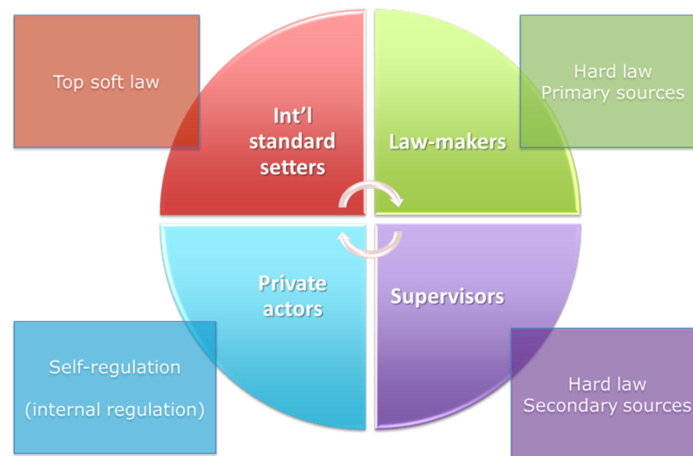
[33] López, D., Dittmar, E. C., y Vargas, J. P. (2020). *Self-regulation of sexist digital advertising: From ethics to law* in *Journal of Business Ethics, 171*, 709-718. https://doi.org/10.1007/s10551-020-04471-y.
[34] Sanders, S., y Karmowska, J. (2020). *Voluntary flexible working arrangements and their effects on managers and employees* in *Harvard Deusto Business Research, 9*(2), 197-220. https://doi.org/10.48132/hdbr.304.
[35] S. Cassese, La nuova architettura finanziaria europea, in Dal testo unico bancario all'Unione bancaria: tecniche normative e allocazione dei poteri, in Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia, 2014, 19; M.

multilevel institutional setting and the multiplicity of public and private actors implicated in the process of financial regulation. It illustrates the co-existence of global to local and public to private actors, with variety of sources and variety of modes of regulation. Hard law relies extensively on soft law, and leaves appropriate room to self-regulation. Governance and markets tend to be tangled with each other, and so the parties involved in drafting and developing the regulatory framework[36]. Elaborating upon the regulatory wheel developed by Marco Lamandini[37], such mutual reinforcing interaction between international standard setters, law-makers, supervisors and private actors could be graphically sketched out by this scheme:



The graph is divided into 4 quadrants that can be read both in top down and bottom up perspective. On top and bottom left, respectively, the soft law of international sources, mainly the expression of non-conventional type of international institutions and without any legally binding effects and the soft law produced by market participants. On the other two quadrants, the prescriptive legislative source of supranational federal, state and prescriptive rules released and implemented by supervisors. In the financial sector *soft law* provisions can become *de facto* compulsory for both public institutions and private market players[38]. The latter occurs, for instance, when a supervisory authority considers self-regulatory best practices as a decisive factor in assessing financial institution's compliance with general principles of supervision like safe and soundness, fairness or transparency[39].

Lamandini, D. Ramos Munoz, A Simplified Model for European Capital Markets' Law, Libreria Bonomo editrice, Bologna, 2014, 97 ss. Christopher Arup, 'The Global Financial Crisis: Learning from Regulatory and Governance Studies' (2010) 32 Law and Policy 363, refers to this as the matrix of state and corporate power in co-governing the financial sector.

[36] C Brummer, How International Financial Law Works (and How it Doesn't), Georgetown Law Journal, Vol. 99, 2011; Georgetown Law and Economics Research Paper No. 11-15; Georgetown Public Law Research Paper No. 11-112. Available at SSRN: https://ssrn.com/abstract=1542829

[37] M Lamandini, Il diritto bancario dell'Unione, in Scritti sull'Unione Bancaria, Quaderni di ricerca giuridica della Banca d'Italia, July 2016, n. 81.

[38] In this respect, the ECJ recently held that guidelines or recommendations issued by the ECB to national competent authorities (NCAs) can be considered as having legal effects whenever the NCAs feel somehow obliged to abide by these guidelines and recommendations or, differently said, if such is "the perception of the Policy Framework on the part of the euro area Member States' regulatory authorities". See Judgment of the General Court, T-496/11, 4 March 2015, *United Kingdom v. ECB*, par. 42.

[39] The former materializes in situations like the one so neatly described by Article 6 of Directive 2013/36/UE where it reads: "Member States shall ensure that the competent authorities make every effort to comply with those guidelines and

Rule-making is a dynamic process whereby rules move frequently from one quadrant to another, enriching the content and adding to at each transition. Such a paradigm is premised on the idea that the regulatory space should be composed by 'knowledge-based' actors. Hence, the regulated industry is likely to maintain a position of 'authority' in governance in the post-crisis landscape, by virtue of the set of information they possess. The regulatory wheel could be said to be dominated by knowledge-based individuals and communities whose collective role provides a form of governance that is perceived as legitimate and credible because of the knowledge base, professionalism and rationality in operation and action. Hence are likely to have the authority to participate in governance[40].

Along the wave of financial regulatory reforms spurred by the financial crisis, the advent of recovery and resolution planning (so called "living wills regulation") has been welcomed as a "one of the few genuine innovations"[41]. Not only does it mandate banks to outline plans to be incorporated into regulation and supervision practices, but it envisages, most importantly to our mind, new modes of interaction between regulators and regulatees.

Living wills regulation has indeed become a key instrument in many jurisdictions[42] in order to minimise costs to taxpayers and prevent "bail-outs", as well as to help limit and counteract the externalities that generally accompany bank and financial failures[43].

In U.S. the Dodd-Frank Act requires systemically important banks to submit a resolution plan that sets forth how the firm would liquidate in an orderly manner to minimize any systemic impact (Dodd-Frank Act, § 165(d))[44]. On the other side of the ocean, the U.K. has been particularly proactive in advancing the policy and regulatory concept of living wills, which has first proposed in January 2008 in a Treasury consultation paper entitled "Financial stability and Depositor Protection: Strengthening the Framework"[45]. The UK Financial Services Act 2010 indeed provides for the

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recommendations issued by EBA in accordance with Article 16 of Regulation (EU) No 1093/2010 and to respond to the warnings and recommendations issued by the ESRB pursuant to Article 16 of Regulation (EU) No 1092/2010".

[40] Gili S Drori and John W Meyer, 'Global Scientization: An Expanded Environment for Organization' in Gili S Drori, John W Meyer and Hokyu Hwang (eds), Globalization and Organization (Oxford: Oxford University Press 2009), 50; Gili S Drori, 'Governed by Governance' in Gili S Drori, John W Meyer and Hokyu Hwang (eds), Globalization and Organization (Oxford: Oxford University Press 2009), 91.

[41] A Feibelman, A Prelude to Private Ordering under Bankruptcy Law, in: Eidenmüller (ed.), Regulatory Competition in Contract Law and Dispute Resolution, 2013, 199.

[42] The development of living wills regulation has been prompted by some influential recommendation put forth by international standard setters, most notably the Financial Stability Board: see FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions, 4 November 2011, available at http://www.fsb.org/wp-content/uploads/pr_111104dd.pdf?page_moved=1. The proposed measures comprise four key building blocks: (1) Strengthened national resolution regimes that give a designated resolution authority a broad range of powers and tools, including statutory bail-in, to resolve a financial institution that is no longer viable; (2) Cross-border cooperation arrangements in the form of institution-specific cooperation agreements, underpinned by national law, that will enable resolution authorities to act collectively to resolve cross-border firms in a more orderly, less costly, way; (3) Improved resolution planning by firms and authorities based on ex ante resolvability assessments that should inform the preparation of Recovery and Resolution Plans; and (4) Measures to remove obstacles to resolution arising from complex firm structures and business practices, fragmented information systems, intra-group transactions, reliance on service providers and the provision of global payment services

[43] T.F. Huertas, R.M. Lastra, Living Wills, in Banco de Espana, Estabilidad Financiera, 2011, n. 21, p. 25.

[44] Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, H. R. 4173). The

[45] In August 2011 the FSA published its combined consultation and discussion paper (CP11/16) setting out detailed proposals for recovery and resolution planning for deposit taking institutions and certain major investment banks. With the forthcoming dismantling of the FSA (due to take place at the beginning of 2013), the tasks concerning living wills will be part of the remit of the Prudential Regulatory Authority. The Bank of England and the FSA published a document. In

regulator to require financial institutions to draw up *ex ante* "recovery and resolution plans" in order to set out how they would deal with a potential crisis[46].

Living will regulation has also found favour in EU policy-making and is now part of the set of measures embodied in the ambit of banking crisis management.

EU recovery and resolution planning for financial institution is both regulated in Directive 2013/36/EU (CRD IV) and Directive 2014/59/EU (BRRD). And indeed, recovery plans dwell at the intersection of these two pieces of legislation. They are to be regarded as a *governance arrangement* within the meaning of Article 74 of Directive 2013/36/EU, in that they are for the bank to develop and "own". Such tool is comprised within the set of internal arrangements, processes and mechanisms of the financial institutions.

Recovery plans basically aim to reduce the likelihood of failure by requiring banks to identify options in order to achieve recovery when a crisis occurs. The purpose is therefore to enable banks to outline the steps they could take to recover from severely adverse situations and conditions that could cause their failure.

Despite being rightly qualified as an internal governance component, recovery plans are materially and extensively regulated in the BRRD. They are a *private internal measure* which connects to the public objectives enshrined in the Banking Recovery and Resolution Directives, namely ensuring "the continuity of the financial institution's critical financial and economic functions, while minimising the impact of an institution's failure on the economy and financial system" (see Recital 5). Recovery plans are but a "menu of options" (way-outs) for dealing with a range of increasingly distressing scenarios. They "include appropriate conditions and procedures to ensure the timely implementation of recovery actions as well as a wide range of recovery options. Member States shall require that recovery plans contemplate a range of scenarios of severe macroeconomic and financial stress relevant to the institution's specific conditions including system-wide events and stress specific to individual legal persons and to groups"[47].

Recovery plans amount to a delegation of clearly defined quasi-regulatory duties to closely regulated agents, in that they allow self-regulatory initiative based upon, and clearly constrained by, directive provisions. Section A of the Annex attached to BRRD lists the minimum information to be included in the recovery plans and the European Banking Authority, in close cooperation with the European Systemic Risk Board (ESRB) are required to issue guidelines to specify further the range of scenarios to be used for the purposes of setting up the internal procedures. Additionally, such planning is to be updated at least annually and assessed and approved by the authorities, which therefore retain some monitoring and scrutiny power upon them[48].

Resolution plans, on the other hand, are prepared not by the firms themselves, but by the authorities. Nonetheless, the plan is based on a detailed resolution analysis to be submitted by the bank as to determine resolution tools and ways to ensure the continuity of critical functions. In that respect recovery and resolution plans are strictly interdependent, being the latter based on the information provided by the former. Indeed, resolution planning takes account, *inter alia*, of how critical function and core business lines can be legally ad economically separated from other functions as to ensure continuity in the event of the failure of the institution; a detailed description of the assessment of

May 2011, "Our approach to Banking Regulation" in which they emphasised that "resolvability" is a key element of UK prudential regulation and in particular in considering the appropriateness of firm structures.

[46] Financial Services Act 2010 (UK), s 139B.

[47] See art. 5(6), BRRD.

[48] See art. 5(2), BRRD.

resolvability, a description of critical interdependencies; an analysis of the impact of the plan on other institutions within the group; a description of the options for preserving access to payments and clearing services and other infrastructures and so forth[49].

The overall aim of living will regulation is not the development of a pre-packaged resolution or bankruptcy by the firm itself only. It rather intends to provide the authorities with the necessary information concerning the details of the bank structure and to enable the authorities to form opinions on its resolvability[50]. These plans outline arrangements and measures to enable the supervisory and resolution authorities to take early action to restore the bank's long viability in the event of a material deterioration of its financial situation.

The objective of living wills regulation is therefore two-fold: one purpose is to force the firm to think about its own resilience in times of trouble; the other, and even more important one, is to provide supervisory authorities with necessary information, therefore enabling them to be taking the right measure at the right time[51]. Thus, recovery and resolution planning have both an *ex ante*[52] and *ex post*[53] element to them: they are directed at identifying rescue scenarios for institutions running into troubles, taking action as early as possible; but they are also aimed at providing a credible means of resolution should the bank fail.

Economic and legal scholarship alike emphasise the relevance of living wills regulation as to deal with complexity in financial institution organisation, financial markets structures and networks[54]. Living wills act as a structural simplification which contributes towards reducing excessive complexity and could entail general risk moderation in the financial sector, since financial institutions are compelled to think about how their structure can be made simpler[55]. In that respect, we contend that new governance theory might be informative in better understanding the modes of interaction as required by living will regulation. Recovery and resolution planning measures allow private initiatives to integrate the traditional "uniform-rules-of-general-application" approach by incorporating regulated institutions' internal models and plans into crisis management regime.

Financial regulators face chronic and potentially severe asymmetries of information and expertise *vis-à-vis* regulated actors. These asymmetries are the products of, *inter alia*, *i)* high-powered

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49 The resolution procedure revolves around the criterion of the public interest, which is one of the three conditions to be satisfied for a bank to be put into resolution (see art. 32 BRRD, art. 18 SRMR). Before determining the "preferred resolution strategy" (PRS), indeed, the public interest criterion should be ascertained, as it represents the parameter against which to define and implement of the resolution plans (see European Banking Authority, *EBA final draft Regulatory Technical Standards on the content of recovery plans under Article 5(10) of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms*, 18 July 2014). If there is no public interest attached to the resolvability of the bank, the national insolvency procedures take place instead (NIPs), insofar they are feasible and credible. See also Single Resolution Board, The Single Resolution Mechanism. Introduction to Resolution Planning, 22 September 2016.

50 A Thole, Can Living Wills Revive Contractual Approaches to Bankruptcy Law?, in: Eidenmüller (ed.), Regulatory Competition in Contract Law and Dispute Resolution, 2013, 222.

51 See Feibelman, Living Wills and Pre-Commitment, 2011, Am. U. Bus. L. Rev. 93; Feibelman, A Prelude to Private Ordering under Bankruptcy Law, in: Eidenmüller (ed.), Regulatory Competition in Contract Law and Dispute Resolution, 2013, 199 ff..

52 I, Anabtawi, and SL Schwarcz, Regulating Ex Post: How Law Can Address the Inevitability of Financial Failure (November 18, 2013). 92 Texas Law Review 75 (2013); UCLA School of Law, Law-Econ Research Paper No. 13-07. Available at SSRN: https://ssrn.com/abstract=2271587

53 C Thole, Bank Crisis Management and Resolution – Core Features of the Bank Recovery and Resolution Directive (July 22, 2014). Available at SSRN: https://ssrn.com/abstract=2469807 or http://dx.doi.org/10.2139/ssrn.2469807

54 R F Weber, 'Structural Regulation as Antidote to Complexity Capture' (2012) American Business Law Journal 643.

55 E Avgouleas, C Goodhart and D Schoenmaker, 'Living Wills as a Catalyst for Action' (2013) 9 Journal of Financial Stability

economic incentives unique to regulated actors to invest in the acquisition of information and expertise, and *ii)* incomplete and often less than timely access by regulators to market and firm-specific information[56].

Since the effectiveness of crisis management regulation depends on the ability to promptly intervene with the appropriate measures, this complexity paradigm, which entails a dynamic and proliferating risk profile, presents a *fundamental dilemma* for regulators. In response to this dilemma, in recent years financial regulators have sought to incorporate private regulation a means of bridging the informational gap between the actual risk profile of regulated firms and the regulators charged with minimizing the social costs incurred if those risks materialize.

Standing in contrast to traditional legal-centric paradigm, living will regulation is premised upon an iterative, dialogic, "conversational"[57], relationship within which regulated actors are invited to play a potentially important role within the process of generating regulation. Living will regulation is thus a reflection of the new governance theory which envisages a hybrid form of private-public regulation[58].

Living will regulation resembles *mutatis mutandis* the regulatory technique devised for internal ratings-based approach (IRB) and internal control system.

On one hand, Robert F. Weber convincingly demonstrates how regulators adopted internal models approaches as a means of more closely calibrating capital requirements to the actual risk profiles of banks, which had become increasingly complex over time. He approaches capital adequacy regulation by applying the new governance theory as an analytical framework. He advocates for new modes of interaction between public- and private-actors in overcoming the flaws stemming from as a solely "top-down" prescriptive risk-weighting approach[59].

On the other hand, Iris H-Y Chiu puts forwards strong arguments in favour of a regulatory approach that empowers and enhances the capacity of financial institutions to self-regulate ("meta-regulation") their internal governance measures. This is a form of delegated governance by regulators to banks, and banks can have considerable discretion in designing the implementation systems and processes. As she maintained, "regulatory interest in the institution of internal control at banks and financial institutions lies in its organisational position and role. Internal control has proximity to inside knowledge and issues, and acts as an internal gatekeeper for banks and financial institutions. It may be argued that such an organisational position and role could also serve the regulator's objective of securing the financial institution's compliance with regulatory requirements. In other words, internal control is increasingly being fashioned as an internal gatekeeper which serves gatekeeping purposes for the regulator"[60].

Likewise, the design of living will regulation appears to be construed on a calibrated interplay between regulators-supervisors and regulated-supervised entities. External regulation (hard law) is

[56] Robert Baldwin and Martin Cave, Understanding Regulation: Theory, Strategy and Practice (Oxford University Press, Oxford, 1999) at 126; Paul Mahoney, "The Exchange as Regulator" (1997), 83 Va. L. Rev. 1543, and Dan Awrey, "The Dynamics of OTC Derivatives Regulation: Bridging the Public-Private Divide" (2010), 11:2 European Bus. Org. L. Rev. 155.)

[57] J Black, Rules and Regulators, 1997, 37.

[58] D Awrey, Regulating Financial Innovation: A More Principles-Based Alternative? (November 3, 2010). (2011) 5:2 Brooklyn Journal of Corporate, Financial and Commercial Law 273; Oxford Legal Studies Research Paper No. 79/2010. Available at SSRN: https://ssrn.com/abstract=1702457) p. 18.

[59] R. Weber, New governance, financial regulation and challenges to legitimacy: the example of the internal models approach to capital adequacy regulation, Administrative Law Review, 2010, 62, 784-840.

[60] Iris H-Y Chiu, *Regulating (From) the Inside. The Legal Framework for Internal Control in Banks and Financial Institutions*, Hart Publishing, 2015, 3-34

used to induce private actors to contribute (self-regulation) in achieving outcomes that would not have been obtained if it had been solely based on a top-down, command and control, approach.

2. Self-regulation in the US

An understanding of private ordering begins with Michael Jensen and William Meckling's famous description of an organization as a "legal fiction" that serves "as a nexus for a set of contracting relationships among individuals"[61].
In recent years, the rules and practices of private groups in the USA have attracted attention within the field of law and economics. In particular, the sharing of regulatory authority with private actors (*i.e.* private ordering) has occurred in many ways[62] in the business, commercial and financial sectors. In the 2000s, for example, the United States government entrusted the internet domain system and assigned Internet protocol numbers with the Internet Corporation for Assigned Names and Numbers (ICANN), a private no profit corporation. Other examples include the delegation by the Securities and Exchange Commission (SEC) of the power to promulgate public accounting standards to the privately organized Financial Accounting Standards Board (FASB).
Sometimes private actors adopt system of rules by opting out of government regulation or by adopting rules in areas where government has not regulated itself: generally, the actors in this type of private ordering have credibility "because of their perceived expertise"[63]. Whilst traditional private ordering is motivated by the desire to reduce costs and delegate policymaking responsibilities to private interests, the main motivation for commercial private ordering is to reduce the cost of regulation (economic efficiency).
The professional self-regulation, standard setting, and similar decisions involved (implicitly) questions of exemption from antitrust law based on regulatory authority and practice.
American antitrust law rests on a fundamental distinction between restraints that are ancillary to legitimate productive business ventures or transactions, and those that are the result of a naked, cartelistic restraint on competition that creates, allocates, and/or exploits market power; some cartels including the NCAA, standard setting organizations, and some professional self-regulatory organizations are not subject to such supervision (See O'Bannon v. NCAA, 802 F.3d 1049, 1071 (9th Cir. 2015), describing how an agreement restricting compensation of college players is not subject to any oversight by a public). Professional self-regulation preceded the emergence of formal state regulation: the Supreme Court pointed to this history as providing a basis to claim a regulatory authority for such entities that is separate and distinct from any regulation that the states provide (See N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 512, 2015). This serves to highlight the importance of establishing some cognizable delegation of regulatory authority to the private group based on history or some other generally accepted public policy. Standard setting organizations can be essential to guiding public and private determinations of safety or interoperability[64].

The International Swaps and Derivatives Association (ISDA)'s role as a transnational private regulator resulted in the standardization of contracts for OTC derivatives transactions, which has been considered as "a leading example of…efficiency-enhancing private industry self-regulation in today's financial markets"[65]. ISDA's role can be seen in its inputs (market constituents forming

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[61] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Manage- rial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976).
[62] See Richard A. Posner, *Economic Analysis of Law*, 13.1, p. 367 (4th ed. 1992); Gillian K. Hadfield, *Privatizing Commercial Law,* Regulation, 2001, p. 40, observing that "from the Middle Ages to the infant digital age, there are examples of law developed and administered by private entities with varying degrees of state involvement".
[63] A. Claire Cutler et al, *Private Authority and International Affairs*, in Private Authority and International Affairs, 1999.
[64] See Peter C. Carstensen, *The Incoherent Justification for Naked Restraints of Competition: What the Dental Self-Regulation Cases Tell Us About the Cavities in Antitrust Law*, in *Loyola University Chicago Law Journal*, vol. 51, issue 3, 2020.
[65] See, e.g., Nathaniel G. Dutt, Current United States Credit Default Swap Regulatory Initiatives: A New World Standard or Just a Ploy?, 16 ILSA J. INT'L & COMP. L. 169, 188–89 (2009) ("[T]here is no international regulatory agency that directly monitors or regulates the CDS market . . . . [T]he true regulators of the CDS market are the participants themselves."); id. at 192 (discussing "ISDA's self- regulatory system"); see also Paul Lejot, Cover Up! Hong Kong's Regulation of Exchange-

bureaucracies to design governing rules, mirroring and working alongside state regulation), outputs (regulatory directives and standardized documentation), results (a harmonized and partially regulated market), and the way in which state actors have deferred to it. In particular, ISDA has successfully imposed upon the market a remarkable degree of regulation and harmonization of practices. From the beginning, it has worked with the G30 to draw up detailed best practices guidelines for the swap business and has helped to constrain insider trading in the derivatives space[66].
However, ISDA's most important contribution has been the creation of its standard form documents. These standard documents have been called a "modern international law merchant"; without these standard documents, "parties would be plagued by arduous negotiation"[67].
Through the use of protocols, ISDA is able to update contracts on an ongoing basis. Protocols are multilateral contractual amendments, drafted by ISDA, which then solicits letters of adherence from swap participants. When all parties to a swap accept the protocol, the protocol becomes binding on the parties, allowing them to assent contingently to multiple contract amendments at once. In addition to playing legislative and judicial roles, ISDA materials are frequently incorporated in state law and regulation. Sometimes, legislative materials refer to ISDA and its documentation by name, such as when the New York Insurance Law specifically mentions ISDA documentation in the definition of a credit default swap[68].
In order to resolve the problems associated with physical and cash settlement, ISDA developed a number of *ad hoc* auction settlement protocols to deal with specific credit events. Specifically, the first such protocol for single-name CDS contracts was employed in connection with the 2006 bankruptcy of Dura Operating Corp. The auctions held pursuant to these protocols established a single market price for the relevant reference obligations, thereby facilitating the smooth operation of the cash settlement mechanism, reducing the need for physical settlement, and eliminating recovery basis risk. Theoretically, auctions can also help tether the market price of the underlying debt to its recovery value[69].
On April 8, 2009, ISDA announced the implementation of the 2009 Credit Derivatives Determinations Committees and Auction Settlement CDS (or "Big Bang") Protocol. The implementation of the Big Bang Protocol was significant in two respects. First, it hardwired the auction settlement mechanism, incorporating it into standard CDS documentation across all reference entities and obligations. Second, it established a new mechanism designed to facilitate the adjudication of certain technical issues arising in connection with ISDA's credit derivatives documentation. This mechanism enables counterparties to CDS contracts and other eligible transactions to request that a determinations committee ("DC") be constituted for the purpose of adjudicating a range of potential issues. These issues include, among other things, whether a credit event has occurred, whether to hold an auction to determine a settlement price following the occurrence of a credit event, and the identity of the reference obligations to be valued in connection with any such auction. Importantly, a DC's determinations are binding in respect to all transactions of the relevant type that incorporate the Big Bang Protocol.
Partnoy similarly analyzes the OTC space: "[O]ne might argue that Congress implemented a *de facto* strong standards regime, relying on ISDA, based on ISDA's dominance at the time". Partnoy surveys evidence of the strength of ISDA's standards and their direct incorporation into law, as well as the law's sometimes-silent reliance on those standards[70]. As an example of the former, there are many legal decisions relying on ISDA; as an example of the latter, globally there are a vast number of

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Traded Warrants , 36 H.K. L.J. 277, 279 (2006) (discussing ISDA as the OTC derivatives market's self-regulatory organization and its documentation-creating role).
[66] See, e.g., Serena Ng, Trading Groups Are Agitating over Apparent Leaks on Street, WALL ST. J., Dec. 14, 2006, at C3.
[67] THOMAS J. MOLONEY ET AL., BUSINESS & COMMERCIAL LITIGATION IN FEDERAL COURTS § 70:17 (Robert L. Haig ed., 3d ed. 2012); see also Sean M. Flanagan, The Rise of a Trade Association: Group Interactions Within the International Swaps and Derivatives Association, 6 HARV. NEGOT. L. REV. 211 (2001).

[68] See, e.g., F. Partnoy, Second-Order Benefits from Standards, 48 B.C. L. REV. 169, 186 (2007).
[69] Jean Helwege *et al*., Fed. Reserve Bank of N.Y., Staff Report No. 372, Credit Default Swap Auctions 2 (2009).
[70] *Ibidem*.

statutes and regulations that reflect provisions of ISDA form contracts, but do not mention ISDA by name.
In conclusion, ISDA's skill in promoting standardization in swap market practice, documentation, and settlement ended pressure for direct regulation of OTC derivative products, in the United States but also elsewhere.
Private market structures also play a number of particularly important roles within modern financial markets. Not only standardized contracts for loans, repurchase agreements, and derivatives reduce legal uncertainty, lower negotiation and drafting costs, facilitate the aggregation and dissemination of new learning about best market practices, and promote greater market liquidity. Stock, commodity, and derivatives exchanges match buyers and sellers and ensure the dissemination of valuable price and trading information, thereby lowering information and search costs, enhancing the process of price discovery, and-once again-promoting greater market liquidity. Benchmark interest rates, foreign exchange rates, and commodity prices lower information, negotiation, and coordination costs within the decentralized, opaque, and relatively less liquid markets for loans, over-the-counter derivatives, and other sophisticated financial instruments. In each case, market participants developed these market structures, at least in part, with a view to capturing the gains from trade stemming from the cheaper, deeper, and more liquid markets which these structures helped to make possible.
eBay's "Top Rated Seller" certification, for example, provides prospective buyers with useful information about the historical trading behavior of otherwise anonymous counterparties. Expedia and other price comparison websites, meanwhile, aggregate information from different suppliers, thereby enabling consumers to compare different products and thus be more confident that they are getting a good deal[71].
The strengths of these market structures as a form of economic organization reflect the strengths of private ordering more generally and, ultimately, of free markets themselves. These strengths flow from the incentives of economic actors to invest in the acquisition of information and expertise, reduce transaction costs, and make credible commitments with the objective of capturing the resulting gains from trade.
The doctrine underlines that private ordering – including a battery of contractual devices and transaction structures – also has a significant role in the creation of debt contracts, in their collective treatment in financial markets as low-risk investments and in the making of deep and liquid markets in them[72].
Market participants can use contracts and transaction structures to make certain debt contracts retain their value and liquidity under different circumstances even in the face of economic shocks. This private ordering works on three different levels. First, contracts and transaction structures regulate the inputs in securitization vehicles. Second, contracts and structures regulate the outputs (asset-backed securities) to give those securities higher priority claims on the issuer's cash flows than the issuer's other debts. Third, market participants can create institutions (including trading and clearing companies) and impose trading rules to create deeper and more liquid secondary markets in asset-backed securities.
Securitization sponsors also use private ordering to create a secondary trading market for senior asset-backed securities. Techniques include having the securities trade in book entry form, making clearing and settlement services available for trades, and even listing the securities on specialized exchanges. Clearing companies, in turn, impose various rules, such as margin requirements and position limits, to mitigate their counterparty exposure to traders[73].

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[71] R.H. Coase, *The Nature of the Firm,* 4 ECONOMICA 386, 392 (1937); Daniel W. Elfenbein et al., *Market Structure,Reputation,and the Value of Quality Certification* 11 (Nat'l Bureau of Econ. Research, Working Paper No. 20074, 2014).
[72] See A. Gelpern and E. F. Gerdin, *Private And Public Ordering In Safe Assets Markets* 10 BROOK. J. CORP. FIN. & COM. L. 97 (2015).
[73] See J. Gregory, *Central Counterparties: Mandatory Central Clearing and Initial Margin Requirements for OTC Derivatives* 22 (2014).

Another reason why private ordering is considered efficient and desirable is its capability to allow for the implementation of market-driven corporate governance arrangements[74]. That is, it "allows the internal affairs of each corporation to be tailored to its own attributes and qualities, including its personnel, culture, maturity as a business, and governance practices"[75].
It is important to note that public companies overwhelmingly take the corporate form so they can take advantage of the private ordering that corporate law allows, enabling private ordering by providing default rules: for instance, Delaware General Corporation Law (DGCL) section 212(a) provides for a default rule of one share, one vote; however, DGCL section 151(a) allows for the use of dual class share structures if provided for in the company's certificate of incorporation[76]. Moreover, state corporate law and its provision for private ordering are not expected to be interfered with by federal law. As the Supreme Court has said, "[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation".
Lastly, investment banks might also conduct market making and market stabilization activities for the asset-backed securities issuances they underwrite. These activities provide additional market liquidity, which can be a critical attribute for safe assets. Some investment banks may take the extra step of buying asset-backed securities for use as collateral in resecuritizations, such as collateralized debt obligations (CDOs) and re- resecuritizations (CDO Squareds). Investors in securitization often require third-party credit enhancement, such as bond insurance or credit derivatives. Guarantees of senior asset-backed securities may take the form of bond insurance policies, often packaged together with the securities upon their issuance, or credit derivatives contracts, which might be purchased in connection with secondary market transactions. In other safe asset markets, credit enhancement takes the form of guarantees from affiliates of the issuer[77].
Summarizing, securitization serves as a model for understanding how making, labeling, and guarantees operate in the private ordering of safe asset markets. As with securitization vehicles, other safe asset issuers function as intermediaries that convert riskier, less liquid assets into low-risk, liquid securities.

3. Self-regulation in Singapore

One of the world's smallest island-states, with a population of under 4 million people living in some 600 sq. km., Singapore can be considered among the leading "ict-rich" countries, not only in Asia but also in the world. It has been at the forefront of Internet-related developments that have given the country the highest Internet penetration among Asian countries. In 1999, Singapore set up the Infocomm Development Authority of Singapore (IDA), with the mandate to help realize Singapore's vision to be a global info-communications hub and digital city. In 2000, the government launched two parallel initiatives, *i.e.* Infocomm 21 and e-Government 2000 to further infuse ict in Singapore. Therefore, internet self-regulation has been supported by the Ministry of Information, Communication and The Arts (MICA), principally through the Media Development Authority (MDA) and the Infocomm Development Authority of Singapore.

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[74] See Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1140–41 (1997). According to Macey "informal norms generate outcomes that are generally welfare-enhancing, while law *at best* generates outcomes that are mixed (and tend strongly towards the welfare-reducing), informal norms should come with a strong presumption of legitimacy. Formal legal rules are likely to be inefficient at best and amorally redistributive at worst. Thus, under a wide range of circumstances, such as when society is interested in maximizing utilitarian considerations, and when society is interested in resolv- ing standard legal disputes within groups, lawmakers are unlikely to improve upon the customary rules the group develops through voluntary, private interaction".
[75] See Troy A. Paredes, Statement at Open Meeting to Propose Amendments Regarding Facilitating Shareholder Director Nominations, U.S. SEC. & EXCH. COMM'N (2009).
[76] *See* Del. Code Ann. Tit. 8 (2017).
[77] See René M. Schultz, Credit Default Swaps and the Credit Crisis (Nat'l Bureau of Econ. Research, Working Paper No. 15384, 2009). See also Adam J. Levitin, The Tenuous Case for Derivatives Clearing houses, 101 GEO. L. J. 445 (2013).

Moreover, the Singapore Code of Advertising Practice (SCAP) is the guiding principle of ASAS and seeks to promote a high standard of ethics in advertising through industry self-regulation. The SCAP was started by the Consumers Association of Singapore and was formulated against the background of national law, international law and practice, including the Advertising & Marketing Communications Code published by the International Chamber of Commerce.

Self-regulation benefits the state due to lower expenses, in economic and political terms, for making regulations, leaving the state to focus on more essential matters[78].

The growth of the digital market has challenged competition policy in terms of how innovation should be considered. Innovation in the digital market brings two new challenges to competition policy: first, how to fit innovation into the policy, and second, how to define suitable approaches to deal with changes driven by innovation in the market. While policy makers and regulators attempt to find the right tune to respond to innovation in the form of the most workable policy and regulation, markets take initiatives to regulate themselves to protect the interests of the contracting parties.

The decentralization of regulation in online world is practically helpful, especially with the development of the digital market, where innovation takes place in fields or sectors where state regulation is lacking.

Terms and conditions represent how the decentralization of regulation is done by private actors (*i.e.* business players), which have become the backbone of online transactions nowadays. They are basically a contract that establishes the foundation on which the relations between parties on the platform are built and governed. As a contract, their existence is based on the agreement between parties on the provisions stipulated in the terms and conditions. Go-Jek's (2018) Terms and Conditions or Terms of Use (both terms are used interchangeably) state: "by downloading, installing, and/or using the Go-Jek application, you agree that you have read, understood and accepted and agreed to these Terms of Use".

Go-Jek is a technology company that focuses on the development and use of a mobile platform and an application that offers a wide range of services, including transportation, logistics, delivery, and mobile payment. The services are provided by bringing together consumers and service providers, which means that Go-Jek plays a role as an intermediary of services. Go-Jek and its competitors, Uber and Grab, have entered the Singaporean market in the last few years, offering online platforms to meet supply and demand for transportation services. Essentially, Go-Jek connects demands and supplies on a mobile platform, where consumers can search for services they need, and service providers can offer their services.

The role of online platforms in the digital market is increasingly important, not only as an intermediary that connect business players and consumers or between business players, but also as an infomediary that collects information from users and shares it with users. Go-Jek exemplifies how online platforms play such roles. Although Go-Jek operates as an online mobility platform, the underlying business concept is like those of Web-based online platforms in general.

As an intermediary, both Go-Jek and online platforms in general play distinctive roles, not only in connecting users (such as business players and consumers), but also because the two types of users cannot engage with each other without the platform. Thus, to allow the transaction between a seller and buyer to take place, both must first engage with the platform. Here, the platform becomes a marketplace and, at the same time, a matchmaker. In the case of Go-Jek, the matchmaking is done through several parameters, including geolocation, types of services, and prices. The para- meters could vary for every platform. For this to happen, the platform sets out rules that both parties must follow.

Go-Jek, like online platforms in general, also acts as information hubs for their users as infomediaries. Although the legality of information as a commodity is highly debatable, the importance of information is undeniable. It helps to define the best suitable services that users might

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[78] Roßnagel, A., & Hornung, G. Self-regulation of Internet privacy in Germany and the European Union. Sungkyunkwan Journal of Science and Technology Law, 55, 55–70 (2007).

get from using the platform. Hence, the collection and use of information also becomes part of the rules set out by the platforms.
On self-regulation and innovation, Brousseau (2002) argued that the absence of state control in self-regulation contributes to the innovative way in which the Internet could be regulated despite not being a perfect model[79]. He further explained that the work of the Internet is governed by technical logic that allows access control and a mechanism to banish infringers from the platform. As an example, Article 10 of Go-Jek's Terms and Conditions reads: "you will treat the Service Providers with respect and will not engage in any unlawful, threatening or harassing behavior or activities whilst using their services". While the provision itself is useful and necessary, the Terms and Conditions do not provide the same provision to protect consumers from "any unlawful, threatening or harassing behavior or activities".
Tang, Hu, and Smith (2008) pointed out an interesting consideration that self-regulation could work based on user trust. Therefore, the online feedback mechanisms are increasingly used for businesses to build reputation. Users, or consumers, rely more on reputation as part of dispute prevention mechanisms than procedural laws or alternative dispute resolution mechanisms when making split-second decisions about whether they will buy the product.

4. Self-regulation in Canada

Canada's capital markets seem to be the subject of continuous scrutiny and proposed reform. This reflects the dynamic nature of our capital markets which demands a regulatory approach that is both responsive and adaptive. Broadened mandates for regulators, recognition of the need for inter-jurisdictional collaboration and cooperation and burden reduction initiatives are all illustrative of this trend.
For nearly 20 years, securities trading activities have been regulated by two industry-led self-regulatory organizations (SROs). These are the Investment Industry Regulatory Organization of Canada (IIROC), which oversees all investment dealers and trading activity on debt and equity markets in Canada, and the Mutual Fund Dealers Association of Canada (the MFDA), which is responsible for oversight of mutual fund dealers in Canada (except in Québec). Both IIROC and the MFDA are recognized as SROs and are overseen by the Canadian Securities Association (CSA) under applicable securities regulation. IIROC and its predecessor, the Investment Dealers Association of Canada, have been regulating investment dealers as a recognized SRO since 1995, although the IDA's origins and operations date back much earlier to 1916.
On June 25, 2020, the CSA released a "CSA Consultation Paper" reviewing the current regulatory framework for the IIROC and the MFDA.
The CSA noted that stakeholders highlighted the following key benefits of the current SRO framework, which has been in place now for over two decades:
- SROs are national in scope, which is advantageous in Canada where securities regulation is managed at the provincial and territorial levels;
- the specialized industry expertise of the SROs has allowed for sensible and responsive rule making, delivering appropriate oversight of the industry as it evolves;
- each of IIROC and MFDA is "fit-for-purpose" for certain financial products or investment activities, which may result in better regulatory oversight and rulemaking and allows for the maintenance of two SRO protection funds.
The MFDA's report on self-regulation in the securities industry (the MFDA Report), released in February 2020, proposes the creation of a new, purpose-built SRO responsible for the prudential regulation of registrable activity in the securities industry. Citing a lack of coordination among the various regulatory and governmental authorities, the MFDA Report submits that creating a "blank page" SRO is the most effective way of demonstrating to statutory regulators and the investing public that meaningful improvements are intended and are being achieved.

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[79] Brousseau, É. Internet regulation: Does self-regulation require an institutional framework? In: DRUID Summer Conference on ''Industrial Dynamics of the New and Old Economy – Who is Embracing Whom? (2002).

In order to restore public confidence in SROs, the MFDA proposes an enhanced governance structure that would include a board of directors consisting of public directors, industry directors and representatives of the CSA, a cooling-off period for public and independent directors coming from the industry, and greater participation by CSA members in the governance of the new SRO. The MFDA's proposed new SRO would have a mandate including registration, business conduct standards, prudential matters, policy and rule development, and enforcement. Notably, this mandate would include oversight over all firms required under securities law to register in order to trade or advise in respect of securities. For the first time, portfolio managers (advisers), exempt market dealers and scholarship plan dealers would be required to be members of the new SRO, along with investment dealers and mutual fund dealers.
Similarly, IIROC's report on improving the self-regulation framework (the IIROC Report), released in June 2020, suggests that rather than creating a new rulebook from scratch, it would be beneficial to both industry participants and the investing public to permit dual-platform dealers and representatives the flexibility to consolidate all of their regulatory oversight under one set of rules. This would have the practical effect of creating a "one-stop shop" investing experience, which would enable retail investors to access a full shelf of products at one point of service, without having to open multiple accounts or sign contracts with multiple entities.

Self-regulation in the context of the Canadian debates also refers to the delegation of power to the professions to regulate themselves: in Canada, professions are regulated at the provincial level, and each of Canada's ten provinces regulates professions slightly differently. Self-regulation has meant that the educational, admission, practice, and ethical standards of each profession are largely determined and administered by its own regulatory body. Over the last 50 years there has been considerable debate amongst Anglo-American policymakers and academics alike about whether professional self-regulation is truly in the public interest[80].
Regulation itself may require interprofessional collaboration to be effective, such as in a healthcare system in which team-based care is expanding whether or not it is encouraged by regulators. These considerations underlie the concept of "collaborative self-regulation" as a new regulatory paradigm for Canada.
In Ontario, the Health System Improvement Act (2007) amended the Health Professions Code to make all colleges responsible for promoting and enhancing relations with other colleges and for promoting interprofessional care[81]. In 2009, the Regulated Health Professions Statute Law Amendment Act made colleges responsible for collaborative development of standards on the performance of shared competencies and for incorporating interprofessional care into their quality assu rance programmes[82]. The changes made – adding collaboration to the objects of all regulatory colleges – reinforce a central feature of Ontario's system: each self-regulator is part of a system of regulation expected to achieve system outcomes ("top down" approach).
the Regulated Health Professions Network Act (2012) allows the province's twenty-two health profession regulators to collaborate for two objectives: to support interprofessional collaborative practice and to improve the regulation of health professions more generally. The RHPNA has three main aspects. First, it endorses collaboration already underway in the sharing of information, best practices, regulatory tools, knowledge and specialized skill and in areas such as training and interfacing on policy issues with government and the healthcare system; second, it provides for collaboration in specific areas of regulatory activity where collaboration was blocked or hindered by legislation. For example, for patient complaints about interprofessional care, the Act allows collaborative investigation to be substituted for the distinct investigation each regulatory body would be required to conduct under its own legislation. The RHPNA also authorizes binding

[80] Bainbridge, L., Nasmith, L., Orchard, C., & Wood, V. Competencies for interprofessional collaboration. Journal of Physical Therapy Education, 24, 6–11 (2010).
[81] Besançon, L., René, J., Rockey, P., & van Zanten, M. Regulation of health professions: Disparate worldwide approaches are a challenge to harmonization. World Medical Journal, 58, 128–136 (2012).
[82] Baker, L., Egan-Lee, E, Martimianakis, M., & Reeves, S. Relationships of power: Implications for interprofessional education. Journal of Interprofessional Care, 25, 98–104 (2011).

interprofessional agreements determining how overlapping scopes of practice are to be interpreted or modified in relation to each other to enable interprofessional care. Third, it makes the informal network of regulators that developed and proposed the Act into a statutory body called the Regulated Health Professions Network comprising all of Nova Scotia's 22 self-regulating health professions.

The "umbrella" model of health professions legislation permits system-wide changes to be efficiently made through amendment of a single statute[83]. As a comprehensive legislative framework built around the controlled acts model of licensing, it may both encourage professions to work together and remove or avoid some of the barriers to doing so that can be created when a legislative framework is constructed incrementally, especially when individual statutes apply traditional licensing to self-regulation. Moreover, there is also the important symbolic aspect of umbrella legislation: it communicates to each regulated profession and to the public that each profession is part of a greater regulatory whole. Moreover, the expertise required for effective regulation is more readily – or at least more cost-effectively – to be found within each profession[84]. Regulation conducted from within professions can have greater legitimacy and thus influence among members of the profession than external regulation would. Furthermore, self-regulation in healthcare reflects a social determination that professions can be trusted to self-regulate in the public interest because their members are trusted to self-regulate in the interests of their patients[85].

Moreover, as outlined by the Supreme Court of Canada in Law Society of British Columbia ("LSBC") v. Trinity Western University, 2018, "*the legal profession in British Columbia, as in other Canadian jurisdictions, has been granted the privilege of self-regulation. In exchange, the profession must exercise this privilege in the public interest*". The statutory object of the LSBC is, broadly, to uphold and protect the public interest in the administration of justice. That object is set out in s. 3 of the *Legal Profession Act,* which reads as follows: "it is the object and duty of the society to uphold and protect the public interest in the administration of justice by *(a)* preserving and protecting the rights and freedoms of all persons, (b) ensuring the independence, integrity, honour and competence of lawyers, (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission, (d) regulating the practice of law, and (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practice law in British Columbia in fulfilling their duties in the practice of law.

While the provisions of s. 3 set out means by which this overarching objective is to be achieved, those means are framed expansively and include "*regulating the practice of law*" and "*preserving and protecting the rights and freedoms of all persons*". Section 3 of the LPA, read as a whole, manifests the legislature's intention to "*leave the governance of the legal profession to lawyers*".

The Supreme Court of Canada considered the self-regulation of the legal profession in *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360. There, Wagner J. repeatedly noted the deference owed to law societies' interpretation of "*public interest*": that they have "*broad discretion to regulate the legal profession on the basis of a number of policy considerations related to the public interest*" (para. 22); that they must be afforded "*considerable latitude in making rules based on [their] interpretation of the 'public interest' in the context of [their] enabling statute*" (para. 24); and that they have "*particular expertise when it comes to deciding on the policies and procedures that govern the practice of their professions*" (para. 25). In in *Law Society of British Columbia ("LSBC") v. Trinity Western University*, the Supreme Court observes that where legislatures delegate regulation of the legal profession to a law society,

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[83] Lahey, W. Interprofessionalism and collaborative self-regulation in the health professions: Two variations on an emerging Canadian theme. In S. Short & F. McDonald (Eds.), Health workforce governance: Improved access, good regulatory practice, safer patients (pp. 113– 142). (2012). Farnham, UK: Ashgate Publishing Limited; Nelson, S., Turnball, J., Caulfield, T., Hudon, G., Kendel, D., Mowat, D., Sketris, I. Optimizing scopes of practice: new models of care for a new health care system. Ottawa, ON: Canadian Academy of Health Sciences. (2014). Retrieved from http://www.cahs-acss.ca/reports/; Regan, S., Orchard, C., Khalili, H., Brunton, L., & Leslie, K. Legislating interprofessional collaboration: A policy analysis of health professions regulatory legislation in Ontario, Canada. Journal of Interprofessional Care, 29, 359–364. (2015).

[84] Conference Board of Canada. Achieving public protection through collaborative self-regulation: Reflections for a new paradigm (2007). Ottawa, ON: CBC. Retrieved from http://www.conferenceboard.ca.

[85] Henaghan, M. Health professionals and trust: The cure for health-care law and policy. New York, NY: Routledge. (2011).

the law society's interpretation of the public interest is owed deference. This deference properly reflects legislative intent, acknowledges the law society's institutional expertise, follows from the breadth of the "public interest", and promotes the independence of the bar[86].

5. Self-regulation in the UK

Typically, self-regulation is first worked out within the professional community in a soft form, later becoming more formal, negotiated with wider stakeholders and promoted in the public sphere as the nascent profession seeks to extend its influence. The self-regulatory regime aims to provide benefits both to practitioners and to their clients or employers beyond those available through the laws of contract and employment. In this context, self-regulation can be defined as action by the profession itself to put in place, operate and gain acceptance for standards and processes that are designed to ensure the quality of practice. The extent to which practitioners are obliged to come under the umbrella of this kind of self-regulation depends on the scope for making a living outside of it, which in turn will relate to a variety of factors stemming from the market, sociopolitical and legislative environments in which they work.
Professional self-regulation has been described as part of an arrangement in which "societies grant professional communities 'freedom from external regulation in return for their commitment to regulate their members' conduct"[87]. In turn, this can be seen as part of the broader social contract that allows professions a degree of monopoly over their employment or services markets in return for conducting themselves in the public interest[88]. In this conception, self-regulation is regarded as involving the delegation of public powers to professional communities via a formal authority that is generally conferred by statute.
Self-regulation is used to mean variously soft law, collective arrangements that may be non-legal, and/or entail no government involvement, bilateral arrangements between firms and the government, unilateral adoption of standards, the involvement of industry in rule-formation, neo-corporatist arrangements in which the collective shares in the state's authority to make decisions about standards of conduct, monitoring, and enforcement, but in which the relationship with government may vary, and/or in which those other than the persons being regulated may play a role (auditors, stakeholders). Self-regulation can additionally mean intra-firm regulation and private contracting.
On 24th November 2015, for example, the UK Supreme Court published "*The Bar Association for Commerce, Finance and Industry's Denning Lecture*" concerning the "*Cyberspace and the Law*", in which there is evidence of the reluctance by national and international authorities to accept that some elements of the Internet do not require external regulation. In particular, it states that "*[the Internet] transcended territorial boundaries and was therefore beyond the control of national governments*" and "*it was regarded as presenting an opportunity for a new kind of freedom of speech, regulated, if at all, by the self-government of the online community*"[89].
In the same direction, on 12th November 2019, the Justice of the UK Supreme Court published a document regarding "*Algorithms, Artificial Intelligence and the Law*", which underlines that "*smart contracts are devised to allow self-regulation by algorithms, to reduce the costs of contracting and of policing the agreement. Distributed ledger technology, such as blockchain, can create secure property and contractual*

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[86] Therefore, in promoting the public interest in the administration of justice and, relatedly, public confidence in the legal profession, the LSBC was entitled to consider an admissions policy that imposes inequitable and harmful barriers to entry. Approving or facilitating inequitable barriers to the profession could undermine public confidence in the LSBC's ability to self-regulate in the public interest. See *https://decisions.scc-csc.ca/scc-csc/scc-csc/en/17140/1/document.do.*

[87] Gorman, E. Professional self-regulation in North America: the cases of law and accounting. Sociology Compass, 8(5), 491-508. (2014).

[88] Marquand, D. Professionalism and politics: towards a new mentality? In J. Broadbent, M. Dietrich, & J. Roberts (Eds.), The end of the professions: the restructuring of professional work (pp. 139-146). London: Routledge. (1997).

[89] See *https://www.supremecourt.uk/docs/speech-151124a.pdf*. See also *Trinity Western University v. Law Society of Upper Canada*, 2018. See also Canada (Attorney General) v. Federation of Law Societies of Canada, that recognizes self-regulation as a means by which legislatures have chosen in this country to protect the independence of the bar: para. 1, available at *https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/14639/index.do?q=%22self-regulation%22.*

rights with much reduced transaction costs and reduced need for reliance on state enforcement. Fintech is being devised to allow machines to assess credit risks and insurance risks at a fraction of the cost of performing such exercises by human agents. In this way, access to credit and to insurance can be greatly expanded, with all that implies for enhancing human capacities to take action to create prosperity and protect against risk".
The issue of self-regulation concerns both individual and collective levels. In this context, "*law will have to have some part to play in supporting achieving it, perhaps through some form of public regulation*".
Some definitions of "self-regulation", such as that of the UK National Consumers Council (NCC) – adopted by the UK Better Regulation Unit) – are even more narrow: the basis for designating a regulatory system as "self-regulatory" is that industry has had an input into the formation of the rules, even if it has not had the final say on their content. This is the basis of the National Consumer Council's classification of eight forms of self-regulation: unilateral codes of conduct, customer charters, sectoral codes (agreed between members of an industry), negotiated codes (negotiated with consumers, government), trade association codes approved by the OFT, recognized codes (codes which have some form of statutory foundation or recognition), official codes and guidance promulgated by government or a regulatory agency often elaborating on statutory requirements, and 'legal codes', those sanctioned by legislation and which may have some legal status. The NCC, therefore, includes large tracts of delegated legislation as "self-regulation" on the basis that practitioners have been consulted in its formation. Moreover, the UK Better Regulation Taskforce also emphasizes collectivity and mutual agreement, as does the Australian Better Regulation Guide (*Alternatives to State Regulation, A Guide to Regulation).*
Although courts do not in general have public law supervisory jurisdiction over the decisions of private organisations, courts have context-dependent jurisdiction to review 'private abuse of power' on public law grounds such as unreasonableness, bias, and procedural unfairness[90].
With regard to the London Stock Exchange's self-regulation of AIM (Alternative Investment Market), no English court has ruled definitively on whether AIM decisions are judicially reviewable, although courts have considered the issue without directly deciding on the matter[91]. Second, there are wide reaching implications for the role of private ordering in broader UK financial markets if elements of AIM regulation are public in nature and therefore amenable to judicial review. Unlike the Takeover Panel in R. v Panel on Takeovers and Mergers Ex p. Datafin Plc (Datafin) which did not have contractual relations with the financial market participants it regulated, self-regulation on AIM and in other contemporary financial markets is predominantly effectuated via contracts. An English court finding that AIM decisions of a sufficiently public nature are subject to judicial review would effectively limit the Exchange's freedom of contract – reducing the Exchange's ability to confine dispute resolution to its own adjudicating bodies – and could create a wider ripple of instability in public UK financial markets as other trading venues and financial institutions face similar uncertainty in their contractual arrangements and permitted discretion. Regulation on AIM illustrates the broader point that the certainty of public law obligations can materially enhance or undermine private ordering. Obviously, greater doctrinal clarity on publicness increases the certainty of private parties' contractual arrangements, while uncertain public law boundaries undermine effective private ordering in financial regulation and other contexts where the nature of self-regulatory powers arguably has a public character.

6. Self-regulation in Brazil

Advertising is not only a booming industry, but also one that requires some form of regulation: regulating advertising to keep it truthful, not misleading, and socially responsible among other

[90] Timothy Endicott, Administrative Law (UK 2018), 4th ed.
[91] See discussion in Section III on R. (on the application of ZAI Corporate Finance Ltd) v AIM Disciplinary Com- mittee of the London Stock Exchange plc [2017] EWHC 778 (Admin) and R. (ZAI Corporate Finance Ltd) v AIM Disciplinary Committee of the London Stock Exchange plc [2017] EWCA Civ 1294; [2017] Bus. L.R. 2139.

standards is a complex task[92]; this can be achieved developing standards, making them widely known and accepted, advising advertisers, monitoring compliance, handling complaints, and penalizing noncompliance: many experts, scholars, and organizations are pushing advertising self-regulation as the preferential way to enable these processes. In relation to this context, Brazil has one of the most comprehensive and functioning advertising self-regulation systems in the world[93].

Both the Brazilian government and the courts have recognized that "although self-regulation does not replace government and legislative regulation, it may be considered an ethical parameter which must be observed [and a useful tool]". Specifically, in 1980 a non-governmental organization was founded, called Conselho de Autor- regulamentacao Publicità (CONAR), or the "Brazilian Advertising Self-Regulating Council".

Brazil's system of self-regulation is enumerated in the Code that is enforced by CONAR, and "ethical behavior standards set forth [therein] shall be observed by all professionals involved in advertising activities, including advertisers, advertising agencies, media, broadcasters, journalists and other communication professionals who participate in the advertising process".

Brazil's concept of advertising self-regulation is based on four goals: 1) establishment of ethical rules for the advertising industry, 2) establishment of a system of dispute resolution procedures, 3) anticipation of controversies, and 4) assurance of prompt and effective solutions for the disputes.

Therefore, the advertising industry functions in accordance with rules and guidelines that members of the business community effectuate, as opposed to a pure form of regulation, which would prescribe that advertising behavior is mandated by government rules. The most obvious advantage of self-regulation is that it is faster and cheaper since the review of complaints is in the hands of a non-governmental entity thus reducing the burden on the legal system. Furthermore, while the government lacks the ability to advise advertisers about grey areas in the law before they advertise, self-regulation entities can. This promotes efficiency by warning advertising companies in advance so they may avoid regulatory missteps.

Industry knows better what the problems of that industry are and what their proper solutions should be. Self-regulation, as a compliment to statutory regulation, has the ability to reach places the law cannot by "going beyond the minimum prescribed by law". Additionally, "Self-regulation generates greater moral adhesion than the law because codes and guidelines are voluntarily developed". For example, if one's peers are relying on him to do something, he will feel more obligated and compelled to do it than he would be for some ambiguous entity. When comparing self-regulation of advertising to other industries, advertising has an advantage because the industry's medium is so visible to the public (*i.e.* print and broadcast media) thus making the standards more observable.

In January 2009, the International Chamber of Commerce (ICC) held a roundtable to discuss the future of self-regulation in the advertising industry, where Brazil served as a model when panelists showcased the strengths of Brazil's advertising self-regulation system and its resistance to a struggling economy.

The self-regulation system that has developed in the country has proven to be highly efficient and advantageous to generally all parties affected. While government regulation has not been completely replaced, at least in the advertising industry, government laws yield to the self-regulation practices. By having a leading body like CONAR, there is no doubt about the credibility of their decisions. Over time, after establishing their rules and regulations as primary reference point for advertisers, CONAR has also been able to focus on other social problems such as alcohol abuse and obesity in children[94].

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[92] Jean J. Boddewyn, *Books Reviewed: Global Perspectives on Advertising Self-Regulation: Principles and Practices in Thirty-Eight Countries,*17 Mo. J. INr'L L. & TRADE 263, 263 (1993).

[93] William M. O' Barr, *Advertising in Brazil,* 9 Advertising & Soc'y Rev. 1 (2008).

[94] See A. Gossett. Brazil's Utilization of Self-regulation to Control the Advertising Industry, Law and Business Review of Americas, vol. 17, no. 1 (2011).

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*The present Report is limited to the legal and regulatory analysis referred to above and cannot be construed as a legal opinion (in Italian, "*parere pro veritate*") on any such matters.*
The considerations outlined in this Report are based on our best interpretation of the applicable provisions of law relating to laws and regulations in force as of the date indicated above. We do not undertake to update this Report nor to inform the addressees thereof of, or advise such addressees on, any changes in the law or in the interpretation of such laws and regulations following the date of this Report.
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(Prof. Dr. Andrea Minto)