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The rise and fall of private self-regulation as a new mode of governance in the European Union

Introduction

In the mid 90's the European Commission started to advocate self-regulation by private economic and social actors as an important new method of governance to improve the achievement of the objectives of the Treaties, in particular with regard to internal market policies (European Commission 2001). Self-regulation was presented by the Commission as a promising alternative to the classical EU law-making process which had become under increasing criticism for its shortcomings on democratic legitimacy and effectiveness. 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 kind of private self-regulation takes place outside the legislative process, with no or only a marginal role of public authorities. Self-regulation may also be a part of a broader public-private arrangement, in which public authorities (the legislator) lay down the objectives to be achieved in a legislative act (e.g. a framework directive) and leave the attainment of these objectives to the private actors concerned. This form of governance, which is known as co-regulation, includes public monitoring of private actors performance. Self-regulation as part of this arrangement is not something separate but remains embedded in a formal hierarchical decision-making structure.

In this paper we want to shed some light on the emergence of self-regulation as a new mode of governance in the EU and the way it has developed in practice. After looking at the reasons of the Commission and other EU institutions to promote self-regulation at the European level (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 of the EU (1.3). We finish this section with a quantitative overview of the actual use of self-regulation in the EU. (1.4)

1.1 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 came to the surface.

First of all, European policy competences had expanded tremendously, 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 ran 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 became widely considered as essentially problematic. The Institutions did not always effectively use their law-making competence, which often resulted in stagnation of the law-making process. This was not only due to the enhanced role and influence of the European Parliament as a co-legislator, but also because of the large number of cases in which the Council took decisions by unanimity. Additionally, the

tendency of the Institutions which were involved in the law-making process to rule on details was an important factor in this.
Third, problems with quantity and quality 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 lacked consistency, clarity, accessibility and comprehensibility, due to the complexity of the law-making process.[1]
To summarize the aforementioned problems, it can be said that the traditional law-making process became associated with two fundamental concerns of European policy-making: lack of efficiency and lack of legitimacy.
The legitimacy crisis, which broke out in the 1990's during the ratification period of the Maastricht Treaty, constituted a catalyst for the European Commission to start its 'better governance program' which included a proposal for 'a new legislative policy'. This new legislative 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"[2]. 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.[3]

With regard to new modes of governance the Commission emphasized the importance of the use of self-regulation as an alternative to the classical community method of legislation.[4] Self-regulation based on private interests and voluntary agreements of social and economic actors became to be viewed as a governance technique which could contribute greatly to enhance the efficiency, legitimacy and competitiveness of the European internal market.[5] The Commission's proposal to make more use of self-regulation was endorsed by the member states in a protocol attached to the Treaty of

[1] L A J Senden, "Alternatieve normering in de EU", in Vormen van (de?)regulering, A R Mackor, P C Westerman (eds) (The Hague, Boom Juridische Uitgeverij, 2008), 127-130.

[2] L A J Senden, "Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?" (2005) vol 9 no 1 Electronic Journal of Comparative Law, 5-9.
[3] 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.
[4] De Búrca and Scott write in G de Búrca and J Scott, "Narrowing the Gap? Law and New Approaches to Governance in the European Union" 2007 13 Columbia Journal of European Law, 513-517 about new governance: "The term new does not necessarily entail a claim for originality or temporality, but is used to refer to the increasingly widespread, deliberate and explicit use of such forms of governance [processes and practices that have a norm-setting or regulatory dimension but do not operate primarily or at all through the conventional mechanisms of command-and-control type institutions] in place of more traditional legal and regulatory techniques" (514). Self-and co-regulation is normally seen as such a tool of new governance even if the claim that it is widespread can be questioned (see section 1.4). For a more comprehensive discussion on the new modes of governance – dealing with topics such as soft law, co- and self-regulation or the Open Method of Coordination - see for example the special issues of the European Law Journal (vol 8, no 1, 2002), the Columbia Journal of European Law (vol 13, 2007) or part I of volume 28 of the Journal of Public Policy (2008).
[5] A systematic overview of the perceived pros and cons of self-regulation, including the Commission's view is presented under section 1.2.

Amsterdam (1997), and later on it became part of the Lisbon strategy for growth and jobs adopted by the European Council in 2000.[6]

To understand the rise and the encouragement, in particular by the Commission, of self-regulation, we have to look at some general and some more specific contextual conditions which surrounded its promotion in the 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 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.[7]

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.[8] 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

[6] 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.
[7] M Egan, "The Singe Market", in European Union Politics, M Cini (ed) (Oxford University Press, 2007); Hix, The Political System of the European Union, supra, n 2, 240; G Majone, "Regulation and its modes" in Regulating Europe, G Majone (ed) (London, Routledge, 1996), 9-27.
[8] Hix, The Political System of the European Union, supra, n 2, 255-260; G Falkner, EU Social Policy. Towards a Corporatist Policy Community (London and New York, Routledge, 1998); 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.

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.[9]
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.[10]
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.[11]

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

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[9] Peters and Wright 1996 B G Peters and V Wright (1996), "Public Policy and Administration, Old and New", in A New Handbook of Political Science, R E Goodin and H Klingemann (eds) (Oxford University Press, 1996), 628-641.

[10] Alliance for a Competitive European Industry (2004), Position Paper 4 November 2004, Brussels.
[11] D Wincott, "The White Paper, the Commission and the 'Future of Europe'", EUSA Review (2001) vol 14, nr 4, 1-3; B Eberlein and D Kerwer (2002) "Theorising the New Modes of European Union Governance", European Integration on-line Papers (EIoP), vol.6, no 5, <http://eiop.or.at/eiop/texte/2002-005a.htm> (last accessed on 13 September 2010).

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.

1.2 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.[12]

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".[13] 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)[14]. Third, private accords do not satisfyingly guarantee legal certainty. Fourth, private accords lack accountability.[15]

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

[12] A Héritier (2001), "New Modes of Governance", in Europe: Policy-Making without Legislation? Preprints aus der Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter 2001/14 (Bonn, available via <ssrn.com>), 11, 16; Majone, "Regulation and its modes", supra, n 10, 23-25.

[13] T Prosser, "Self-regulation, Co-regulation and the Audio-Visual Media Services Directive", *Journal of Consumer Policy*, (2008) 31, 99-113.

[14] **Verwijzen naar case-studies paper Nowak/van den Hoogen, social dialogue case**

[15] Héritier, "New Modes of Governance", supra, n 15, 14-15; Majone, "Regulation and its modes", supra, n 10, 26.

project on better governance. One goal of this project is 'participation' which the Commission considers will contribute to the effectiveness of EU governance.[16] 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.[17] 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".[18]

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 issue.[19] 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.[20] 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.[21] In its report on better law making the EP doubts "the appropriateness of encouraging self- and co-regulation"[22] 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.[23]

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

[16] Commission of the European Communities, European Governance: A White Paper, COM (2001) 428 final, 25 July 2001, 7.
[17] Ibid, 16.
[18] Ibid, 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, 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.
[19] 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).
[20] § L of motion contained in EP Report on 'soft law' instruments.
[21] § Za (2) of motion contained in EP Report on 'soft law' instruments.
[22] § 14 of motion contained in EP report on better law making.
[23] § 14 of motion contained in EP report on better law making.

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.[24] 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.[25] 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."[26] 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.[27] Thus, support of self-regulation in general is accompanied by critical undertones 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-

[24] ESC 2004: Summary of the hearing on the current state of co-regulation and self-regulation in the single market, 1.
[25] See for example the contributions of Verver, 3, Portalier, 7, Giovaninni, 8 in ESC 2004.
[26] ESC 2001 Conference on "The role of civil society in European governance" Workshop 1 Co-responsibility of organised civil society players, 2.
[27] Proceedings of the public hearing on "The current state of European self- and co-regulation" ESC 2008, (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).

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.[28]
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?)[29].

1.3 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.[30]

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[31] 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.[32]

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[28] 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: F Scharpf, Governing in Europe: Effective and Democratic? (Oxford University Press, 1998).

[29] Several of these questions are addressed in Nowak/Van den Hoogen, New Governance at work in EU rule-making., forthcoming

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

[31] L A J Senden, "Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?" (2005) 9 ECJL, 13.

[32] 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

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*[33] 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.
"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".[34]
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.[35]
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

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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.

[33] 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.

[34] European Parliament, Council, Commission, "Interinstitutional Agreement on better law-making", Official Journal of the European Union C 321/1, 31 December 2003, art. 18.

[35] 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).

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"[36]. 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.[37] 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. 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.[38] Finally, the Interinstitutional Agreement also provided for monitoring and follow-up mechanisms.[39]

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. [40] 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.[41] Self-regulation in the EU formed a "grey area

[36] Ibid.
[37] See Senden, "Alternatieve normering in de EU", supra, n 4, 133.
[38] European Economic and Social Committee, "The Current State of Co-Regulation and Self-Regulation in the Single Market", INT/204- CESE 1182/2004 final, 18 January 2005, 12.
[39] Ibid.
[40] European Economic and Social Committee, "The Current State of Co-Regulation and Self-Regulation in the Single Market", INT/204- CESE 1182/2004 final, 18 January 2005.
[41] Ibid.

of Community law", inherently controversial and ambiguous.[42] 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. A report of the DG Health and Consumer criticised 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."[43] 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. Moreover, even in the traditional Community method of law making, and thus outside the field of the social dialogue, we do find strong involvement of private actors who write legislative proposals which are then adopted by the institutions as law[44]. 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 compatibility with EU legal principles.

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.

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

[43] Emphasis in the original (http://ec.europa.eu/dgs/health_consumer/self_regulation/docs/report_advertising_en.pdf, 9).

[44] **See case-study on Lawyers'Establishment Directive in Nowak/Van den Hoogen, New Governance at work in EU rule-making, forthcoming; similar: Banking Directive, completely designed by Basel BIB (a non-EU institution) .**

1.4 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.

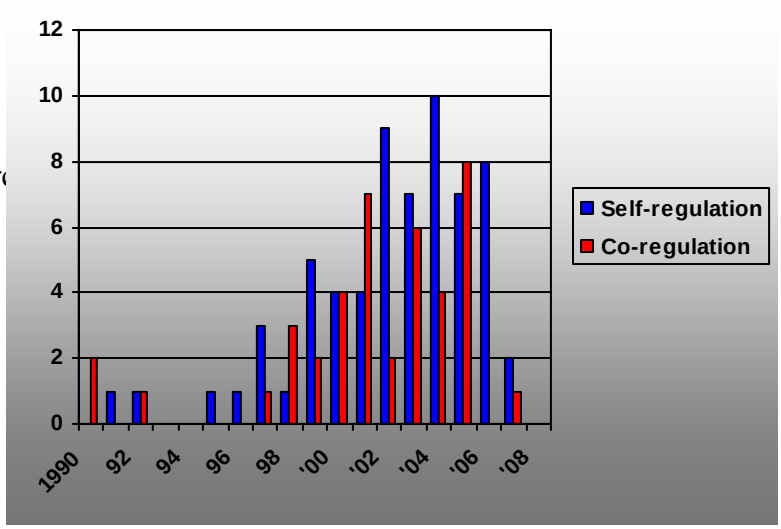
According to rational choice theory of politics, private economic stakeholders are assumed to be rational actors which behave strategically in the policy-making system to achieve outcomes that reflect organizational interests.[45] They are expected to make use of new institutional opportunities when 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.[46] 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.

[45] Hix, The Political System of the European Union, supra, n 2, 12.
[46] Alliance for a Competitive European Industry (2004), Position Paper 4 November 2004, Brussels, 2.

The total number of all registered cases of European co- and self regulation in the period 1990-2009 adds up to 105, with a strong concentration (nearly 75 per cent) in the years 2000-2005. [47]

Figure 1: Registered cases of co- and self regulation in the EU

Sour



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.[48] 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. [49] The statistics lead to

[47] 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 May 2010). 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.

[48] 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.

[49] 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://europa.eu/generalreport). See also Hix, The Political System of the European Union, supra, n 2, 76, 77. Of course, a pure quantitative comparison does not provide information on the impact of the individual acts of both categories. However, an inspection of the content of individual

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.[50] 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.[51] 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)
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).

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cases in the period under consideration only confirms our conclusion about the marginality of co- and self-regulation as an EU policy instrument.

[50] This classification is based on the official EU definitions as contained in the IIA 1993. We are aware that the use of stricter definitions (see our critical remarks in the previous paragraph) may produce results that deviate from the presented overview.

[51] 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.

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 Interinstitutional 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 reined 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?

3. 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.

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