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Self- and co-regulation in the EU – three case studies

1. Self-regulation in practice: three case-studies

(a) 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 Lawyers' 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.

(b) Self-regulation as part of the legislative process: the making of the Lawyers' 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 Lawyers' Establishment Directive [i] 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 Lawyers' Establishment Directive will enhance our understanding of the legislative processes in the EU and put the concept of self-regulation into perspective.[ii]

(i) 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.[iii] 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.[iv] 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.[v] However, the decision making process stalled and it was not before 1988 that the CCBE again seriously discussed proposals for an establishment Directive.[vi]

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.[vii] In 1991 a new draft was put to vote and received eight out of twelve votes.[viii] 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.[ix]

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.

(ii) 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.[x] 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.[xi] 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 mind after voting in favour of the CCBE draft.[xii] The Commission then adjusted the proposal in accordance with the French wishes.[xiii]

(iii) 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.[xiv]

(iv) The amended proposal

The European Commission adopted an amended proposal of the Lawyers' Establishment Directive in September 1996.[xv] 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.[xvi] 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.[xvii] 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.[xviii] 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.[xix] This common position was approved by the Commission and the EP.[xx] 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 Luxembourg.[xxi] The Lawyers' Establishment Directive[xxii] was signed by the European Parliament and the Council of Ministers on 16 February 1998.

(v) 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 (as there was no threat) 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.

(c) 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."[xxiii] Since the Single European Act provisions on the social dialogue can be found in the Treaty.[xxiv] 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. The Social Dialogue can take place across industries or be restricted to a specific sector. We will concentrate on the cross-industry dialogue but will refer to the sectoral social dialogue to illustrate certain points more clearly.[xxv]

(i) 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.[xxvi] The Commission considers the social dialogue as a "key to better governance".[xxvii] 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.[xxviii] 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 argues that the Commission profits from this procedure because it makes it possible to outmanoeuvre the Council of Ministers.[xxix]

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.[xxx] This heterogeneity makes internal decision-making difficult.[xxxi] 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.[xxxii] 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.[xxxiii] 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 rely on the UK to block any European social policy advances.[xxxiv] 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.[xxxv] UEAPME is the employers' European umbrella organisation for crafts, trades and small and medium enterprises. 83 organisations from 36 states are members of UEAPME.[xxxvi] 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.[xxxvii] 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.[xxxviii] As a result, the UEAPME withdrew its complaint about the Part-Time Work Directive and its appeal concerning the Parental Leave Directive.[xxxix]

In general the Council supports involvement of management and labour at a European level.[xl] 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 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).[xli]

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.[xlii] However, the position of the EP is not consistent over time. Obradovic[xliii] 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 demanded a formal role for itself, then, in the late 1990s, the EP started to openly criticise the social dialogue procedure.

(ii) The results of the social dialogue

The cross-industry social dialogue has so far led to the adoption of three Directives concerning parental leave,[xliv] part-time employment[xlv] and fixed-term work[xlvi] 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 meagre 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.[xlvii] 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.[xlviii] 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)).[xlix] Branch and Greenwood contribute this successful negotiation again to the

upcoming IGC.[l] They argue that the social partners wanted to show their ability to use the social dialogue once again.[li]

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 conclude for all three agreements that UNICE wanted to avoid legislation and/or Commission initiatives and thought negotiated agreements the lesser evil.[lii]

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.[liii]

(iii) 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.[liv] 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".[lv] Only 20 of these were framework agreements, 210 were joint statements.[lvi] The leading sector was the telecommunication sector with 32 results by 2002.[lvii]

(iv) 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.[lviii]

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.[lix] 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.[lx] Finally, negotiations between the social partners were started. However, at the last minute UNICE withdrew as a reaction to the rejections 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 reports that the Commission's proposal took the points the social partners had already agreed upon into consideration.[lxi]

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 response to the Commission started with stating that the European employers support the elimination of sex discrimination and the effective application of Community law.[lxii] 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).[lxiii] 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 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.

(v) 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.

(d) 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.[lxiv] 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'.[lxv] 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.

(i) 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 monitoring 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)[lxvi] 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.[lxvii] 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.[lxviii]

(ii) 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[lxix] 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 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.[lxx] 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.[lxxi]

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.[lxxii] In case of the alcohol industry the EASA provided a platform for information exchange on the implementation of these guidelines.

(iii) 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 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.[lxxiii]

(iv) 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 SROs 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.

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[i] 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, OJ L 77, 14.3.1998, 36–43.

[ii] For a more elaborate description of the legislative process concerning the Lawyers' Establishment Directive see T Nowak and N Zeegers, **"**Rules for Professional Legal Services: The Same Authors Acting in a Different Arena?", in *Professions under Pressure. Lawyers and Doctors between Profit and Public Interest*, N E H M Zeegers and H E Bröring (eds) (The Hague, Boom Juridische Uitgevers, 2008), 47-62.

[iii] J Mogg, 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, (London, House of Lords, 1995), 60.

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

[v] See L S Spedding, *Transnational Legal Practice in the EEC and the United States* (Dobbs Ferry, NY, Transnational Publishers, 1987), 163

[vi] CCBE 2005, *The History of the CCBE*, available at the CCBE, 28.

[vii] CCBE 2005, 29-30; J Toulmin, "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, 72.

[viii] France, Luxembourg and Spain voted against the draft, while Greece abstained (CCBE 2005, 31).

[ix] Toulmin, supra, n 58, 73, CCBE, supra, n 57, 31.

[x] COM (1994) 572.

[xi] 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.

[xii] This new position of the French delegation was apparently connected to changes in French law (CCBE 2005, 32). New provisions on professions took effect in 1991 and 1992 (H Adamson, *Free Movement of Lawyers*, (Londen/Dublin/Edinburgh, Butterworths, 1998), 16; R J Goebel, Lawyers in the European Community: Progress Towards Community-wide rights of practice, (1991/92), *Fordham International Law Journal*, 15, pp. 563.

[xiii] CCBE, (2005), 32.
[xiv] OJ C 198, 08.07.1996, 68-85.
[xv] Commission of the European Communities, Amended proposal for a European parliament and council directive 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, COM (1996) 446 final, 24 September 1996.
[xvi] Commission of the European Communities, Amended proposal for a European parliament and council directive 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, COM (1996) 446 final, 24 September 1996; CCBE 2005, 32; J Lonbay, "Legislative Comment. Lawyers Bounding over the Borders: The Draft Directive on Lawyer's Establishment" (1996) 21 European Law Review, 50-58.
[xvii] Interview with Commission official.
[xviii] OJ C 297, 29.09.97, p. 6.
[xix] See Council Minutes of 2007th Council meeting and of 2026th Council meeting.
[xx] SEC/1997/1206/final and A4-0337/1997.
[xxi] Council Minutes of 2060th Council meeting.
[xxii] 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).
[xxiii] Report from the Commission on European Governance 2003, 15.
[xxiv] 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), H Benedictus ea, *The European Social Dialogue. Development, Sectoral Variation and Prospects* (The Hague, Ministry of Social Affairs and Employment, 2003), 19 ff.
[xxv] Besides these Commission-initiated and Council-implemented collective agreements, three other forms of the social dialogue can be distinguished: (1) Commission-initiated but self-implemented collective agreements; (2) self-initiated and self-implemented collective agreements; and (3) self-initiated but Council-implemented collective agreements, see S Smismans, "The European Social Dialogue in the Shadow of Hierachy" (2008) 28 Journal of Public Policy, 161-180. However, all early agreements under the social dialogue were Commission-initiated and Council-implemented collective agreements and the focus of this case study will be on them.
[xxvi] Benedictus ea, *The European Social Dialogue. Development, Sectoral Variation and Prospects*, supra, n 75, 31-32.
[xxvii] http://europa.eu/legislation_summaries/employment_and_social_policy/social _dialogue/c10716_en.htm (last accessed on 24.01.2011).
[xxviii] J E Dølvik and J Visser, "A Third Turning Point: ETUC and Social Partnership", in *Social Partnership in the European Union*, H Compston J and Greenwood (eds), (London, Palgrave, 2001) 19.
[xxix] D Obradovic, "The Impact of the Social Dialogue Procedure on the Powers of European Union Institutions", in Hugh Compston and Justin Greenwood (eds), *Social Partnership in the European Union*, (Houndmills, Palgrave MacMillan, 2001) 89-90.
[xxx] http://www.etuc.org/r/5 (accessed on 24.01.2011).
[xxxi] Dølvik and Visser, "A Third Turning Point: ETUC and Social Partnership", supra, n 79, 15.
[xxxii] Benedictus ea, *The European Social Dialogue. Development, Sectoral Variation and Prospects*, supra, n 75, 29.
[xxxiii] http://www.businesseurope.eu/content/Default.asp?PageID=414(last accessed on 24.01.2011).
[xxxiv] A Branch and J Greenwood, "European Employers: Social Partners?", in *Social Partnership in the European Union*, H Compston and J Greenwood (eds) (Houndmills, Palgrave MacMillan, 2001), 41-43.
[xxxv] Benedictus ea, *The European Social Dialogue. Development, Sectoral Variation and Prospects*, supra, n 75, 30-31.
[xxxvi] http://www.ueapme.com (last accessed on 25.01.2011).
[xxxvii] T-135/96 *UEAPME v Council*, [1998] ECR II-2335.
[xxxviii] Benedictus ea, *The European Social Dialogue. Development, Sectoral Variation and Prospects*, supra, n 75, 31.
[xxxix] Branch and Greenwood, "European Employers: Social Partners?", supra, n 85, 64.
[xl] See H Compston, "The Intergovernmental Dimension of EU Social Partnership", in *Social Partnership in the European Union*, supra, n 85, 98.
[xli] Ibid, 106.
[xlii] D Obradovic, "The Impact of the Social Dialogue Procedure on the Powers of European Union Institutions", in ibid, 91. 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.
[xliii] Obradovic, "The Impact of the Social Dialogue Procedure on the Powers of European Union Institutions", supra, n 91, 92
[xliv] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.
[xlv] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time working concluded by UNICE, CEEP and the ETUC.
[xlvi] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.
[xlvii] Dølvik and Visser, "A Third Turning Point: ETUC and Social Partnership", supra, n 79, 27-28. The agreement is also rather short consisting of only four clauses and a number of sub-clauses.
[xlviii] Benedictus ea, *The European Social Dialogue. Development, Sectoral Variation and Prospects*, supra, n 75, 36.
[xlix] Ibid.
[l] A Branch and J Greenwood, "European Employers: Social Partners?", in supra, n 85, 59.
[li] This agreement is again rather short and consists of roughly two pages containing six clauses with a number of sub-clauses.
[lii] Branch and Greenwood, supra 85, 57-63.

[liii] Benedictus ea, *The European Social Dialogue. Development, Sectoral Variation and Prospects*, supra, n 75, 32 ff.

[liv] 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.

[lv] Benedictus ea, *The European Social Dialogue. Development, Sectoral Variation and Prospects*, supra, n 75, 46.

[lvi] Ibid, 48.

[lvii] Ibid, 54.

[lviii] In the cases of sexual harassment and consultation in national enterprises negotiations were rejected by UNICE, see Falkner, EU Social Policy. Towards a Corporatist Policy Community, supra, n 11, 150.

[lix] Falkner, *EU Social Policy. Towards a Corporatist Policy Community*, supra, n 11, 98-99.

[lx] Ibid, 103.

[lxi] Ibid, 107-109.

[lxii] UNICE, Burden of Proof in Sex Discrimination Cases. UNICE Response to First Commission Consultation. 29.09.1995.

[lxiii] T Nowak, "The Working Time Directive and the European Court of Justice" (2008) 15 Maastricht Journal of European and Comparative Law, 447-471.

[lxiv] http://www.easa-alliance.org/page.aspx/237 (last accessed on 13.09.2010).

[lxv] Briefing of the EASA, June 2008, http://www.easa-alliance.org/ Search/ page.aspx/18?sRequest=briefing, 2 (last accessed on 13 September 2010).

[lxvi] 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).

[lxvii] 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".

[lxviii] Directorate-General Health and Consumer Protection, *Self-Regulation in the EU Advertising Sector: A Report of Some Discussion among Interested parties*, July 2006. Available under http://ec.europa.eu/dgs/health_consumer/self_regulation/docs/report_advertising_en.pdf, last accessed on 24.01.2011.

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

[lxx] For the newest version of this code see http://www.iccwbo.org/policy/marketing/id8532/index.html last accessed on 24.01.2011.

[lxxi] For this purpose the EASA provides an online complaint form, http://www.easa-alliance.org/page.aspx/105 (last accessed on 13 September 2010).

[lxxii] 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.

[lxxiii] 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 (see http://www.easa-alliance.org/page.aspx/96 last accessed on 24.01.2011) and in the UK no advertisement of products that are high in fat, salt or sugar is allowed "in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 16" (UK Broadcasting Advertising Code paragraph 35.5).