THE EMERGENCE AND USE OF SELF-REGULATION IN THE EUROPEAN DECISION-MAKING PROCESS:

Does It Make a Difference?[1]

Theo van den Hoogen & Tobias Nowak

1 Introduction

Private policy stakeholders have always had a relatively open access to official officeholders in EU legislative processes, especially economic actors in sectors relevant to the working of the internal market. Their actions at the European level aim at achieving outcomes in public rule making that reflect their preferences and interests (Hix 2005, p. 12). The encouragement of self-regulation as an alternative to the classical legislative instruments intends to enhance further this role of private actors in European integration. It fits into a broader trend in Europe towards a more participatory style of governance which on its turn has been affected by the neoliberal ideological shift in public policy-making from government towards the market. In a pure sense, self-regulation concerns private actors who make rules for and by themselves on a voluntary basis to address common problems or interests.

This private rule-making takes place outside the legislative process, with no or only a marginal role for public authorities. Since the mid 90's the European Commission has started to advocate self-regulation by private economic and social actors as an important new steering mechanism to improve the achievement of the objectives of the Treaties, in particular with regard to internal market policies (European Commission 2001).

In this paper we want to shed some light on self-regulation as a new mode of governance in the EU and the way it has developed in practice. Why did the Institutions of the EU pay increased attention to the concept of self-regulation in the 1990s? What advantages and disadvantages compared to normal legislation do the political actors expect from self-regulation? What regulatory framework for self-regulation did the institutions create? Has the introduction of self-regulation in the EU gained prominence as an alternative to traditional legislation? Does self-regulation offer an attractive new institutional opportunity for economic and social actors to influence European decision-making?

1 The authors thank Charis van den Berg for her support.

The first section deals with the emergence and institutionalization of self-regulation. After looking at the reasons of the Commission and other EU institutions to promote self-regulation as a new mode of EU governance (1.1), we present an overview of advantages and disadvantages of self-regulation as discussed in the academic literature and by a number of political actors who take part in the EU policy-making process (1.2). Then we continue with the way self-regulation is defined in the context of EU governance and the criteria and modalities that have been adopted for the use of this mechanism to fit it into the broader legal and institutional system (1.3). We finish this section with a quantitative overview of the actual use of self-regulation in the EU. (1.4)

In the second section we turn to the experience of self-regulation as it has been applied in practice by studying three different cases of self-regulation. Approaching self-regulation as part of a more participatory trend of EU governance, our focus is on the relationship between public authorities and private actors in rule making processes. The selected cases are the lawyers' case (2.1), the social dialogue case (2.2), and the advertisement case (2.3). These cases represent three different policy-making models, from hierarchical top-down processes towards bottom-up voluntary private agreements: a classical law making model (a Council and European Parliament directive), a model of delegated rule-making (co-regulation), and a voluntary model (self-regulation).

The third and final section summarizes the main findings and presents some conclusions on the use and attractiveness of self-regulation as an alternative mechanism of EU governance.

2 The emergence and institutionalization of private self-regulation as an alternative mechanism of EU governance

2.1 Historical background

With the acceleration of the European integration process since the mid 1980's, a number of problems with the traditional "Community method" of regulation based on EU legislative procedures has surfaced, of which several remain unsolved until this day. Senden summarizes four of these problems, which are partially inherent to the EU law-making process and partially to policy choices of the European institutions (Senden 2008, pp. 127-130).

First of all, European policy competences have expanded tremendously during the past few decades, not only by virtue of new Treaties, but also because of extensive interpretation by the European Court of Justice (for example, the theory of implied powers). Parallel to this trend runs the decrease of national powers, or national sovereignty, as well as an ongoing discussion about the democratic legitimacy of the European decision-making process.

Second, the complexity and lack of efficiency in the traditional European law-making process is widely considered as essentially problematic. The Institutions do not always effectively use their law-making competence, which often results in stagnation of the law-making process. This is not only due to the strongly enhanced role and influence of the European Parliament as a co-legislator, but also because of the cases in which the Council takes decisions by una-

nimity. Additionally, the tendency of the Institutions which are involved in the law-making process to rule on details is an important factor in this.

Third, problems with quantity and quality have emerged: too much regulation, leading to unnecessary administrative burdens for economic actors and at the same time a lack of quality of European legislation. It often lacks consistency, clarity, accessibility and comprehensibility, due to the complexity of the law-making process.
Fourth, the absence of a hierarchy of norms is seen as a problem. Often, it is not clear for the member states what the character of a regulation is, whether it is a legislative or an executive document.

All aforementioned problems with traditional legislative regulation refer to more fundamental problems of the European law-making process: lack of efficiency and lack of legitimacy (Senden 2008, p. 130).

The legitimacy crisis, which broke out during the ratification period of the Maastricht Treaty, constituted a catalyst for the European Commission to start reflections on its legislative task and the use of classical law-based methods (regulations, directives, decisions) as the main instruments to attain EU policy goals. To address the identified shortcomings the Commission started its 'better governance program' which included a proposal for 'a new legislative policy'. This new policy consisted of two pillars which can be captured under the headings of "do less in order to do better" and "diversification of modes of governance" (Senden 2005, pp. 5-9). In practice, these pillars are rooted in, and represented by concepts such as flexibility, decentralization, differentiation, subsidiarity, reduction of administrative burden, and private actor involvement. Better governance should contribute to both democratic legitimacy and the performance of the EU policy-making system.[2]

With regard to new modes of governance the Commission emphasized the importance of the use of self-regulation as an alternative to top-down command and control legislation. Systems of self-regulation based on voluntary agreements of social and economic actors became to be viewed as a policy mechanism which could contribute greatly to enhance the efficiency, legitimacy and competitiveness of the European internal market.[3] The Commission's proposal to make more use of self-regulation as an instrument of European policy-making was endorsed by the member states in a protocol attached to the Treaty of Amsterdam (1997), and later on it became part of the Lisbon strategy for growth and jobs adopted by the European Council in 2000.[4]

2 The "do less in order to do better" pillar is based on the notions "simplification" and "deregulation". Simplification has been defined as the need to ensure that regulation imposes the least constraint on competitiveness and employment whilst maximizing the effects of direct government intervention. Deregulation has been regarded as an unavoidable extension of simplification and entails the reduction or removal of government regulations, when these are no longer necessary or when their objectives can easily be achieved through alternative mechanisms (COM(95) 288 final) . The "diversification of modes of governance" pillar focuses on modes of governance or alternative means of regulation besides legislation. In this article, the first pillar will be left out of consideration.

3 A systematic overview of the perceived pros and cons of self-regulation, including the Commission's view is presented under section 1.2.

4 Protocol on Subsidiarity, Treaty of Amsterdam 1997; Lisbon extraordinary European Council, 23-24 March 2000. This European Council also launched the open method of coordination as a new instrument to increase the convergence of macro-economic and social policies of the member states. The open method of coordination is a pure intergovernmental cooperation mechanism of governance which is separated from the community regulatory method. It is based on non-binding agreements on policy targets, bench-marking, best practices, mutual learning and publication and discussion of results. The open method shares the aspect of voluntariness with self-regulation. The main difference is that national public authorities are the principal participants in the open method of coordination, whereas forms of self-regulation are set up and managed by private social and economic actors.

To understand the rise and the encouragement, in particular by the Commission, of this new mode of EU governance, we have to look at some general and some more specific contextual conditions which surrounded its introduction in de mid-1990s.

First of all, the concept of alternative regulation was not an entirely new phenomenon. In the White Paper for the Internal Market of 1985 the Commission had already introduced a new method of product standardization, by which the task of the legislator (EP and Council) was limited to the establishment of the essential requirements of harmonization, mostly in terms of safety, health and environmental goals to be attained, whereas the filling in of the corresponding technical details was referred to private European standardization and certification bodies of the industries concerned. Products meeting the standards adopted by these bodies are covered by the so-called presumption of conformity, implying that all legal requirements for trading in the European market are considered to be satisfied. This form of co-regulation, which divides regulatory responsibilities between the EU legislative authorities and civil society actors, has worked well on the whole. It is generally considered as a crucial institutional innovation for the successful completion of the internal market (Egan 2007; Hix 2005, p.240; Majone 1996, pp 24-25)).

Another example of delegating regulatory tasks to private actors can be found in the European social dialogue. The European social dialogue resulted from an effort in the mid 1980's of then Commission President Jacques Delors to add a social dimension to the internal market project. European employer organizations and trade unions were invited to start a labour market dialogue as 'social partners'. The Maastricht Treaty (1992) formally institutionalized this dialogue, providing the social partners with the right to be consulted on social policy issues (art. 138 TEC), and even to propose EC labour market laws themselves (art. 139 TEC). This empowering of private organizations with Treaty based regulatory capacity was an institutional novelty and expectations were high at the time that the social partners were going to negotiate many social policy agreements (Hix 2005, p.255-260; Falkner 1998).[5] Both examples illustrate that the Commission had already gained experience with regulatory methods which deviated from the classical legislative procedure when it announced its new legislative policy in the mid-1990s. The demonstrated effectiveness of the new approach to product standardization and the expected potential impact of the European social dialogue may have strengthened the motivation of the Commission to promote forms of self-regulation and co-regulation as alternative instruments of European integration.

Second, ideas such as self-regulation and co-regulation or management by objectives fitted seamlessly in the then dominating theory of New Public Management. With the underlying goals of enhancing the efficiency and reducing the costs of public policies, this theory emphasized the need of decentralization of policy-making and public bureaucracies and to include private stakeholders in the formulation and implementation of policies. Reforms in the public sector in the 1980's and 1990's have made public policy-making more market-oriented (Peters and Wright 1996).

5 For more detailed information on the social dialogue process and its (rather poor) practical significance as alternative mode of governance, see the case study on this subject in section 2.

Third, in the neo-liberal ideology of market liberalization, which became the dominant political approach to European economic integration in the 1990's, self-regulation and to a certain extent also co-regulation are viewed as advisable alternatives to counter over-regulation by public authorities. Policy-makers should avoid resorting to legislative intervention when other options (including no regulation at all) could be more effective to achieve the objectives. Generally, European associations representing the interests of companies in industrial and service sectors strongly supported the use of private voluntary agreements. (Alliance for a Competitive European Industry, position paper)

Fourth, to prevent an incremental and unintended process of power centralization in Brussels (integration by stealth), the principle of subsidiarity was included in the Maastricht Treaty as a safeguard against undermining the sovereignty of member states. Concepts of self-regulation fit into this political strategy of decentralized policy-processes.

Fifth: alternative instruments as co-and self-regulation create opportunities for the Commission to enhance its institutional position in the European political system. Under the traditional Community method the role of the Commission is part of an institutional balance which is closely monitored by all the other Institutions. Arrangements of self-regulation largely diminish the activities of the Council and the European Parliament in the policy-making process, whereas the Commission as the only remaining EU interlocutor builds a strong relationship with private regulators concerned. A stronger weight for self-regulation and co-regulation in the EU policy system may serve the institutional interests of the Commission (Wincott 2001; Eberlein and Kerwer 2002).

Conclusion
The debate on non-legislative modes of policy-making was initiated after a number of problems with the traditional law-making system were identified as an obstacle for the democratic legitimacy and the performance of EU policies. The legitimacy crisis in the wake of the Maastricht Treaty put additional pressure on the Commission to reassess the existing repertoire of policy instruments. An ideological and scientific climate favouring decentralized and market-friendly approaches, previous positive experience with forms of co-regulation as harmonization method and institutional self-interest of the Commission were all factors which favoured the introduction of self-regulation as a panacea for perceived weaknesses in European decision making.

2.2 The pros and cons of self-regulation

This paragraph first presents the advantages and disadvantages self-regulation might have compared to normal regulation in general. It then describes the positions and arguments of a number of political actors who play a part in EU decision-making.

The advantages and disadvantages in theory
From the theoretical literature a list of advantages that self-regulation allegedly has compared to the standard legislative process can be derived.
First, the voluntary commitment of private actors to a certain measure is assumed to reduce political decision making costs because these actors will mobilize less political resistance.

Second, the decision-making process of private actors is thought to be faster, especially when the alternative is decision-making in a system of multi-level governance involving many levels of governance of different states. Third, the compliance rate of the private actors with measures they have formulated themselves is expected to be higher than in cases of hierarchical decision making. They are expected to mobilize resources, such as obliging members to comply, expertise, money, sanctions in cases of non-compliance, and thus make implementation easier. Fourth, private accords are seen as more flexible and they can therefore be adjusted to new developments more easily (Heritier 2001, p. 11, 16; Majone 1996, pp 23-25). However, the disadvantages found in the literature (and in the documents of the institutions) seem to be informed by empirical experience with self-regulation instead of by theoretical considerations.

First, most self-regulatory action is not initiated by the private parties but by the European Commission and is often flanked by threats of hierarchical decision-making. Therefore, the voluntary character of self-regulation and with it the assumed advantages of voluntariness cannot be taken for granted. Prosser correctly points out that "the effectiveness of enforcement is an empirical matter, not one to be determined a priori by the choice of regulatory regime" (Prosser 2008, p. 104). Second, the participation in the formulation process of private accords is selective and non-representative. This is especially problematic in cases in which private accords lead to binding regulations for actors who where not involved in the formulation (for example the exclusion of UEAPME in the parental leave and part-time work negotiations, see case study on social dialogue). Third, private accords do not satisfyingly guarantee legal certainty. Fourth, private accords lack accountability (Heritier 2001, p. 14-15; Majone 1996, p. 26)).

Arguments of the Commission

The Commission produced a number of documents in which it praises the advantages of self-regulation. As noted, for the Commission self- and co-regulation are part of its project on better governance. One goal of this project is 'participation' which the Commission considers will contribute to the effectiveness of EU governance.[6] The Commission counters the fear that the principle of participation will lead to a lengthy consultation process by arguing that such a consultation process will later lead to faster adoption and easier application and enforcement.[7] The Commission also argues that co-regulation makes good use of the practical expertise private actors have in their field and that compliance, even with non-binding rules, will be higher. However, the Commission stresses that "with more involvement comes greater responsibility".[8]

Arguments of the European Parliament

Not surprisingly the EP is rather sceptical towards self-regulation (including the social dialogue) because decision making in such cases usually circumvents the EP. Actually, not many statements of the EP concerning self-regulation exist. Only two reports seem to address the

6 Commission 2001 European Governance White Paper COM (2001) 428final p. 7.

7 Ibid, p. 16.

8 Ibid, p. 12. In a later report the Commission "proposes to make greater use of **alternatives to traditional legislation** without undermining the provision of the Treaty or the prerogatives of the legislator" Commission 2003 Report from the Commission on European Governance, Office for Official Publications of the European Communities, p. 21, emphasis in the original. The latter part of this sentence can be seen as a forerunner of the Interinstitutional Agreement of December 2003 which contains all legal and institutional requirements for the use of co- and self-regulation, see section 1.3.

issue.[9] The first one concentrates more generally on soft law but the arguments brought forward by the EP against soft law instruments can easily be transferred to the realm of self-regulation and they sound indeed similar to what the EP later said on self- and co-regulation. On soft law the EP is of the opinion that soft law is legitimate as long as it is not used as surrogate for legislation in fields where the Community has legislative power.[10] It stresses that especially in cases in which no procedure exists which would give consultation rights to the EP, soft law cannot be a substitute for legislative acts.[11] In its report on better law making the EP doubts "the appropriateness of encouraging self- and co-regulation"[12] It fears that the use of self- and co-regulation will lead to "legislative abstinence" and that only lobby groups and powerful economic actors will benefit from it. For the sake of legal security the EP concludes that law-based regulations are the best way to achieve the objectives of the Community.[13]

Arguments of civil society

The arguments of the civil society can be found in the many hearings held by the European Economic and Social Committee (ESC) concerning self- and co-regulation. Civil society is far from united in its view of self- and co-regulation. Here it is important to make a distinction between profit-organisations (business) and non-profit organisations (public interest organisations). As seen before, business in general supports self-regulation. However, it becomes clear that non-profit NGOs are much less enthusiastic than one would expect looking at the list of advantages presented in the theoretical literature or by the Commission. Many of the arguments advanced in the hearings either in favour or against co- and self-regulation are familiar. Eva Belabed, president of the study group on co- and self-regulation, for example, stresses that although problems could be resolved more flexibly by co- and self-regulation because of the skills of the involved actors, acts of co- and self-regulation could appear exclusive and therefore not legitimate. She also questions the value of voluntary agreements as she considers compliance rates to be low.[14] Besides the usual positive points found in the theoretical literature most contributors to the debate emphasise that voluntary rules need mechanisms that ensure their application.[15] A similar reserved tenor can be found in the conclusions of a workshop of the ESC on co-responsibility of organised civil society players held a few years earlier: "Responsibility for drawing up legislation (and regulation) must remain with the official institutions […]"and in order to reconcile individual interests of civil society organisations with the general interest it is necessary that "the legislative authority always has the last word."[16] A recent hearing of the ESC on self- and co-regulation pointed to the problem of free riders, stressing the importance of enforcement of voluntary agreements (ESC 2008 p. 3).[17] Thus, support of self-regulation in general is accompanied by critical undertones

9 Report on institutional and legal implications of the use of 'soft law' instruments (A6-0259/2007) and Report on 'Better lawmaking 2006' pursuant to Article 9 of the Protocol on the application of the principles of subsidiary and proportionality (A6-0355/2008).

10 § L of motion contained in EP Report on 'soft law' instruments.

11 § Za (2) of motion contained in EP Report on 'soft law' instruments.

12 § 14 of motion contained in EP report on better law making.

13 § 14 of motion contained in EP report on better law making.

14 ESC 2004: Summary of the hearing on the current state of co-regulation and self-regulation in the single market, p. 1

15 See for example the contributions of Verver, p. 3, Portalier, p. 7, Giovaninni, p. 8 in ESC 2004.

16 ESC 2001 *Conference on "The role of civil society in European governance" Workshop 1 Co-responsibility of organised civil society players*, p. 2.

17 Proceedings of the public hearing on "The current state of European self- and co-regulation" ESC 2008, p. 3. (remark of mr. Telička of the 'Stoiber Group', a group of experts called the High Level Expert Group on Administrative Burdens chaired by and named after the former minister-president of Bavaria, Edmund Stoiber).

from a large part of civil society. One could say that civil society holds a yes-but-position on co- and self-regulation.

Table 1: Pros and Cons of self- and co-regulatory acts as compared to hierarchical rulemaking

	Argument
Pros	Reduce decision making costs
	Make decision-making faster
	Compliance is higher
	Easier implementation
	Can be adjusted more easily
	Better participation
	Better regulation because experience of affected actors s used
Cons	Lack of legitimacy (lack of representativeness, opaqueness)
	Lack of legal certainty
	Benefits only powerful private actors
	Compliance is lower (free rider problem)

Conclusions

This overview makes clear what kind of advantages and disadvantages the actors expect of self- and co-regulation. The positions of the three actors can be summarized as follows: the Commission acts as driving-force, proponent and policy entrepreneur; the European Parliament is rather sceptical; and civil society welcomes the possibility of co- and self-regulation, especially the profit sector. Doubts are expressed by non-profit NGOs which represent public interests (consumer groups; environmental movement etc). They stress the need for a strong institutional framework especially in the monitoring phase. The advantages of co- and self-regulation are mostly seen in terms of efficiency gains; while the disadvantages mostly point to the issue of democratic legitimacy of the rule making process.[18]

In addition, some of the theoretical arguments seem to be rather weak: Is decision making by private actors really faster? This is rather doubtful considering the composition of some of the civil society actors at the European level (members from many states with different interests are combined in the European umbrella organisations). Is the compliance rate with voluntary agreements really higher than in cases of top-down regulation? We do not know of any empirical research which addresses this point. Are private actors really more flexible? As with faster decision making the civil society with its many conflicting interests might be even more inflexible than the normal legislators. Not mentioned anywhere is the possible lack of transparency and legitimacy created by processes in which the actors are different for each field and point in time and are often unknown to the public (who has ever heard of the UEAPME before?). In the three case studies in the second part of this paper we will look into several of these questions.

18 This classification of advantages and disadvantages of self-regulation in terms of efficiency and democratic process corresponds with Scharpf's distinction between input democracy and output democracy as the two sources of legitimate authority in the European Union (Scharpf 1998).

2.3 The regulation of self-regulation: the 2003 Interinstitutional Agreement on better law-making

Although self-regulation and co-regulation were proposed as new modes of governance which could improve the EU's regulatory system, it was clear from the beginning that these alternative instruments could not be developed and used completely separate from the existing legal and institutional system. General principles such as legal consistency, legal certainty and democratic legitimacy are fundamental to the effective and democratic working of the system of European integration.
The demand for legal and institutional compatibility created a need for a legal framework which specified the conditions and modalities of the use of the new instruments. This framework was provided for in the Interinstitutional Agreement on better law-making adopted by the European Parliament, the Council and the Commission on 16 December 2003[19].

Conditioning and defining co-and self-regulation: the legal framework
To some extent, the IIA on better law-making reflects the experiences already gained with European co- and self-regulation[20] and elaborates upon these. The provisions of the IIA are divided into ten paragraphs, which show the variety of aspects of the better-lawmaking policy as initiated by the Commission in the mid 1990's.[21]

Of specific relevance to co-regulation and self-regulation is the fifth paragraph, 'Use of alternative methods of regulation'. In the first article of this paragraph, article 16, the three institutions reiterate their observance to the principles of subsidiarity and proportionality, which entails "the need to use, in suitable cases or where the Treaty does not specifically require the use of a legal instrument, alternative regulation mechanisms". Most important is article 17 which spells out the basic requirements for the practical use of co- and self-regulation at EU level. It provides some basic duties of the Commission in this respect. The Commission has to ensure not only *consistency* of any use of alternative regulation (co-regulation or self-regulation) with Community law, but also *transparency*, *representativeness of the parties involved*, and demonstration of *added value for the general interest*. The article concludes with an enumeration of the circumstances in which co- and self-regulation are not an option. When *fundamental rights*[22] or *important political options* are at stake or in situations where the *rules must be applied in a uniform fashion* in all Member States use of co- and self-regulation is not permitted. They are also not permitted when they affect the principles of competition or the unity of the internal market.
Following these general conditions on the use of co-and self-regulation, the concepts are defined in article 18 respectively in article 22.

19 European Parliament, Council, Commission, *"Interinstitutional Agreement on better law-making"*, Official Journal of the European Union C 321/1, 31 December 2003.

20 L. Senden, *"Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?"*, in: ECJL, Vol. 9, 1 January 2005, p. 13.

21 Simplifying and reducing the volume of legislation, improving the quality of legislation, utmost transparency of the legislative process, and adherence to general principles such as democratic legitimacy, subsidiarity, proportionality and legal certainty might be regarded as some of the ultimate goals that are pursued by the IIA, European Parliament, Council, Commission, *"Interinstitutional Agreement on better law-making"*, Official Journal of the European Union C 321/1, 31 December 2003, art. 1.

22 However, we find self-regulation in the media sector (and self-regulation in the advertisement industry is even used as a good example of self-regulation at the EU level by the Commission in several documents) which seems to contradict the rule that self-regulation is not an option when fundamental rights are concerned since one could argue that the fundamental right of freedom of speech is being regulated in these cases.

> *"Co-regulation means the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations)."*

The advantages of the use of this mechanism are enumerated. They correspond with some of the advantages discussed in the previous paragraph. According to the IIA co-regulation enables "the legislation to be adapted to the problems and sectors concerned, to reduce the legislative burden by concentrating on essential aspects and to draw on the experience of the parties concerned".[23]

The contribution of private actors under co-regulation clearly exceeds mere consultation. However, agreements between the concerned private actors on measures to attain the objectives in a legislative text have an *inter partes* (between signatory parties only) and not an *erga omnes* (general application) character.[24]
The procedural conditions for the use of this instrument, such as the duties of the Commission, are stipulated in the three subsequent articles.

A definition of the concept of self-regulation can be found in article 22:

> *"Self-regulation is defined as the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)."*

The continuation of this article stresses that self-regulation must be regarded as a voluntary initiative that does not necessarily imply any involvement or standing of (one of) the Institutions, especially in cases in which no Community legislation on that subject exists, or when the subject is not dealt with by the Treaties. Thus, when social and economic actors are faced with specific situations on the ground not covered by a Community law solution, they can regulate themselves. As in the case of co-regulatory contracts, the solution commits only the signatory actors. Nevertheless, these agreements may form the basis for a Commission proposal to other institutions "to confer general application upon these agreements within the EU through a vote on the proposal"[25]. The Commission, however, is placed under a duty to verify practices of self-regulation on points mentioned in article 17.

Although certain manifestations of co-regulation and self-regulation within the European Union had already been apparent in the years preceding the IIA of 2003, the conceptualization and institutionalization of these alternative methods had not been developed accordingly.[26] The IIA for the first time addressed the concepts of co- and self-regulation and provided a general legal framework for the practical use of these instruments within the single market.

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23 European Parliament, Coucil, Commission, *"Interinstitutional Agreement on better law-making"*, Official Journal of the European Union C 321/1, 31 December 2003, art. 18.

24 European Economic and Social Committee, Self – and co-regulation website, <http://eesc.europa.eu/smo/prism/regulation/conceptsexamples/index_en_asp>, last accessed 10 March 2009.

25 Ibid.

26 See L. Senden 2008, p. 133.

In addition, it transformed these practices into a set of legal rules and requirements to enable coexistence, compatibility and complementarity of both notions with the general principles of Community law.[27] Finally, the Interinstitutional Agreement also provided for monitoring and follow-up mechanisms.[28]

In addition to this legal compatibility motive for the institutionalization of alternative methods of regulation a more political argument can be put forward. As has already been noted, the use of co- and self-regulation may distort the balance between the Institutions in the decision-making process. In particular the European Parliament repeatedly warned against being sidelined by new methods of governance which take place entirely or to a large extent outside the legislative framework. The adoption of the IIA might be viewed as an answer to address these worries and to gain broad institutional support for alternative regulation. One might argue that the Institutions have exerted their power and influence to secure their role as decision-making bodies. Another view is taken by the European Economic and Social Committee: the situation that gave rise to action related to the institutionalization of self-regulatory instruments was characterized by the lack of a legal framework governing its position, which caused considerable disparities between the national situations. [29] Primarily English-speaking states were generally inclined to acknowledge and support European self-regulation, to which they referred as "soft law", whereas other countries saw them as a potential threat to public authority.[30] Self-regulation in the EU formed a "grey area of Community law", inherently controversial and ambiguous.[31] Institutionalization could throw light on the legal status of alternative regulation.

The IIA can be criticised for its rather narrow view of the two forms of regulation defined.[32] The IIA definition of co-regulation only applies to scenarios in which the legislator formulates aims which then are to be realised by the concerned sector through self-regulation. However, many more co-regulatory scenarios are imaginable. Goals, for example, could be formulated by private actors and goal attainment monitored by public authorities. And indeed, the social dialogue is generally considered to be a co-regulatory instrument but here the goals are formulated by the social partners and not by the legislator. In certain cases these goals are then adopted as law. In addition, the definition of self-regulation contained in the IIA can be criticised for the fact that it is too restrictive to cover forms of rule making that are actually referred to as self-regulation by the actors. All so-called self-regulatory acts take place in a highly regulated environment. Self-regulatory regimes are often the reaction to pressure from the Commission and they are being scrutinized by the Commission for their compatibly with EU legal principles.

27 European Economic and Social Committee, *"The Current State of Co-Regulation and Self-Regulation in the Single Market*", INT/204- CESE 1182/2004 fin, 18 January 2005, p. 12.

28 Ibid.

29 European Economic and Social Committee, *"The Current State of Co-Regulation and Self-Regulation in the Single Market"*, INT/204- CESE 1182/2004 fin, 18 January 2005.

30 Ibid.

31 See European Economic and Social Committee, *"The Current State of Co-Regulation and Self-Regulation in the Single Market"*, INT/204- CESE 1182/2004 fin, 18 January 2005, p. 10.

32 See also DG Health and Consumer 2006: Self-regulation in the EU advertising sector: a report of some discussion among interested parties which criticises that the definitions leave "a **grey area** of self-regulation that is not quite as purely autonomous as this wording implies and yet has none of the characteristics required for a system to qualify as CoRegulation" <http://ec.europa.eu/dgs/healt_consumer/self_regulation/docs/report_advertising_en.pdf>, p. 9>.

Conclusions

The 'better governance policy' of the EU made non-legislative alternative regulation one of the key points of that policy. In order to prevent the undermining of legal certainty and democratic legitimacy in the internal market by the extensive use of alternative regulatory instruments, co- and self-regulation themselves became subject to formal regulation. Political pressures from the European Parliament and the Member-States also contributed to this institutionalisation.

Legal rules were laid down in 2003 IIA to delineate the scope of alternative regulation and bind its use to procedural and substantive requirements. In case of policy failure of voluntary agreements the legislator retains the right to intervene with binding law instruments. On the one hand the IIA addressed some of the concerns on self-regulation as expressed by a number of political actors, on the other hand it had the effect to bind self-regulatory methods firmly to the constraints of the hierarchical command-and control order. The freedom of private actors to rule for and by themselves in specific policy areas at the EU level became to be strongly restricted in practice. In the European policy-making system the law-maker never disappeared out of sight.

2.4 The practical use of co-regulation and self-regulation in the EU: some empirical information

The 'new regulatory policy' advocated by the Commission and other EU institutions emphasized the need to make more frequent use of co- and self-regulation. Especially in policy-making areas related to the internal market, these alternative instruments became a focus of attention as promising alternative options to the classical legal instruments. However, both co- and self-regulation rely on the willingness and possibilities of civil society actors to make use of this option by committing to voluntary agreements on policy issues at the EU level.

According to modern theory of politics, private economic stakeholders are assumed to be rational actors which behave strategically in the policy-making system to achieve outcomes that reflect organizational interests (Hix, 2005, p. 12). They are expected to make use of new institutional opportunities when these serve their interests in the policy-process in more effective way.

European industry has expressed repeatedly its support for the use of self-regulation (Alliance for a Competitive European Industry 2004, p.2). Compared with traditional top-down legal regulation the new methods are seen as more flexible and effective ways to attune European measures to the specific circumstances and interests of the companies concerned.

Most of the individual economic operators in the European market are affiliated with and represented in the European policy process by European umbrella organizations, the so-called recognized parties in the field. These European associations are key actors in taking initiatives to draft self-regulation proposals on behalf of their members. To what extent has the Commission's call in the mid 1990's to introduce more diversification in the modes of governance been taken up by these associations? The rest of this paragraph summarizes some empirical information on the actual use of co- and self –regulation at the European level.

The total number of all registered cases of European co- and self regulation in the period 1990-2008 adds up to 105, with a strong concentration (nearly 75 per cent) in the years 2000-2005. [33] (Table 1, Annex 1) Although some non- legislative regulation already existed in the beginning of the 1990's, a sharp rise in co- and self-regulation cases started just in the last years of the 1990's, coinciding with the Commission's promotion campaign. In this period the average number of new initiatives per year approached 13. However, this upward trend did not last long. It ended abruptly after 2005 when new initiatives dropped back to the same low level as in the first half of the 1990's.[34] In the practice of EU policy-making, co- and self-regulation remains of minor importance. This empirical marginality in EU policy-making also shows up in comparison with the classical legislative output in the EU, such as directives and regulations. [35] The statistics lead to the conclusion that the introduction and promotion of self-regulation as an alternative policy instrument has not decreased the dominant position of the law-making process, at least not in quantitative terms.

About one-third of the registered cases can be classified as co-regulation and two-third as self-regulation. As regards the spread over policy sectors most voluntary initiatives originate in industrial and service sectors operating in the European market. Environmental issues and social affairs take a prominent place as subjects of European self-regulation. The dominance of social affairs in co-regulation agreements is not surprising when considering that this policy field is covered by the Social Dialogue with its Treaty based provisions for co-regulation. Besides environment and social affairs there is a broad variety of subjects covered by self- and co-regulation, from European professional standards to consumer protection issues. (Tables 2a and b, Annex 1)

It is interesting to have a more detailed look at some features of co-regulation and self-regulation. The *co-regulation* cases can be subdivided according to the initiating type of legal act, which can be a legislative act (of the Council, the Council and the European Parliament, or the Commission), or a non-legislative legal act, for example a recommendation of the Commission or the Council (soft law). It turns out that co-regulation is mostly related to legislative acts, in particular to Council/ EP or Council directives.[36] It is remarkable that more than half of the cases in which a legislative act creates a framework for co-regulation is not followed up by private initiatives. At least this raises doubt about the qualification of these legal frameworks as co-regulation (**Table 3,** Annex 1)

33 This information is calculated from a database on self-regulation and co-regulation set up in 2006 by the European Economic and Social Committee in cooperation with the Commission. The database aims to take stock of all European initiatives (involving more than one member-state) of self-regulation and co-regulation, and to update them regularly. So far, it is the most comprehensive source of empirical information on this subject in the EU. In classifying cases as co-regulation or self-regulations the data-bank applies the EU definitions of the Interinstitutional Agreement 2003.<http://eesc.europa.eu/self-and-coregulation/index.asp>, last accessed: 10 March 2009. It is quite possible that besides these 'official' registered cases of self-regulation several 'unofficial' non-registered voluntary agreements exist at the European level. More research is needed to identify 'unofficial' self-regulation at the European level and to assess its empirical significance and relevance for the European integration process.

34 Actually, the total number of cases in use declines to 89 after deduction of cases which have become obsolete or have been replaced by updated versions in the meantime.

35 In the period 1999-2003 the European legislator (Council; Council and Parliament) produced a yearly average of 165 regulations, 65 directives, and 60 decisions. When we add all binding and non-binding legal acts of the Commission the average yearly output of the EU legal system is more than 1000. See the General Report on the Activities of the European Union, editions 1999, 2000, 2001, 2002, 2003 <http://eurpa.eu/generalreport>. See also Hix 2005, p 76,77.

36 These directives sometimes encourage the member states to transpose its provisions in the form of self/co-regulation at the national level. National voluntary agreements are then linked to goal attainment at the EU level.

Self-regulation cases often start with a private initiative at the beginning (for example guidelines or code of behaviour). A substantial part of these initiatives is motivated by the wish to prevent a threatening law-making proposal of the Commission. The Commission can endorse the private agreement in a recommendation (non-binding legal act). On the other hand, when self-regulation does fail to achieve the expected results, the Commission can nullify the self-regulation by proposing a legislative act. The process of private rule-making is always linked to actual or potential legislation.

There is great variety in the methods which are applied in the collective actions of private actors to regulate themselves. Codes of conduct are the most popular. Codes of conduct and other forms of self-regulation differ enormously in terms of goal commitment, monitoring, compliance mechanisms and provisions for conflict resolution. Without more information on these internal provisions of voluntary agreements and the way these are applied in practice it is difficult to assess whether self-regulation agreements actually enhance the efficiency, effectiveness or democratic legitimacy of EU governance (**Table 4** (Annex 1)

Conclusions

For private stakeholders, especially business, the introduction of self-regulation at the EU level created a new institutional channel to influence policy measures which affected their interests. However, the repeatedly declared support for this part of the Commission's better governance policy has not led to a significant change in the way EU policies are made in practice. In empirical terms, self-regulation remains a rather marginal phenomenon, in absolute numbers as well as relative to the classical legislative process. Furthermore, many cases of self-regulation are non-committal codes of conduct or guidelines with unknown effects on the behaviour of its signatories. Prevention of formal legal intervention in their sector of interest is an important motivating factor for private actors to develop voluntary initiatives. The 'shadow of law' also extends to the implementation phase of self-regulation. The Inter-institutional Agreement 2003 has empowered the Commission to propose legislation when self-regulation contracts fail to meet the expectations of the EU law-makers. In practice, the attractiveness of self-regulation seems to be considerable less than in theory. First, initiatives of self-regulation have been reigned in by the legal and institutional conditions of the IIA 2003. Second, the drafting of a voluntary agreement is not an easy enterprise. European associations represent private actors from many countries which have shared interests but who are also competitors in the European market. Conflicts of interests are part of the negotiations on voluntary agreements and problems of free-riding, monitoring and enforcement have to be addressed. The question arises whether the assumed contribution of self-regulation to better governance and better interest intermediation in EU policy-making holds out in practice. Is self-regulation indeed a better institutional option for private economic stakeholders to attain their interests than the traditional law-making process? This is one of the questions addressed in the case-studies in the next section.

3 Self-regulation in practice: three case-studies

3.1 Introduction

In order to get a better understanding of how different forms of co- and self-regulation work in practice and to highlight some of the difficulties one encounters when studying regulation with these concepts in mind three short case studies are presented below. They show that co-regulation in the EU is a general phenomenon that comes in different forms. These case studies also highlight some of the elements identified above, such as the problem of representativeness or the alleged higher efficiency of self-regulation. Although all three cases under investigation contain elements of self-regulation, they differ among other things along the lines of legal status (of civil society's involvement as well as of the produced agreements) and degree of institutionalisation.

The first case study takes a look at the making of the lawyer's establishment directive. Although this directive was passed according to the standard law making procedures of the EU, the special role given to the lawyer's interest group in the formulation phase of the directive brings it close to self-regulation. The second case concerns the much spoken of treaty based social dialogue between management and employees. The social dialogue makes it possible for the social partners to negotiated agreements amongst themselves which will then be adopted by the Council and receive the status of directives. The third case deals with the advertisement industry, an example often used by the Commission for a pure form of self-regulation. In this field national self-regulatory organisations established a European umbrella organisation which reports regularly to the Commission on advertising standards.

3.2 Self-regulation as part of the legislative process: The making of the Lawyer's Establishment Directive

The biggest interest group of lawyer's in Europe, the Council of Bars and Law Societies of the European Union (CCBE), was deeply involved in the making of the European rules governing the provision of legal services. According to the Commission's definitions of self-regulation (private actors voluntarily adopt amongst themselves and for themselves common guidelines at the European level) and co-regulation (the legislators define objectives that they then leave to private actors to attain), this involvement would not classify as self- nor as co-regulation. However, the decision-making process that led to the passing of the Lawyer's Establishment Directive[37] shows characteristics usually attributed to self-regulation: non-governmental actors formulate rules that apply to them. Thus, a short description of the political process surrounding the Lawyer's Establishment Directive will enhance our understanding of the legislative processes in the EU and put the concept of self-regulation into perspective.[38]

37 'Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained'.

38 For a more elaborate description of the legislative process concerning the Lawyer's Establishment Directive see Tobias Nowak and Nicolle Zeegers (2008), Rules for Professional Legal Services: The Same Authors Acting in a Different Arena? In Nicolle Zeegers and Herman Bröring (eds.), *Professions under Pressure. Lawyers and Doctors between Profit and Public Interest*, Boom Juridische Uitgevers, Den Haag, pp. 47-62.

Fulfilling a request from the Commission

In 1977, Viscount Davignon, the Commissioner for the Internal Market, asked the CCBE to draft a Directive on the establishment of lawyers.[39] This was the beginning of a lengthy process in which the Commission made an initiative for a Lawyers' Establishment Directive dependent on a draft by the CCBE which had to be supported by a vast majority of CCBE members and the member states. The CCBE formulated several proposals in the early 1980s.[40] The discussion in the CCBE, as well as the discussion between the CCBE and the European Commission, included the questions as to which activities a lawyer would be allowed to perform in the host state and whether the rules for the profession of the host state or of the home state applied.[41] However, the decision making process stalled and it was not before 1988 that the CCBE again seriously discussed proposals for an establishment Directive.[42]

Basically, three versions were produced and put to vote. The 1988 vote on these three versions did not produce a winner. Thus, the CCBE continued to work on a draft for a Lawyers' Establishment Directive.[43] In 1991 a new draft was put to vote and received eight out of twelve votes.[44] In order to be accepted ten votes were needed. However, in 1992, after some changes had been made to that draft, ten delegations voted in favour of it.[45]

The two delegations voting against the proposal had very different reasons for doing so. The Spanish delegation voted against the draft of the CCBE because it would have liked a more liberal approach. The Luxembourg delegation was of the opinion that adequate means already existed for lawyers from other member states to practise law in Luxembourg.

The proposal of the European Commission

Then, in 1994 the Commission published its own Proposal for a European Parliament and Council Directive to facilitate practice of the legal profession by a lawyer on a permanent basis in a member state other than that in which his qualification was obtained.[46] Although the Commission stressed that its point of departure had been the draft of the CCBE, the Commission's proposal differed from the CCBE draft on two major points.[47] Moreover, the Commission's proposal differed on several minor points from the CCBE draft, for example, no reference was made to the CCBE's Code of Conduct. Why did the Commission depart from the CCBE draft? The CCBE reports that the French delegation to the CCBE had changed its

39 J. Mogg 1995, Letter from the Commission, in House of Lords (1995), *Select Committee on the European Communities: The Right of Establishment for Lawyers. With* Evidence, House of Lords Paper 82, written evidence section, p. 60.

40 The best known are called Zurich 10/80 and Athens 5/82 according to the dates and places the CCBE adopted them.

41 See Spedding 1987, p. 163.

42 CCBE 2005, *The History of the CCBE*, available at the CCBE, p. 28.

43 CCBE 2005, p. 29-30; J. Toulmin 1993, The CCBE Draft Directive on Rights of Establishment. Paper from the President. in House of Lords (1995), *Select Committee on the European Communities: The Right of Establishment for Lawyers. With Evidence*, House of Lords Paper 82, written evidence section, p. 72.

44 France, Luxembourg and Spain voted against the draft, while Greece abstained (CCBE 2005, p. 31).

45 Toulmin 1993, p. 73, CCBE 2005, p. 31.

46 COM (1994) 572.

47 First, the right of establishment under the home title would expire after five years. Second, the proposal did not require an aptitude test for lawyers who wanted to join the host state's legal profession.

mind after voting in favour of the CCBE draft.[48] The Commission then adjusted the proposal in accordance with the French wishes.[49]

Reactions to the proposal of the Commission
After the European Economic and Social Committee and the EP Committee on Legal Affairs and Citizens' Rights criticized the Commission's proposal on several points. In their opinions most of the points on which the Commission's proposal departed from the draft of the CCBE were criticized. Both committees wanted to return to the original draft of the CCBE on all major points and proposed to amend the Directive accordingly. In June 1996 the European Parliament approved the Commission proposal on the condition that the proposed amendments would be incorporated into the Directive.[50]

The amended proposal
The European Commission adopted an amended proposal of the Lawyers' Establishment Directive in September 1996.[51] The Commission adopted all of the major amendments proposed by the EP. The time limit on practice under home-state title was deleted, and the verification procedure for professional qualifications was included. The European Commission declined to follow the EP proposal only on some minor points. In its explanatory memorandum on the amended proposal the European Commission stated that it followed the suggestions of the European Economic and Social Committee, of the European Parliament's Committee on Legal Affairs and Citizens' Rights, and of the CCBE.

However, the Commission did not only follow the suggestions of the CCBE but considered the support of the CCBE as prerequisite for adopting the Directive. Thus, the new proposal was put to the vote in the CCBE on 17 November 1995 in Dresden.[52] The CCBE made some changes to the provisions concerning the aptitude test and then accepted the proposal by qualified majority. The president of the CCBE, Heinz Weil, informed the responsible Commission official immediately per fax of the outcome of the vote.[53] In addition, the EP was informed about the decision.

In July 1997 the Council of Ministers adopted a common position on the Commission's amended proposal.[54] The changes made by the Council of Ministers to the amended proposal were rather minor. The only member state not in favour of the Directive was Luxembourg.[55] This common position was approved by the Commission and the EP.[56] The Council of Ministers finally approved the Directive in its second reading in December 1997 by use of the decision mode of qualified majority. Again the only member state rejecting the Directive was Luxem-

48 This new position of the French delegation was apparently connected to changes in French law (CCBE 2005, p. 32). New provisions on professions took effect in 1991 and 1992 (H. Adamson 1998, *Free Movement of Lawyers*. 2nd ed. Butterworths, London, Dublin, Edinburgh, p. 16, Goebel 1991/92, p. 563).

49 CCBE, (2005), p. 32.

50 OJ C 198, 08.07.1996, pp. 68-85.

51 COM/1996/446/final.

52 COM (96) 446 final, CCBE 2005, p. 32; J. Lonbay 1996, Legislative Comment. Lawyers Bounding over the Borders: The Draft Directive on Lawyer's Establishment, *European Law Review*, vol. 21 **(1),** pp. 50-58.

53 Interview with Commission official.

54 OJ C 297, 29.09.97, p. 6.

55 See Council Minutes of 2007th Council meeting and of 2026th Council meeting.

56 SEC/1997/1206/final and A4-0337/1997.

bourg.[57] The Lawyers' Establishment Directive[58] was signed by the European Parliament and the Council of Ministers on 16 February 1998.

Conclusions
Even though the history of the Lawyers' Establishment Directive started in the late 1970s with the Commission asking the CCBE to prepare a draft, the Commission does not seem to have been the driving force behind the drafting and passing of the Directive. The CCBE did thus not react to a threat of the Commission to pass a law that would regulate the establishment of lawyers but parts of the CCBE saw different rules of establishment in the member states as a problem that needed to be tackled. As the CCBE was in itself divided on how to regulate establishment, the formulation and approval of a common proposal was rather difficult. This seems strange at first sight because no other interest group was involved (which brings the issue of representativeness to mind). However, this can easily be explained as the CCBE, like many European interest groups, is composed of many national interest groups with different agendas which makes compromises often difficult.

3.3 Institutionalised self-regulation: Dialogue of the Social Partners

"Because of their representativeness, trade unions and employers' organisations have a particular role in the shaping of social policy."[59] Since the Single European Act provisions on the social dialogue can be found in the Treaty.[60] Today Articles 137-139 contain the relevant provisions on the social dialogue. Article 139 makes it possible for the social partners to ask the Council of Ministers to adopt an agreement negotiated by the social partners as legislative act. However, the term social dialogue also refers to the obligatory consultation of the social partners by the Commission found in Article 138 EC and in a broader sense to all kinds of consultation committees involving the social partners. The procedure of the social dialogue as found in Article 138 and 139 EC goes as follows: The Commission has to consult the social partners in the preparation phase of a proposal in the field of social policy. If the Commission decides to go ahead with legislation it has to consult the social partners again on the proposal itself. At this moment the social partners can decide to start negotiations on the proposal. In this case the normal legislative process is stalled for nine months. In case the social partners have reached an agreement, the agreement can be transformed into a directive by the Council of Ministers by Qualified Majority Vote (QMV) or unanimity depending on the issues being regulated. Alternatively, such an agreement can be implemented at a national level 'in accordance with the procedures and practices specific to management and labour and the Member States' (Article 139 (2) EC). If no agreement was reached the normal decision-making procedure continues. Note that the European Parliament is not formally involved in this process. However, the Commission keeps the EP informed about the contents of agreements (Benedictus, pp. 28). The Social Dialogue can take place across industries or be restricted to a specific

57 Council Minutes of 2060th Council meeting.

58 The CCBE (2001) has drawn up guidelines on the implementation of the Lawyers' Establishment Directive. This has been done in consultation with the Commission (interview with Commission officials).

59 Report from the Commission on European Governance2003p15.

60 The social partners have been involved in a more informal way via committees and working groups in the legislative process since the 1960s. With the SEA the social dialogue found a treaty basis. Article 118b of the SEA (1987) stated that the dialogue of the social partners (management and labour) could lead to agreements. The social dialogue in its contemporary form could first be found in the Agreement on Social Policy of the Maastricht Treaty (1993), it became part of the Treaty with the Treaty of Amsterdam (1999) (Benedictus (2003), p. 19 ff).

sector. We will concentrate on the cross-industry dialogue but will refer to the sectoral social dialogue to illustrate certain points more clearly.

The actors and their reasons

The main participants of the social dialogue are the Commission as supervisor, employees represented by ETUC and management represented by BusinessEurope (called UNICE before 2007), CEEP and UEAPME. The Council of Ministers plays a role as it can adopt agreements of the social partners as Council Directives. A marginal role if any is played by the EP. These actors and their reasons for supporting or criticizing the social dialogue will now be introduced.

The European Commission, or to be more precise DG Employment and Social affairs, supervises the social dialogue. According to Article 138 (1) EG the Commission ensures a balanced support for the parties. The Commission is not directly involved in the negotiations but its proposal forms the starting point for negotiations. The Commission determines which organisations are consulted during the social dialogue. Agreements presented to the Council are first checked by the Commission for representativeness of the parties involved, compatibility with Community law and impact on small and medium sized industries.[61] The Commission considers the social dialogue as a 'key to better governance'[62]. The social dialogue was introduced by the Commission to reconcile the trade unions with the 1992 programme and to make the social dimension more tangible.[63] The Commission is also the strongest supporter of the social dialogue. Although the Commission surrendered some of its powers under the Social Dialogue procedure to private actors, Obradovic (2001, p. 89 f.) argues that the Commission profits from this procedure because it makes it possible to outmanoeuvre the Council of Ministers.

The ETUC, the umbrella organisation for labour unions set up in 1973, has 82 member organisations from 36 European countries and all fields of industry.[64] This heterogeneity makes internal decision-making difficult.[65] The ETUC is under the control of the national trade unions and negotiation mandates are given to the ETUC on a case-by-case basis by its members.[66] Despite these unfavourable organisational characteristics, the ETUC is normally described as being in favour of the social dialogue procedure.

The Commission recognises three cross-industry employers' associations as participants in the social dialogue: BusinessEurope, CEEP and UEAPME. BusinessEurope has 40 members from 34 states and can trace its history back to 1949.[67] However, it was not before the 1970s that UNICE started to represent the interests of its members and only at the 1991 IGC that the employers opened up to the idea of bargaining at European level. The reluctance to European level bargaining with trade unions dwindled with the extension of QMV and thus the disappearance of the veto position of any one member state. Under unanimity the employers could

61 Benedictus, p. 31-32.

62 <http://europa.eu/scadplus/leg/en/cha/c10716.htm>, accessed on 25 November 2008.

63 Dølvik, Visser, in Compston/Greenwood p 19.

64 <http://www.etuc.org/r/5>, accessed on 25 November

65 Dolvic/Visser, p. 15.

66 Benidictus, p. 29.

67 http://www.businesseurope.eu/content/Default.asp?PageID=414.

rely on the UK to block any European social policy advances.[68] CEEP represents public and formerly public enterprises as public enterprises that were privatized remained members. Willingness of the CEEP to participate in the social dialogue is considered to be bigger than from BusinessEurope. In social dialogue negotiations CEEP and BusinessEurope coordinate their positions.[69] UEAPME is the employers' European umbrella organisation for crafts, trades and small and medium enterprises. 83 organisations from 36 states are members of UEAPME.[70] UEAPME is a late-comer to the social dialogue. In 1996, unhappy about its exclusion from the negotiation concerning parental leave and part-time work, it went to the Court of First Instance to gain access.[71] UEAPME asked the CFI to annul Directive 96/34/EC (Parental Leave Directive) because the Directive was the result of a negotiation between ETUC, UNICE and CEEP in which UEAPME was not involved. The CFI ruled that the representativeness of the involved actors was sufficient and declared the case inadmissible because UEAPME was not individually concerned. In 1998, the same year the CFI delivered its judgment, the UNICE and UEAPME signed an agreement on the UEAPME's participation in the social dialogue.[72] As a result, the UEAPME withdrew its complaint about the Part-Time Work Directive and its appeal concerning the Parental Leave Directive.[73]

In general the Council supports involvement of management and labour at a European level (see Compston, p. 98 ff.). Not one member state was against the social dialogue procedure at the time of its creation, except maybe the UK which did not sign the social protocol. The fact that there is only a very limited number of Directives based on the social dialogue is not due to the unwillingness of the Council but the social partners. In fact, the Council transformed the few agreements that the social partners asked them to transform into Directives without ado. The reasons given for the supportive stance taken by the Council in official documents are rather vague. They stress the need for dialogue between the social partners and that this dialogue is needed to bring about the single market. Compston (p. 106) points out that the concept of social partnership existed in most member states and that the political benefits created by the social dialogue for governments are high (easier implementation, content electorate) and the costs low (it is still the Council which adopts the Directives under the social dialogue procedure).

The most critical towards the social dialogue amongst the institutions is undoubtedly the EP. As it has no formal role in the social dialogue procedure this is understandable. During the negotiations leading up to the Amsterdam Treaty the EP unsuccessfully pushed for a formal role for itself in the social dialogue procedure (Obradovic, p. 91).[74] However, the position of the EP is not consistent over time. Obradovic (p. 93 f.) distinguishes three phases: the EP's support of the involvement of the social partners in the mid 1980s was followed by a phase in the early 1990s in which the EP was in favour of the social dialogue but at the same time

68 Branch and Greenwood, p. 41 f.

69 Benedictus, p. 30-31.

70 <http://www.ueapme.com>, accessed on 25 November 2008.

71 T-135/96 *UEAPME v Council*, [1998] ECR II-2335.

72 Benedictus, p. 31.

73 Branch/Greenwood, p. 64.

74 Some students of democracy could actually think that circumventing the EP in a legislative process would be a threat to the democratic legitimacy of the acts thus adopted. However, the ECJ knows better. In *UEAPME v Council* (T-135/96, [1998] ECR II-2335, para. 89) the ECJ argued that it is enough to ensure participation of the peoples in some other way, in this case by involving the social partners under the condition that heir representativeness is guaranteed.

demanded a formal role for itself, then, in the late 1990s, the EP started to openly criticise the social dialogue procedure.

The results of the social dialogue

The cross-industry social dialogue has so far led to the adoption of three Directives concerning parental leave[75], part-time employment[76] and fixed-term work[77] and two agreements concerning temporary workers and teleworking.

In 1996 the Council adopted a Directive regulating parental leave which was the result of an agreement between ETUC, UNICE and CEEP. This Directive grants minimum parental leave rights of three months to working parents on the grounds of birth or adoption of a child. The agreement is generally considered to be rather meager in substance as it only concerns unpaid leave, specification of most issues is left to the national level and most member states had stricter regulations in place already.[78] The significance of this first agreement is thus not its contents but that it was concluded at all. Although the procedure already existed for a number of years no results had been produced and the Commission apparently threatened to remove the procedure at the Amsterdam IGC.[79] With this agreement the social partners showed that they were actually able to reach agreements under the social dialogue procedure.

The second agreement concluded by ETUC, UNICE and CEEP concerns part-time employment and also took the form of Council Directive. In this agreement both unions and employers made considerable concessions. The unions agreed to identify and eliminate obstacles to part-time work (clause 5 (1)). Some unions even withdrew their support of the agreement because of these concessions. The employers, on the other hand, agreed to adhere to the principle of *pro rata temporis* (being in proportion to the length of time involved) (clause 4 (2)).[80] Branch and Greenwood (p. 59) contribute this successful negotiation again to the upcoming IGC. They argue that the social partners wanted to show their ability to use the social dialogue once again.[81]

As mentioned above, UEAMPE felt excluded from the negotiations of these first two agreements and took legal action. However, UEAMPE managed to conclude a cooperation agreement with UNICE in 1998 and is now involved in the social dialogue procedure.

The third agreement that was adopted as Council Directive concerned fixed-term work. Its content is similar to the agreement on part-time work (for example the principle of *pro rata temporis*) and lays down the principle of non-discrimination for fixed-term workers. Again, many issues concerning fixed-term work are to be decided on national level. Branch and Greenwood (57, 59, 62 f.) conclude for all three agreements that UNICE wanted to avoid legislation and/or Commission initiatives and thought negotiated agreements the lesser evil.

75 Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.

76 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time working concluded by UNICE, CEEP and the ETUC.

77 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

78 Dolvik, Visser 27-28. The agreement is also rather short consisting of only four clauses and a number of sub-clauses.

79 Benedictus, p. 36.

80 Benedictus, p. 36.

81 This agreement is again rather short and consists of roughly two pages containing six clauses with a number of sub-clauses.

Besides these three agreements which were adopted as Council Directives, the social partners negotiated in 2002 a legally non-binding agreement on teleworking which lays down the working conditions for these kinds of workers. An ad-hoc group will prepare a joint report on the implementation measures taken. In addition, the social partners issued a number of joint statements covering subjects such as the Community's strategy for more employment, mobility of workers, vocational training and the social dialogue itself.[82]

The sectoral dialogue

So far only the inter-sectoral social dialogue has been discussed. However, the same procedure can be utilised by sectoral interest groups. Three sectoral agreements were adopted as Council Directives.[83] Benedictus et al report that 'between 1978 and 2002, 230 results have been achieved in the sectoral social dialogue, against 40 in the inter-sectoral dialogue".[84] Only 20 of these were framework agreements, 210 were joint statements.[85] The leading sector was the telecommunication sector with 32 results by 2002.[86]

Cases in which the social dialogue failed

Several attempts for a social dialogue were made which can be described as failed. They concern – without any guarantee for completeness - the European Works Councils, the burden of proof in cases of sex discrimination, sexual harassment, consultation in national enterprises and the regulation of working time. Three of these attempts – namely the European Works Councils, the burden of proof and working time - will be described in short.[87]

The first attempt to conclude a social dialogue under the Social Protocol concerned Works Councils. Works Councils are meant to facilitate information and consultation of employees in their firms. However, the member states in the Council were divided concerning the necessity of regulating such councils at a European level – as were the representatives of the employers.[88] Moreover, while employers presented by UNICE preferred a non-binding recommendation, the employees presented by ETUC wanted a legally binding document. However, the Commission was very much in favour of regulating Works Councils at a European level and in 1990 had produced a proposal for a Directive. This pushed management to formulate its own position. If they could not prevent European level regulation at least they could try to make it non-binding. With the introduction of QMV and the exclusion of the UK by virtue of the social protocol and thus an increased chance that a binding Directive would be adopted in the Council, UNICE also became more willing to participate in formulating binding regulations on a European level (Falkner, p. 103). Finally, negotiations between the social partners were started. However, at the last minute UNICE withdrew as a reaction to the rejections

82 Benedictus, p. 32 ff.

83 Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST); Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA); Council Directive 2005/47/EC of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector.

84 Benedictus, p. 46.

85 Benedictus, p. 48.

86 Benedictus, p. 54.

87 In the cases of sexual harassment and consultation in national enterprises negotiations were rejected by UNICE (Falkner, p. 150).

88 Falkner, p. 98 f.

of the compromise text by the British employers' federation and the social dialogue ended before a decision was taken. Nevertheless, in 1994 a European Works Council Directive (Directive 94/45/EC) was adopted by the Council. Despite the fact that the social dialogue in the case of works councils failed, Falkner (p. 107 ff.) reports that the Commission's proposal took the points the social partners had already agreed upon into consideration.

The Burden of Proof Directive (Directive 97/80/EC) can be seen as another failed attempt to bring about legislation via the social dialogue. In 1995, the interest groups representing employees and employers gave their opinion on the proposed Directive. The Union of Industrial and Employers' Confederations of Europe (UNICE 1995) response to the Commission started with stating that the European employers support the elimination of sex discrimination and the effective application of Community law. They also agreed that plaintiffs could sometimes have difficulties verifying their allegations and that in certain cases "the burden of proof may need to be interpreted with more flexibility to allow proper investigation of the complaint". However, they did not think that the EU should act on this issue. They argued that there is no reason for such a step because the member states already have systems that modified the burden of proof and that the ECJ case law takes account of the difficulties of plaintiffs. Thus, the proposed Directive would have no added value. The European Association of Craft, Small and Medium-sized Enterprises (UEAPME) took the same point of view as UNICE: "It should not be up to the entrepreneur to prove that he hasn't discriminated on the basis of sex" an UEAPME official said (European Voice, vol. 2, no. 14, 04.04.1996). The European Trade Union Confederation (ETUC) on the other hand, supported a shift in the burden of proof to the employer (European Voice, vol. 2, no. 14, 04.04.1996). Negotiations between the social partners never started.

Another example is the amendment of the Working Time Directive (Council Directive 93/104/EC).[89] In 2003 the Commission had published a Communication on how to reform the Working Time Directive (COM (2003) 843). The Council of Ministers considered the Communication to be the first step in the consultation process of the social partners. Probably because the Communication of the Commission was not officially directed to the social partners at all, the Commission called upon the social partners to give their opinions on a new Directive which were published in a second consultation paper in May 2004 (SEC (2004) 610). Their opinions on a reform of the Directive were very different. The ETUC was in favour of stopping the practice of opt-outs and against making a twelve-month reference period the norm. Moreover, ETUC was against the introduction of the concept 'inactive part of on-call time' into the Directive (SEC (2004) 610, p. 3). In contrast, the other two social partners that would have been part of the social dialogue procedure, UNICE and the European Centre of Enterprises with Public Participation and of Enterprises of General Public Interest (CEEP), were in favour of the opt-out provision, of the twelve months reference period and of defining inactive on-call time as distinct from working time (SEC (2004) 610, p.3-4). The division between employee and employer associations on the reform of the Directive is not restricted to these three organizations. Basically all European employee's associations that gave their opinion had a similar point of view than ETUC (for example The European Transport Workers' Federation and The European Federation of Public Service Unions), and all employer's associations

89 Nowak (2008), The Working Time Directive and the European Court of Justice, in Maastricht Journal of European and Comparative Law, vol. 15, no. 4, pp. 447-471.

agreed with UNICE (for example Comité Européen des Fabricants de Sucre and Hotels, Restaurants and Cafés in Europe) (SEC (2004) 610, p. 5-7). At the end of the consultation paper the Commission invited the social partners to start negotiations on a new Directive. However, the social partners could not agree to start negotiations. The highly incompatible positions of the employee and employer associations seem to have been the main reason for them to not open a social dialogue on the reform of the Working Time Directive. A comprise on the main issues would have been difficult. Moreover, not initiating a social dialogue could therefore be a sign that at least one of the social partners thought that the normal legislative process would lead to a result close to its own position. In the case of the Working Time Directive the odds were in favour of the employers as most member states as well as the Commission signalled that they were in line with UNICE's position. Thus, the employers' side understandably preferred the high chance of getting its position through via the normal legislative procedure above having to enter into negotiations with the employees' side.

Conclusions

Although a number of legal acts resulted from the social dialogue, it is not the success story it is often sold as by the Commission and the social partners. Why does the social dialogue lead such a rather marginal existence next to classical law making procedures? One explanation is the low level of organisation of some industries at a European level and/or disagreement in a sector on how to regulate the sector. In addition, the party which expects a better outcome from classical law making procedures, for example because it has better access to the Commission or it knows important EU institutions share its opinion, has no incentive to agree to open a social dialogue which is after all characterised by compromise.

3.4 A prime example of self-regulation?: The advertisement industry

An example often referred to by the Commission and other actors as representing some kind of exemplary form self-regulation is found in the advertisement industry. In 2004 the advertisement industry represented by the European Advertising Standards Alliance (EASA, not to be confused with the European Aviation Safety Agency which uses the same acronym) concluded the Advertising Self-Regulation Charter (http://www.easa-alliance.org/page.aspx/237). Together with the Statement of Common Principles and Operating Standards of Best Practice (2002) and the Best Practice Self-Regulatory Model (2004) this document is meant to ensure 'that advertising is legal, decent, honest and truthful' (briefing of the EASA, June 2008, http://www.easa-alliance.org/Search/page.aspx/18?sRequest=briefing briefing June 2008, p. 2). The fact that self-regulation of the advertisement industry is often mentioned as a good example of self-regulation on a European level makes it necessary to take a closer look at what the EASA is, what the self-regulation charter contains and whether it is indeed a purer form of self-regulation than the ones described in the previous case studies.

The actors involved

The EASA consists of national self-regulatory organisations and organizations representing the advertisement industry and is based in Brussels. With the establishment of the EASA in 1992 the advertisement industry wanted to prevent the Commission from issuing detailed legislation concerning advertisement. This was a direct reaction to a request by the Commissioner for Competition, Leon Brittan. The EASA's declared aim is 'to promote legal, decent, honest and truthful advertising rules.' The EASA tries to achieve this by coordinating moni-

toring processes, the handling of cross-border complaints and providing best practice recommendations. At the same time, the EASA wants to provide 'detailed guidance on how to go about advertising self-regulation across the Single Market for the benefit of consumers and businesses'. Today the EASA consists of 33 national Self Regulatory Organisations (SROs)[90] and 16 advertising industry members (advertisers, agencies, media). The EASA is funded by membership fees and monitoring exercises, special projects and the sale of publications.

The most important interlocutor for the EASA on a European level is the European Commission, more specifically the Directorate General (DG) for Health and Consumers. Not only was it the Commission threatening to regulate the advertisement sector that lead to the establishment of the EASA but also the reports of the EASA are at least implicitly addressed to the Commission. In addition, the EASA does not become tired to stress how satisfied the Commission is with the work of the EASA.[91] The Commission itself mentions the advertisement industry's approach to self-regulation as a good example of an efficient self-regulatory system which becomes clear from a report following three discussion meetings between Commission officials, the EASA and other interested NGOs held in 2005 and 2006 (DG SANCO 2006).

The advertising self-regulation at European level

The overarching self-regulation document is the Advertising Self-Regulation Charter in which the EASA stresses its commitments to self-regulation as a 'the best way to maximise confidence in responsible advertisements – for consumers, competitors and society'. To enhance this confidence the charter suggests that common principles and standards of best practice should be applied throughout Europe. However, at the same time the charter recognises that self-regulation needs to be backed by legislation in order to be effective and vice versa.

The Charter lays down ten principles that should apply to all national self-regulatory systems. Such a system should cover all forms of advertising, be adequately funded by the advertising industry, have a code of practices that has been drafted after consulting interested parties, have 'due consideration of the involvement of independent, non-governmental lay persons in the complaint adjudication process' (point 5), have an independent and impartial self-regulatory body which administers the code and handles complaints, handle complaints promptly, efficiently and free of charge for the consumer, provide training and advice to practitioners, contain effective sanctions and enforcement mechanisms[92] and spread awareness amongst consumers and industry for the self-regulatory system itself. The EASA regularly publishes reports on how the national SRO's live up to these standards. Two relevant documents of the EASA preceded the Charter: the EASA Best Practice Self-Regulatory Model from 2004 which contains the same principles as the Charter but presents them more comprehensively and the Statement of Common Principles and Operating Standards of Best Practice from 2002 lists similar principles but also contains some principles that cannot be found in the

90 SROs handle complaints, normally give copy advice (an ad is submitted voluntarily before publication or airing to the national SRO for evaluation), monitor ads to check that they comply with the code and in some countries they give pre-clearance (in a few countries where submitting an ad before publication to the national SRO is obligatory, for example, Ireland and the Netherlands (radio, TV) in case of alcohol commercials). In the Netherlands this SRO is called Stichting Reclame Code. Not all states that are member of the EU also have such SROs and some have more than one. Thus, not all member states of the EU are represented in the EASA. However, the home country of an SRO does not have to be a member of the EU in order for it to join the EASA (Switzerland, Turkey) nor does it have to be in Europe (Australia, Brazil, Canada, Chile, India, New Zealand, South Africa).

91 For example, on the website of the EASA we can read that in 1998 Commissioner Brittan acknowledged that the work of the EASA "had reduced the perceived need for legislative intervention".

92 These sanction and enforcement mechanisms can include, for example, naming and shaming, non-publication and pre-clearance.

other two documents, like the duty for member SRO's to cooperate or that the constitution and membership of all SRO's should be published. In addition, reference is made to the International Chamber of Commerce's Code of Marketing and Advertising Practice.[93] The main guidelines for the advertisement industry contained in this code are: be fair, decent, honest, truthful, responsible, distinguishable (from, for example the editorial part of a magazine), protect children and respect privacy.

Thus, the EASA functions as a link between national SRO's and the European Commission. With its Charter and the two accompanying documents the EASA gives guidelines what a good national self-regulatory system should look like and with its reports it tries to convince the Commission that the national SRO's are doing a good job and that therefore no legislation is needed. Moreover, it manages cross-border complaints by putting complainants into contact with the relevant SRO in another state if necessary.[94]

In addition to the Advertising Self-Regulation Charter, the Best Practice Self-Regulatory Model and the Statement of Common Principles and Operating Standards of Best Practice published by the EASA, different sectoral organisations have published guidelines and standards for their members on a European level.[95] In case of the alcohol industry the EASA provided a platform for information exchange on the implementation of these guidelines.

Regulating the advertisement industry by law

Despite the fact that self-regulation in the advertisement sector is rather well developed and used as an example of good practice by the Commission, many issues concerning the advertisement industry have been regulated by Community law as well as national law. The following part introduces some of the Directives regulating advertisement. Only a few have to be listed here in order to show that the often praised self-regulatory system of the advertisement industry is restricted by an increasing number of Directives. This overview also shows that the shadow of the law is very real.

The Audiovisual Media Service Directive (2007/65/EG) concerns television and online broadcast and explicitly emphasises in Article 3.3 the opportunity to implement the Directive by national self-regulation (see for example Prosser for a Discussion of this Directive). And the Directive concerning unfair business-to-consumer commercial practices in the internal market deals among other things with misleading and aggressive marketing (2005/29/EC). The CO2 Labelling Directive for Cars (1999/94/EC), the Energy Labelling Directive (92/75/EC) and the Nutrition Labelling Directive (2008/100/EC) and the Tobacco Labelling Directive (2001/37/EG) and the Advertisement and sponsorship of tobacco products Directive (2003/33/EG) all prescribe a certain kind of labelling for advertisements or packaging of certain products.

In addition, the member states have different national laws regulating the advertisement industry. France and Portugal, for example, have laws that prescribe the use of the French and Portuguese language respectively. Sweden has an alcohol act that contains, for example, the

93 For the newest version of this code see http://www.iccwbo.org/policy/marketing/id8532/index.html.

94 For this purpose the EASA provides an online complaint form (http://www.easa-alliance.org/page.aspx/105).

95 Examples are the Common Standards for Commercial Communications from the European Forum for Responsible Drinking (EFRD) and the almost identical Guidelines for Commercial Communications for Beer from The Brewers of Europe.

rule that alcoholic strength must always be specified in commercial communication. Some national laws demand the pre-clearance of advertisement for certain products and certain media and some states limit commercials addressed to children.[96]

Conclusions
The advertisement industry established a coordinating organisation on a European level only after being confronted with the threat of traditional legislation by the Commission. This organisation plays a coordinating role bringing the national SRO's together or consumers in touch with the relevant national SRO. It also represents the advertisement industry towards the Commission and keeps the Commission satisfied with its reports on self-regulation based on its code of conduct. Its declared goal after all is to advertise self-regulation. Nevertheless, a lot of issues concerning advertisement have been regulated by law on a European level as well as on a national level. Thus, self-regulation in the advertisement sector is limited by these laws.

4 Conclusions

Officially the EU embraced the concept of self-regulation in order to address some of the perceived deficits of EU decision making. These are the ever reoccurring problems of legitimacy, transparency and efficiency. The climate for a new approach was good because political actors as well as the scientific community at that time embraced concepts such as deregulation and decentralisation in general. Moreover, the Commission, which could gain influence by sidestepping the other institutions, actively supported self- and co-regulation.

The expected advantages, like reduced decision costs, higher compliance and better participation, were used as arguments by the proponents to advertise self- and co-regulation. Most of the arguments used, enjoy only little empirical support. However, the same holds true for the expected disadvantages, such as lower compliance, lack of legitimacy and legal certainty, brought forward by critics of self- and co-regulation. These critics can be found in the EP, which has the most to loose from alternative forms of decision-making of all the EU Institutions, and parts of civil society who worry about the formulation phase (participation) as well as the monitoring phase (free rider problem, low compliance) of self-regulatory acts.

To address these points of critique, self- and co-regulation became subject of regulation through means of the IAA which mainly lays down the role played by the Commission in processes defined as self- and co-regulation. However, the quantitative overview made clear that self-and co-regulation play only a minor role in the overall legislative output of the EC. It seems thus that self-regulation does not offer an attractive new institutional opportunity for economic and social actors to influence European decision-making. Instead private actors remain sceptical towards this form of regulation. Voluntary agreements are not necessarily more effective as strategic options for private actors to attain their goals than active interest representation in traditional legislative processes.

96 For example, in Greece advertisement for toys on television is prohibited from 07:00 to 22:00 hours, in Sweden, television advertising addressed to children under the age of 12 is prohibited and in the UK no advertisement of products that are high in fat, salt or sugar.

What then is the result of this regulatory mechanism? Has it blurred further the distinction between public and private sector by transferring rule-making powers to private interest associations? The three case studies show that the line drawn between classical law making by public authorities and self-regulation by private actors is much thinner than is often suggested in official documents and academic literature. In the lawyers case we saw a strong involvement of a private interest group in the formulation phase of a traditional legislative process, resembling in many ways the characteristics of a self-regulatory system. In the case of the social dialogue, self-regulation is based on an institutionalized delegation of public rule-making powers to European associations representing employers and unions. The case of the advertisement industry seems to come closest to the standard definition of self-regulation, as it is initiated by and based on a voluntary agreement of private economic actors. Nevertheless, also here a strong legislative framework exists. Private actor participation in EU policy making remains to be linked to the hierarchical control and command chain, even when it takes the form of voluntary agreements.

Annex

Table 1 : Initiatives of Self-regulation and Co-regulation per year (includes cases that have become obsolete)

Period 1990-2008	1990	91	92	93	94	95	96	97	98	99	2000	2001	2002	2003	2004	2005	2006	2007	2008	
Policy Sectors																				
Agriculture			1																	1
Employment, Social Affairs								1			4	1	1	3		1				11
Energy, Transport								3		3			3	2		2				13
Enterprise and Industry	2						1		1	1		3	1	1	4	2		1		17
Environment									1	2	2			1	1					7
Fisheries and Maritime Affairs										1										1
Health and Consumer Protection												2	2	1	1	3	1			10
Information Society and Media									1			1		2	1		2			7
Internal Market and Services		1	1			1			1		2	3	4	4	6	4	4	2		33
Research											1					2				3
Public Administration																1	1			2
Total	**2**	**1**	**2**	**0**	**0**	**1**	**1**	**4**	**4**	**7**	**9**	**11**	**11**	**14**	**13**	**14**	**8**	**3**		**105**

Table 2a: Self-Regulation

	1990	91	92	93	94	95	96	97	98	99	2000	2001	2002	2003	2004	2005	2006	2007	2008	
Policy Sectors																				
Agriculture																				
Employment, Social Affairs																				
Energy, Transport								3		3			2	1		1				10
Enterprise and Industry							1			1			1	1	4	1		1		10
Environment										1	1									2
Fisheries and Maritime Affairs																				
Health and Consumer Protection												1	2	1	1	1	1			7
Information Society and Media														1	1		2			4
Internal Market and Services		1	1			1			1		2	3	4	3	4	3	4	1		28
Research											1									1
Public Administration																1	1			2
Total	**0**	**1**	**1**	**0**	**0**	**1**	**1**	**3**	**1**	**5**	**4**	**4**	**9**	**7**	**10**	**7**	**8**	**2**		**64**

Table 2b: Co-Regulation

	1990	91	92	93	94	95	96	97	98	99	2000	2001	2002	2003	2004	2005	2006	2007	2008	
Policy Sectors																				
Agriculture			1																	1
Employment, Social Affairs								1			3	2	1	2	1	1				11
Energy, Transport													1	1		1				3
Enterprise and Industry	2								1			3				1				7
Environment									1	1	1			1	1					5
Fisheries and Maritime Affairs										1										1
Health and Consumer Protection												1				2				3
Information Society and Media									1			1		1						3
Internal Market and Services														1	2	1		1		5
Research																2				2
Public Administration																				
Total	**2**	**0**	**1**	**0**	**0**	**0**	**0**	**1**	**3**	**2**	**4**	**7**	**2**	**6**	**4**	**8**	**0**	**1**		**41**

Table 3: Co-Regulation: type of instrument

	Co-Reg	**Type of Legal Act**		**Private Regulator**					**No Private Regulator**
Policy Sectors	cases	Legislative act	Soft Law	charter	code	guidelines	best practice	other	
Agriculture	1	1							1
* Employment, Social Affairs	11	11		2	6	1		2	
Energy, Transport	3	3				3			
Enterprise and Industry	7	4	3					3	4
Environment	5	5						2	3
Fisheries and Maritime Affairs	1	1							1
Health and Consumer Protection	3	3							3
Information Society and Media	3	2	1		3				
Internal Market and Services	5	2	3		1				4
Research	2		2						2
Public Administration									
Total	**41**	**32**	**9**	**2**	**10**	**4**		**7**	**18**

* Social Dialogue procedure, Treaty articles 138, 139

Table 4: Self-Regulation: variety of forms

		Forms of SR					
Policy Sectors	Number of cases	charter	code of conduct	guidelines	best practices	voluntary agreements	others
Agriculture							
Emloyment, Social Affairs							
Energy, Transport	10		1	2	1	5	1
Enterprise and Industry	10	1	4	1		4	
Environment	2					2	
Fisheries and Maritime Affairs							
Health and Consumer Protection	7	3	1	2		1	
Information Society and Media	4		3	1			
Internal Market and Services	28		17	3	1	4	3
Research	1		1				
Public Administration	2		2				
Total	**64**	**4**	**29**	**9**	**2**	**16**	**4**