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Regulatory Pluralism within the EU Context: The Case of Private Regulation and the Challenge of Constitutionalism

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1. Introduction

Private actors are playing an increasingly important role in the performance of public regulatory functions, both at national and transnational level. Economic globalisation and the fast-moving technological innovation cycles have created highly complex regulatory environments. These pose ever-growing challenges to public regulatory authorities. In such regulatory environments, there is a shift regarding the perceptions and expectations of which role public regulators can actually play in steering societal and economic processes. Traditional state-made norms, set by competent public authorities pursuant to conventional norm-setting channels, are incrementally ceasing to serve as “the main institutional vehicle”¹ for delivering public policy objectives. Globalisation and technological progress have made visible the limits of and constraints to public regulatory capacities in addressing challenges in contemporary regulatory environments. What can thus be observed is that the public often “lack sufficient authority to regulate against many of the negative social externalities of international economic activity.”²

This creeping loss of public regulatory authority has prompted the search for alternative regulatory routes. This has led to a diversification of the public regulatory toolbox and the proliferation of instruments, in which private actors are playing an increasingly important role.³ The dispersion of regulatory authority between public and private actors can be observed both in national as well as supranational regulatory contexts. The focus of the present analysis will be put on the EU's regulatory landscape, as it offers some topical examples of the significant role private actors play in performing – genuinely public – regulatory authority.

The present contribution is divided into six parts: following this introduction, the second chapter will present some terminological considerations on how the somewhat ambiguous notion of “private regulation” is operationalized within the EU's institutional lexicon. The third part gives a brief overview of the EU's private regulatory landscape, reflecting, in particular, on its institutional fragmentation. After some general remarks on the promises and criticism of private regulation in the fourth part, the analysis will then turn the central issue of this contribution,

¹ J. Bakan (2015): “The Invisible Hand of Law: Private Regulation and the Rule of Law.”, in: *Cornell International Law Journal*, Vol. 48, No. 2, (pp. 279-300) 290. Similar also: M. Isailovic and P. Pattberg (2016): „38. Private Governance.”, in: C. Ansell and J. Torfing (eds.), *Handbook on Theories of Governance*, Edward Elgar: Cheltenham, (pp 468-476) p. 468.

² L. K. McAllister (2014): “Harnessing Private Regulation.”, in: *Michigan Journal of Environmental & Administrative Law*, Vo. 3, Issue 2, (pp. 219-420) p. 293.

³ Peters, A. (2011): “Soft law as a new mode of governance.”, in: Diedrichs, U. et al. (eds.): *The Dynamics of Change in EU Governance. Studies in EU Reform and Enlargement series*, Edward Elgar: (pp. 21-51) p. 27.

that is the constitutional challenges that ensue from the shift from public to private regulatory authority within the EU's governance framework. To underline the significance of these constitutional challenges, attention will then be paid to the potentially far-reaching normative effects private regulatory regimes may entail. Finally, in the last part some concluding remarks will be made.

2. Terminological considerations

What must be noted from the very outset is that “private regulation” as such is a polysemous concept. From a conceptual viewpoint, the term must be conceived as an elusive umbrella concept which, in principle, encompasses a wide range of private and semi-private regulatory and enforcement mechanisms. “Private regulation” encompasses a multifaceted universe of different regulatory practices. What these practices have in common, however, is that certain regulatory functions, which are conventionally performed by public authorities, are allocated to or taken over by private constituencies.

Yet, in the EU's lexicon the notion of “private regulation” *per se* is widely unknown. Private regulation is primarily referred to as “co-” or “self-regulation”, two concepts which are frequently referred to in the scholarly literature and policy documents of national or international governmental organizations. A first uniform definition of these two terms within the EU's institutional context has been put forward by the so-called “Interinstitutional Agreement on Better Lawmaking” (hereinafter: “2003 IIA”)⁴, which has been replaced in the meantime.⁵ In said document, **self-regulation** is defined as:

“the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements).”⁶

In contrast, **co-regulation** is defined as:

“mechanisms 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).”⁷

Considering that these concepts are not always used consistently⁸, drawing a clear dividing line between them appears to be quite difficult in practice. However, the key distinguishing feature resides in the respective role the public legislator plays. Self-regulation comprises private regu-

⁴ Interinstitutional agreement on better law-making, *OJ C 321*, 31.12.2003, p. 1–5.

⁵ As part of the Commission's recent “Better Regulation”-initiative, also a new “Interinstitutional Agreement” has been enacted, repealing its predecessor, i.e. the 2003 IIA. Interestingly, as opposed to its forerunner, the new 2016 IIA itself does not make any reference to “co- and self-regulation”.

⁶ Interinstitutional agreement on better law-making, *OJ C 321*, 31.12.2003, p. 1–5, recital 22.

⁷ Interinstitutional agreement on better law-making, *OJ C 321*, 31.12.2003, p. 1–5, recital 18.

⁸ Cf. F. Cafaggi (2006): “Rethinking Private Regulation in the European Regulatory Space.”, in: *EUI Working Papers*, no. 13, p. 15, fn. 63.

latory practices, which are initiated autonomously by the industry itself and operate independently from public legislation.⁹ In contrast, co-regulation, as generic category, must be understood as a conglomerate of hybrid regulatory practices whereby public legislative acts (i.e. directives or regulations) make use of private self-regulatory activities for the attainment of the objectives set out in the respective legislation. In simplified terms, it might be said that the difference between self- and co-regulation is that “the former operates without any legislative act while the latter presupposes a legislative act.”¹⁰ The “Database on Co- and Self-regulatory Initiatives”¹¹, established by the Single Market Observatory of the European Economic and Social Committee, entails a quite comprehensive collection of these instruments.¹²

3. The EU’s private regulatory landscape

As has become evident from the above elaborations already, private regulation constitutes a well-established, albeit legally ill-defined phenomenon within the EU’s regulatory policy framework. In the form of co- and self-regulation, private regulatory strategies form a fundamental pillar of the EU’s so-called “Better Regulation” initiative. The use of private regulatory strategies has become an integral part of the EU’s regulatory toolbox in an expanding range of policy domains.

As the Commission’s “Governance White Paper” illustrates, the search for alternative routes of regulation has been shaping the EU’s regulatory policy reform agenda for more than two decades already. Just recently, in May 2015, the European Commission has presented its new “Better Regulation Package”, within which co- and self-regulation have again been paid special attention to. Private regulatory mechanisms have been reinforced as important policy options at the EU’s disposal for addressing given regulatory challenges, where traditional “command-and-control” instruments are deemed to be too intrusive from the viewpoint of subsidiarity and proportionality.¹³

A preliminary observation that must be made is that the EU’s private regulatory landscape presents itself as highly fragmented in both, functional and institutional respects. First, what must be noted in this regard is that discrepancies exist among forms of private regulation as to the respective degree of formalization within the EU’s legal order. While some forms of private

⁹ Cf. in its “Action Plan on ‘Simplifying and improving the regulatory environment’”, the Commission has made clear that the key distinction between co- and self-regulatory instruments lies in the fact that – unlike co-regulation – self-regulation is usually initiated by stakeholders themselves and “does not involve a legislative act.” (COM(2002) 278 final, p. 11.)

¹⁰ F. Cafaggi, ‘Rethinking Private Regulation in the European Regulatory Space.’, 2006 *EUI Working Papers*, no. 13, p. 15. Similarly, Spindler and Thorun (2015): “Unlike co-regulation, self-regulation is not based on an explicit legal basis and may be applied without any particular legal framework for action.” (G. Spindler and C. Thorun (2015): “Key Points of a Digital Regulatory Policy. Recommendations to improve the conditions for the effective co-regulation in the information society.”, ConPolicy research report, p. 22. https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/dae-library/cornerstones_of_a_digital_regulatory_policy_-_executive_summary.pdf (latest access: 1/10/2017))

¹¹ The Database on Self- and Co-regulation Initiatives, <http://www.eesc.europa.eu/?i=portal.en.smo-database>

¹² A first attempt of a systematic mapping of the data contained in the Database has been presented by Senden and colleagues (2015). (See: Senden et al., ‘Mapping Self- and Co-regulation in the EU Context. Explorative Study for the European Commission’, 2015 *RENFORCE* research report, pp. 49 et seqq, https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/dae-library/mapping_self-and_co-regulation_in_the_eu_context_0.pdf (latest access: 30/9/2017).)

¹³ Cf. European Commission (2015): “Better Regulation ‘Toolbox’”, pp. 87 et seqq., http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf (latest access: 1/10/2017)

rule-making are firmly anchored in Treaty law itself¹⁴, other forms of private regulation are induced by secondary legislative acts or merely initiated through soft law instruments.¹⁵ This also corresponds with a second guiding observation, which concerns the fact that some forms of private regulatory authority at EU level rest upon a relatively firm normative foundation – e.g. a legislative mandate –, whereas others operate in a rather loose institutional framework, resulting from mere informal public sponsorship. Hence, the specific institutional and normative setting in which private regulatory authority is performed differs considerably from one regime to another. That said, a detailed analysis of the multi-faceted phenomenon of private regulation within the EU context would certainly go beyond the scope of this contribution. For the purpose of the present analysis, the focus shall thus be limited to those forms of private rule-making authority, which are endorsed by secondary legislative acts. This category of private regulation is sometimes referred to as “*legislation-induced co-regulation*”.¹⁶

Research has shown that there are numerous legislative acts entailing mechanisms whereby private actors are explicitly enabled to adopt self-regulatory acts to spelling out certain legislative provisions. This should facilitate the application of the often rather vaguely framed legislative requirements within specific economic fields and sectors.¹⁷ The prime example in this respect is the so-called “New Approach” to technical harmonization. The “New Approach” describes a legislative practice whereby the EU legislator limits itself to the definition of “essential requirements” – e.g. on product safety –, which products or services must comply with in order to be considered as eligible for the EU internal market. Based on a formal mandate to be issued by the European Commission, private standardisation bodies¹⁸ are then entrusted to adopt technical specifications, by which these “essential requirements” are translated into practical terms. These specifications may then be published by the Commission in the Official Journal and become part of the EU’s body of law as so-called “harmonized standards”.¹⁹ Although market operators are not obliged to abide by these “harmonized standards” – they are only bound by the general requirements laid down in the legislative act –, there is, however, a strong incentive to do so. Products that are produced in accordance with “harmonized standards” are automatically presumed to be in compliance with EU law and are, therefore, permitted to access the internal market.

While the “New Approach”-directives certainly constitute the most prominent example²⁰, also other examples can be found at EU level whereby rule-making authority is delegated to private

¹⁴ See art. 155 TFEU (the so-called “European Social Dialogue”).

¹⁵ E.g. through Commission Recommendations.

¹⁶ European Commission, ‘Better Regulation ‘Toolbox’’, 2015, p. 88. http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf (latest access: 30/9/2017).

¹⁷ Cf. Spindler and Thorun 2015, p. 17.

¹⁸ At European level, three European standardization organization are formally recognized: CENELEC (European Committee for Electrotechnical Standardisation), CEN (European Committee for Standardisation) and ETSI (European Telecommunications Standards Institute).

¹⁹ See: Case C-613/14, *James Elliott Construction Limited v. Irish Asphalt Limited*, delivered on 28 January 2016, nyr.

²⁰ Cf. G. Howells (2004): “Co-Regulation’s Role in the Development of the European Fair Trading Laws.”, in: H. Collins (ed.): *The Forthcoming EC Directive on Unfair Commercial Practices*, p. 119; L. Senden and T. Van den Brink (2012): “Checks and Balances of Soft EU Rule-Making.”, Study for the European Parliament’s Committee on Legal Affairs, PE 462.433, p. 16; E. Best (2008): “Alternative Methods and EU Policy-Making: What Does “Co-Regulation” Really Mean?”, *EIPAScope*, vol. 2, p. 13; A. M. Darmanin (2011): “Brochure on European Self- and Co-Regulation”, p. 14, http://www.eesc.europa.eu/resources/docs/auto_coregulation_en_14092011.pdf (latest

actors within the framework of legislative acts. Another quite prominent, yet much less debated, instance of private norm-setting taking place in the shadow of secondary legislation are “codes of conduct”.²¹ The EU legislator defines “codes of conduct” as “an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors.”²² The EU’s body of law entails several secondary legislative acts, which explicitly acknowledge “codes of conduct” of private stakeholders as an appropriate means to implement legislative requirements on a sectoral level. Here, the standard scenario is that EU legislator calls upon the Member States and/or the Commission to actively encourage private market operators, professional associations or other sectoral stakeholders to set up collectively “codes of conduct” to facilitate the application of EU legislation in specific economic domains. Such “codes” may be adopted either by private entities at the national level or on EU-wide basis. In the latter case, it is usually the Commission, which is required to encourage private associations, representing particular professions or market branches at the European level, to set up such “codes of conduct at Community level”²³. Similar to the way in which technical standards are used in the framework of “New Approach”-directives, the primary intention of making use of such “pan-European”²⁴ “codes of conduct” in EU legislation is to create a flexible mechanism for the translation of rather neutrally framed legal requirements (e.g. on professional diligence) into more practical terms. Thereby, legislative provisions shall be made more accessible for norm addressees, which operate in specialized fields that fall under the scope of application of the respective legislative act.

To give but one very topical example, reference can be made to the General Data Protection Regulation (thereinafter: “GDPR”)²⁵, which has been adopted only recently, replacing its predecessor, Directive 95/46/EU. In art. 40 of the GDPR, the EU legislature created a mechanism whereby private “associations and other bodies representing categories of controllers or processors” are explicitly encouraged to draw up “codes of conduct”.²⁶ These private “codes” shall be used to “calibrate the obligations of controllers and processors, taking into account the risk

access: 27/9/2017); H. Hofmann et al. (2011): *Administrative Law and Policy of the European Union*, p. 588; M. Latzer et al. (2002): *„Selbst-Und Ko-Regulierung Im Mediamatiksektor: Alternative Regulierungsformen Zwischen Staat Und Markt“*, p. 88.

²¹ For a more elaborated analysis of the role of private “codes of conduct” in EU policy-making see: G. Howells (2016): „Chapter 7: Codes of Conduct.”, in: Howells, G., Micklitz, H. W., & Wilhelmsson, T. (eds.): *European fair trading law: The unfair commercial practices directive*. Routledge, pp 195-215.

²² Art. 2 lit. f of the Directive 2005/29/EC and Art. 2 (1) lit. i of Directive 2008/122/EC.

²³ See e.g.: Art. 14 of Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts; Art. 17 of Directive 2004/48/EC on the enforcement of intellectual property rights; Art. 37 of Directive 2006/123/EC on services in the internal market.

²⁴ P. Delimatsis (2010): “Thou Shall Not...(Dis) Trust: Codes of Conduct and Harmonization of Professional Standards in the EU.”, in: *Common Market Law Review*, 47, (pp. 1049-1087) p. 1050.

²⁵ On the role of “codes of conduct” within the framework of the “old” Data Protection Directive (Directive 95/46/EC) see: D. Schiek (2007): “Private rule-making and European governance – issues of legitimacy.”, in: *European Law Review*, Vol. 32, (pp. 443-466) p. 457 et seq.; On co-regulatory mechanisms under the new GDPR, see: I. Kamara (2017): “Co-regulation in the personal data protection: the case of technical standards and the privacy by design standardisation ‘mandate’.”, in: *European Journal of Law and Technology*, Vol. 8, No. 1, p. 8.

²⁶ See: Art. 40(1) of Regulation (EU) 2016/679, stipulating: “The Member States, the supervisory authorities, the Board and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper application of this Regulation, taking account of the specific features of the various processing sectors and the specific needs of micro, small and medium-sized enterprises.”

likely to result from the processing for the rights and freedoms of natural persons.”²⁷ Using such “codes” shall “facilitate the effective application of this Regulation, taking account of the specific characteristics of the processing carried out in certain sectors and the specific needs of micro, small and medium enterprises.”²⁸ Under certain circumstances, specified in the same provision, such voluntary private “codes” may even be turned into binding EU law by means of Commission implementing acts.²⁹ By enabling data processors to enact collectively voluntary self-regulatory instruments with the aim to concretize by themselves the obligations laid down in the GDPR, art. 40 quite intentionally allocates rule-making authority from the public to the private sphere.

Similar mechanisms can also be found in other legislative acts at EU level, such as in the Directive on services in the internal market³⁰, in the Audio-visual Media Services Directive³¹ or in the E-Commerce Directive.³² Reference to “codes of conduct” seem to be especially popular where the EU legislator seeks to enhance consumer protection and professional diligence of service providers or where the media’s responsibilities are at stake. Yet, surprisingly, although numerous acts of EU legislation explicitly enable the industry to draw up “codes of conduct” at EU level, the actual adoption of such “European codes” is rather scarce. Generally speaking, industry associations seem to be still somewhat hesitant to make use of this regulatory authority granted by the EU legislator. In the field of data protection, for example, only a handful “pan-European” “codes of conduct” have been developed so far.³³ A similar picture can also be drawn in other regulatory fields, where the EU legislator provided a role for private “codes” for the implementation of legislative objectives.³⁴

4. Private regulation: a curse or a blessing?

The advantages of making use of private regulatory strategies for the attainment of public policy objectives at EU level have been stressed in multiple policy documents issued by the European Commission. Therein, the Commission repeatedly promotes private regulation as a more flexible and more efficient way of tackling challenges emerging in complex and dynamic regulatory environments.³⁵ Co- and self-regulatory mechanisms are praised as valuable alternatives to tra-

²⁷ Recital 98 of Regulation (EU) 2016/679.

²⁸ Recital 98 of Regulation (EU) 2016/679.

²⁹ See art. 40(9) Regulation (EU) 2016/679, which stipulates: “The Commission may, by way of implementing acts, decide that the approved code of conduct, amendment or extension submitted to it pursuant to paragraph 8 of this Article have general validity within the Union. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 93(2).” Art. 26 leg. cit. further stipulates that “adherence to approved codes of conduct as referred to in Article 40 [...] may be used as an element by which to demonstrate compliance with the obligations of the controller.”

³⁰ See: art. 37 of Directive 2006/123/EC.

³¹ See: art. 9 of Directive 2010/13/EC.

³² See: art. 16 of Directive 2000/31/EC

³³ See e.g.: “Data Protection Code of Conduct for Cloud Service Providers”; “European Code of Practice for the use of Personal Data in Direct Marketing”.

³⁴ C. M. D. S. Pavillon (2012): “The Interplay Between the Unfair Commercial Practices Directive and Codes of Conduct.”, in: *Erasmus Law Review*, 5(4), (pp. 265- 288) p. 285; G. Howells (2016): „Chapter 7: Codes of Conduct.”, in: Howells, G., Micklitz, H. W., & Wilhelmsson, T. (eds.): *European fair trading law: The unfair commercial practices directive*. Routledge, (pp 195-215) p. 200.

³⁵ Cf. Borrás and Conzelmann (2007): “Democracy, Legitimacy and Soft Modes of Governance in the EU: The Empirical Turn.”, in: *European Integration*, 29(5), (pp. 531-548,) p. 531.

ditional “hard” regulation that may reduce regulatory burdens and simplify law-making activities.³⁶ By involving the relevant stakeholders into the regulatory process, private regulatory strategies are deemed to enhance the acceptance among norm addressees of EU rules and to strengthen the legitimacy of EU governance processes as such.³⁷ Yet, this growing importance of private regulatory instruments also signifies a general dilemma, which is elsewhere often referred to as the “legitimacy paradox”³⁸ of the EU’s “new governance” approach. On the one hand, private regulatory alternatives are presented as a promise of cure for the alleged detachment of supranational rule-making from the citizens and the ensuing legitimacy deficits.³⁹ On the other hand, however, the spread of private regulation has also attracted a great deal of criticism, especially from the viewpoint of legitimacy.

One general point raised in this respect concerns the alleged “teethlessness” of such regulatory routes. Leaving it up to the discretion of private standard-setters or code-owners to implement legislative objectives has the effect that binding public rules are getting superseded by voluntary and unenforceable alternatives.⁴⁰ This tendency has elsewhere been referred to as the “de-normativization”⁴¹ of public regulation or “voluntarism”.⁴²

As has been illustrated above, the EU legislator acknowledges, on several occasions, the development of self-regulatory instruments by professional associations and economic operators as appropriate means to operationalize legal obligations. This shall alleviate the burden of public regulation in the interest of economic operators whose activities might be affected. Thereby, private economic stakeholders are enabled to occupy a privileged position within public regulatory processes.⁴³ That said, the spread of private regulatory instruments at EU level might be brought in connection to a general subordination of public authorities under the ideology of markets and corporate interests. The general argument here is that market forces and vested corporate interests are increasingly dictating the public policy agenda as well as the steering instruments to be used for its implementation. A term that is commonly referred to in this context is “marketization”. Shamir (2011) concisely defines “marketization” as “the process whereby market-oriented policies are becoming dominant in shaping both how government is organized and how it deploys its authority. Markets are perceived to be more efficient (and ultimately also more just) in distributing resources and generating wealth than bureaucratic governments.”⁴⁴ The increasing reliance on private regulators, such as through the promotion

³⁶ COM(2002) 278 final, p. 11.

³⁷ Cf. COM(2001) 428 final, p. 20.

³⁸ See e.g.: P. Popelier (2011): “Governance and better regulation: dealing with the legitimacy paradox.”, in: *European Public Law*, 17(3), pp. 555-569; J. Scott and D. M. Trubek (2002): “Mind the Gap: Law and New Approaches to Governance in the European Union”: in: *European Law Journal*, 8(1), pp. 1-18.

³⁹ Cf. P. Verbruggen (2009): “Does Co-Regulation Strengthen EU Legitimacy?”, in: *European Law Journal*, 15(4), (pp.425.441) p. 430.

⁴⁰ D. Levi-Faur (2012): “From ‘big government’ to ‘big governance’.”, in: D. Levi-Faur (ed.), *The Oxford Handbook on Governance*, Oxford University Press, Oxford, (pp. 3-18) p. 4.

⁴¹ Lachmayer, K. (2013): “Technokratische Rechtssetzung Privater.”, in: *Juridikum*, vol. 1, (pp. 109-118), p.110.

⁴² C. Garsten; K. Jacobsson (2007): “Corporate globalisation, civil society and post-political regulation – Whither democracy?”, in: *Development Dialogue*, November 2007, (pp. 143-157) p. 145.

⁴³ Cf. Lachmayer, K. (2013): “Technokratische Rechtssetzung Privater.”, in: *Juridikum*, vol. 1, (pp. 109-118), p.115.

⁴⁴ R. Shamir (2011): “Socially Responsible Private Regulation: World-Culture or World-Capitalism?”, in: *Law & Society Review*, 45, (pp. 313 – 336) p.

of private codes or standards for the implementation of legislative objectives, might be viewed as an expression of such “marketization” of public regulation.

But why is this “marketization” of public rule-making problematic? A general risk concerns the fact that private regulatory arrangements may not sufficiently deliver on the public policy objectives at stake. Private regulators may primarily pursue their own (economic) interests. When regulatory authority is delegated to private regimes, such as through mechanisms referred to above, then public interests may not be sufficiently taken into account. The recent financial crisis has underscored the drastic consequences private self-regulation may entail when public interests are not sufficiently protected.⁴⁵ This problem becomes even more pressing considering that private regulatory instruments are promoted in areas that touch upon highly sensitive matters, such as the protection of privacy or consumer’s interests. Hence, the protection of interests of a wider public appears to be a pivotal challenge when it comes to private regulatory authority.

5. Why raising the constitutional card?

Despite all evident advantages, the allocation of regulatory authority to private actors is considered as holding considerable potential for conflicts with core aspirations of constitutional law.⁴⁶ The primary concern that must be voiced in this context relates to the fact that the reallocation of regulatory authority from public to private entities bears the risk of encroaching upon the constitutional setup of conventional norm-setting avenues.

At EU level, the Treaty of Lisbon established a quite comprehensive set of instruments to be deployed by EU authorities for the exertion of the rule-making powers conferred upon them.⁴⁷ This comprises “binding” as well as “non-binding”, “legislative” as well as “non-“ or “sub-legislative” instruments. The Treaty of Lisbon has also brought forward a quite rigorous framework for the delegation of rule-making authority. Under certain circumstances defined in articles 290 and 291 TFEU, the EU legislator (EP and Council) may delegate regulatory powers to the executive branch, i.e. the Commission.⁴⁸ That said, it can be concluded that EU primary law establishes a carefully designed constitutional framework for the exercise and delegation of rule-making authority at EU level.⁴⁹ Yet, with the sole exception of the “European Social Dialogue”⁵⁰, delegated rule-making authority exerted by private actors is not formally acknowledged within this constitutional framework. Simply put, private regulation lacks a corresponding constitutional foundation within the EU framework.⁵¹ This is where the constitutional critique steps in.

⁴⁵ Cf. V. Hatzopoulos (2013): “From Hard to Soft: Governance in the EU Internal Market.”, in: C. Barnard et al. (ed.), *The Cambridge Yearbook of European Legal Studies*, Vol. 15, 2012-2013, pp. 101-138.

⁴⁶ Cf. C. Scott, F. Cafaggi and L. Senden (2011): “The Conceptual and Constitutional Challenge of Transnational Private Regulation.”, in: *Journal of Law and Society*, 38(1), p. 12.

⁴⁷ See articles 288-291 TFEU

⁴⁸ See articles 290 and 291 TFEU in particular.

⁴⁹ Cf. M. Everson and E. Vos (2016): “European agencies: what about the institutional balance?”, in: A. Lazowski and S. Blockmans (eds.): „Handbook on EU Institutional Law“, Edward Elgar Publishing: (pp. 139-151) p. 148.

⁵⁰ Reference to: art. 155 TFEU

⁵¹ As the EESC (2015) rightly points out, “what is lacking is an enabling provision authorising these institutions to delegate their legislative power to such mechanisms, as a legitimate alternative to the Community regulatory instruments defined in the Treaties.” See also: E. Svilpaite (2007): “Legal Evaluation of the Selected New Modes of Governance: The Conceptualization of Self- and Co-Regulation in the European Union Legal Framework.”, deliverable D.41 within the FP7 Project “NEWGOV New Modes of Governance”, p. 4.

As detailed above, private “standards” and “codes” are formally acknowledged as appropriate means to spell out certain objectives defined in legislative acts. From a functional perspective, it is thus the private standard-setters who sets norms on behalf of the public legislator. While the definition of the basic objectives remains in the hands to the EU legislator, the actual formulation of norms is outsourced to the private (market) actors. Even though the “standards” and “codes” these private actors produce do not qualify as law in a formalistic sense, they do serve as functional equivalents in practice.⁵² That said, these mechanisms must be considered as modes through which genuine rule-making authority is delegated from the EU legislator to private actors.⁵³ The fact that there is no corresponding enabling provision for such delegation raises concerns from a constitutional viewpoint.

In this context, reference shall be made to an argument voiced by the EESC in its recent Opinion on “Self-regulation and co-regulation in the Community legislative framework”⁵⁴. Therein it is argued that the exertion of delegated rule-making authority by private actors is at odds with the principle of legality. “In a community of law” founded on the principle of the “rule of law”, “the validity of any rule depends on an enabling provision which must first be present in the founding text and subsequently in the various legislative acts that make up the regulatory pyramid.”⁵⁵ From this it follows, that any delegation of rule-making competences, functionally equivalent to those of public legislative authorities, must be specifically authorised in the primary law framework.⁵⁶ From a legality perspective, the allocation of regulatory powers through secondary legislative acts, such as through the instruments exemplified above, does arguably not suffice to legitimize private actors to exert rule-making powers on behalf of the public legislator.⁵⁷

⁵² Cf. G. F. Schuppert (2012): “New Modes of Governance and the Rule of Law. The Case of Transnational Rule Making.”, in: M. Zürn, A. Nollkaemper and R. Peerenboom (eds.): *In an Era of International and Transnational Governance*, Cambridge University Press, (pp. 90-107) p. 97.

⁵³ H. Hofmann et al. (2011): *Administrative Law and Policy of the European Union*, Oxford University Press, p. 587.

⁵⁴ Opinion of the European Economic and Social Committee on Self-regulation and co-regulation in the Community legislative framework (own-initiative opinion), INT/754 Self-regulation and co-regulation, Brussels, 22 April 2015.

⁵⁵ Ibid., p. 9.

⁵⁶ Ibid.

⁵⁷ Latzer and colleagues (2002) counter in this that private regulation induced by EU legislation does, in general, not constitute a challenge in terms of legality, as such regulatory initiatives are legally anchored in secondary legislation. (Cf. M. Latzer et al. (2002): „Selbst-Und Ko-Regulierung Im Mediamatiksektor: Alternative Regulierungsformen Zwischen Staat Und Markt“, p. 99.) However, this view is oversimplified, considering that the principle of legality requires more than that. As also stressed by the EESC in its Opinion, it must also be ensured that “every act that can be attributed to the Union must be consistent with higher ranking law.” (A. Von Bogdandy and J. Bast (2002): “The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform.”, in: *Common Market Law Review*, 39, (pp. 227-268) p. 228.) Consequently, also acts of secondary legislation must comply with the higher ranked provisions laid down by the Treaties. Given that primary law is silent when it comes to the delegation of regulatory powers to private parties, the question of legality cannot simply be brushed aside. In similar vein, the EESC concludes: “Irrespective of the “legitimation” sought in various secondary law instruments and the more or less detailed definition of the principles and conditions that such mechanisms must respect in order to be recognised at EU level by the institutions with legislative power, **what is lacking is an enabling provision authorising these institutions to delegate their legislative power to such mechanisms, as a legitimate alternative to the Community regulatory instruments defined in the Treaties.**” (Opinion of the European Economic and Social Committee on Self-regulation and co-regulation in the Community legislative framework (own-initiative opinion), INT/754 Self-regulation and co-regulation, Brussels, 22 April 2015, p. 9)

A second concern arises out of the fact that private rule-making processes are “not governed by constitutional guidelines which normally have to be applied to the procedures of statutory law.”⁵⁸ Rule-making authority that is carried out through modes and by actors not formally recognized in the EU’s constitutional order, may consequently also escape the procedural and substantive conditions provided therein. Here, reference must be made to the concept of the “Rule of Law”.

The exercise of public rule-making competences, both at national as well as EU level, is governed by a quite comprehensive set of constitutional safeguards and constraints.⁵⁹ In liberal constitutional orders, public authorities are strictly disciplined when exercising powers by a catalogue of constitutional premises forming the so-called “Rule of Law”. The “Rule of Law” serves as the “dominant organizational model of modern constitutional law [...] to regulate the exercise of public powers”.⁶⁰ As a rather elusive umbrella concept⁶¹, the “Rule of Law” encompasses several principles, most notably, accountability, legal certainty, prevention of arbitrariness, equal treatment, human rights protection and qualitative standards of good governance.⁶² These principles form a normative framework for the setting, enforcement and quality of public norms.⁶³ Their primary objective is to shield individual liberties against excessive public interventions and to protect the legitimate interests of the norm addressees as well as a wider public.⁶⁴

The European Union considers itself as *pouvoir constitué* founded on the principle of the “Rule of Law”, as explicitly stipulated in art. 2 TEU and reiterated in the Preamble of the EU’s Charter of Fundamental Rights.⁶⁵ Accordingly, EU authorities themselves must abide by the “Rule of Law” premises whenever they perform powers that are conferred upon them by the Treaties. However, what remains highly contested in constitutional doctrine is whether and, if so, to what extent these public principles should/could be applied when regulatory authority is performed by private delegates.⁶⁶ From a constitutional point of view, the threat of private regulation thus resides in the possible erosion of the safeguards granted under the “Rule of Law” order. Through

⁵⁸ Ibid., p. 98.

⁵⁹ Cf. C. Scott et al. (2011): “The Conceptual and Constitutional Challenge of Transnational Private Regulation.”, in: *Journal of Law and Society*, 38(1), (pp.1-19) p. 13.

⁶⁰ European Commission (2014): “Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law.”, COM(2014) 158 final, p. 3.

⁶¹ M. Claes and M. Bonelli (2016): “The Rule of Law and the Constitutionalisation of the European Union.”, in: W. Schroeder (ed.): “Strengthening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation.”, Hart Publishing, p. 267.

⁶² Cf. Venice Commission of the Council of Europe (2016): “The Rule of Law Checklist.”, http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf, pp. 10 et seq. (latest access: 20/9/2017)

⁶³ Cf. M. Kötter and G. Folke Schuppert (2014): “Chapter 6. Applying the Rule of Law to Contexts Beyond the State.”, in: J. R. Silkenat et al. (eds.), *The Legal Doctrines of the Rule of Law and the Legal State*, pp. 87 et. seqq.

⁶⁴ Cf. J. Freigang (2002): “Scrutiny. Is Responsive Regulation Compatible with the Rule of Law?”, in: *European Public Law*, 8(4), (pp. 464-472) p. 472.

⁶⁵ Art. 2 TEU stipulates: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

⁶⁶ See: J. Freigang (2002): “Scrutiny. Is Responsive Regulation Compatible with the Rule of Law?”, in: *European Public Law*, 8(4), (pp. 464-472) p. 469.; L. McDonald (2004): “The Rule of Law in the ‘New regulatory State’.”, in: *Common Law World Review*, 33(3), pp. 197-221.

the allocation of regulatory powers to private entities, the norm-setting process – initially carried out by the competent public institutions bound by the “Rule of Law” – becomes detached from the strict normative yardstick the constitutional order applies to public regulators.⁶⁷ This detachment becomes especially problematic considering the far-reaching effects some private regulatory arrangements have on third parties or on a wider public in practice.

6. The normative effects of private regulatory regimes

A first obvious argument to challenge the constitutional concerns formulated above may stress the voluntary, i.e. non-binding, character private regulatory acts claim to have. It is certainly right that acts of private self-regulation, promoted in the framework of EU legislative acts, do *per se* not constitute legally binding rules. As “codes of conduct” exemplify, self-regulatory acts set by professional associations or other private stakeholder organisations – even when mandated by legislative acts –, cannot impose any legally binding obligations – certainly not on third parties or *erga omnes*. As also frequently stressed by the EU legislator itself, these instruments are purely voluntary in nature, i.e. in a twofold sense: first, the drawing up of such private regimes is up to the goodwill of the private stakeholders addressed and, secondly, abidance with such codes is usually not formally “policed”. Hence, by making reference to private regulatory acts, the EU legislator merely seeks to incentivise a complementary, less formalized pathway for implementing public regulatory objectives in specific fields of application.⁶⁸

This provokes the question why the problem explained above, i.e. the detachment of private regulatory authority from constitutional safeguards and constraints, is of significance in the first place. Here it must be argued that the constitutional significance of such private regulatory regimes does not necessarily arise from the formal legal nature of the act itself, but rather from the actual effects it may have in practice.⁶⁹ Regardless of the voluntary nature these instruments claim to have, private regulatory arrangements at EU level often do exhibit *de facto* normative effects, on third parties or a wider public in general. In some cases, these normative effects are more upfront, while in others they might appear less obvious.

To exemplify the potentially quite far-reaching effects of these seemingly purely voluntary instruments, reference shall be made to one, recently heatedly debated, initiative taken at EU level. In May 2016, the European Commission initiated – pursuant to art. 16 of the E-Commerce Directive – the development of a “Code of Conduct on Countering Illegal Hate Speech Online”⁷⁰, involving four global IT-companies (i.e. Facebook, Twitter, Microsoft and Google). The Commission thereby delivers on a corresponding claim expressed earlier in a “Joint Statement” issued by the Justice and Home Affairs Council after an extraordinary meeting following the terrorist attacks in Brussels in March 2016. In this “Code of Conduct”, it is declared that

⁶⁷ Cf. C. Scott (2010): “Regulatory Governance and the Challenge of Constitutionalism.”, in: *EUI Working Papers*; Robert Schuman Centre for Advanced Studies, Private Regulation Series 02, pp. 1-20; Lachmayer, K. (2013): “Technokratische Rechtssetzung Privater.”, in: *Juridikum*, vol. 1, (pp. 109-118), p.110; C. Scott et al. (2011): “The Conceptual and Constitutional Challenge of Transnational Private Regulation.”, in: *Journal of Law and Society*, Vol. 38, No. 1, pp. 1-19.

⁶⁸ Cf. P. Verbruggen (2009): “Does Co-Regulation Strengthen EU Legitimacy?”, in: *European Law Journal*, 15(4), (pp.425-441) p. 429.

⁶⁹ M. Mataija (2016): “*Private Regulation and the Internal Market: Sports, Legal Services, and Standard Setting in EU Economic Law.*”, Oxford University Press, p. 9.

⁷⁰ http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf, (latest access: 1/10/2017)

the four IT-companies involved are „taking the lead on countering the spread of illegal hate speech online.”⁷¹ The code outlines several “public commitments” to be taken by the IT-companies for combatting the spread of hateful content online. These commitments shall complement the efforts to be taken by national law enforcement authorities in sanctioning relevant conduct occurring within their jurisdictions.⁷² The most contested aspect of the code concerns the commitment of IT-companies to set in place “Rules or Community guidelines”⁷³ upon which removal requests for allegedly “hateful online content” will be reviewed. Where considered appropriate, the IT-companies commit themselves to remove this content within less than 24 hours upon the receipt of a removal notification. This has attracted heavy criticism among civil society organisations on several grounds.⁷⁴ The major point here is that the Code “downgrades the law to a second-class status, behind the ‘leading role’ of private companies that are being asked to arbitrarily implement their terms of service.”⁷⁵ By this Code, it is argued, a handful of global economic players are authorized to police – on behalf of the public – allegedly “unlawful” conduct at their own discretion. The normative effects of this seemingly purely voluntary act of “self-commitment” reside in the interference, which this private regime presupposes, with the free expression rights of millions of users of the social media platforms concerned.⁷⁶ Furthermore, also the drawing up process of this initiative itself has been fiercely criticized by CSOs for having “systematically excluded” their input from the negotiations prior to the adoption of this code.⁷⁷

Turning back to general critique outlined in this paper, this example quite impressively underlines the constitutional implications of conferring regulatory authority to private actors. It shows that through such alternative regulatory arrangements (a certain group of) private actors are authorized to set in place rules that may directly affect protectable interests of consumers or citizens in general. This potentially adverse effects however originate from norm-setting processes which take place outside conventional, that is constitution-made, accountability, legitimacy and transparency systems.

7. Concluding remarks

In this paper, it has been argued that within the EU context regulatory authority is increasingly allocated to private actors. By making reference to private “codes of conduct” and “technical standards” mandated under EU legislation, the attempt has been made to illustrate that private actors may be entrusted to exert rule-making powers which may be functionally equivalent to those of public authorities. However, given that private regulators are not formally acknowledged within the EU’s competence order as recipient of delegated rule-making authority, private regulation still constitutes a (widely) unsettled phenomenon within the EU’s constitutional

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ See: <https://edri.org/edri-access-now-withdraw-eu-commission-forum-discussions/> (latest access: 1/10/2017)

⁷⁵ <https://edri.org/edri-access-now-withdraw-eu-commission-forum-discussions/>, (latest access: 1/10/2017)

⁷⁶ <https://cdt.org/insight/letter-to-european-commissioner-on-code-of-conduct-for-illegal-hate-speech-online/> (latest access: 1/10/2017); <https://edri.org/edri-access-now-withdraw-eu-commission-forum-discussions/> (latest access: 1/10/2017); <https://edri.org/guide-code-conduct-hate-speech/> (latest access: 1/10/2017)

⁷⁷ <https://edri.org/guide-code-conduct-hate-speech/> (latest access: 1/10/2017)

order.⁷⁸ Against this background, it has been argued that by mandating private actors to spell out legislative requirements in their respective domain the rule-making processes (or parts thereof) escape the normative framework provided under the EU's constitutional order. Outsourcing rule-making powers to private regulatory regimes therefore bears the risk of "hollowing out"⁷⁹ or side-lining the protective standards to which conventional public rule-making is subjected under constitutional orders.

Considering the quite far reaching normative effects private regulatory regimes may have in practice, it is all the more important that traditional constitutional constraints imposed on the exercise of public powers are not circumvented when regulatory authority is transferred to private actors.⁸⁰ Efficiency gains achieved through the "privatization"⁸¹ of public rule-making must not outweigh constitutional standards. With the exercise of powers by the public being confined by "Rule of Law" premises, it must be ensured that equivalent safeguards and constraints are in place when such powers are exercised by private entities.⁸² This view is also supported by the Venice Commission of the OECD in its recently adopted "Rule of Law Checklist"⁸³. Therein, it is pointed out that "[t]here are a number of areas where hybrid (State-private) actors or private entities exercise powers that traditionally have been the domain of State authorities [...]. The Rule of Law must apply to such situations as well."⁸⁴

However, this paper concludes with the sobering observation that the crucial question still remains widely unanswered: how could constitutional orders, both at national but also at supranational level, adequately respond to the challenges that emerge from this transformative and pluralist nature of contemporary regulation? How can this conflicting relation between private regulatory mechanisms, as a seemingly "irreversible necessity"⁸⁵ in current times, and "orthodox" constitutional premises of the "Rule of Law" be reconciled? The main problem resides in the fact that constitutional principles are, *prima facie*, ill-equipped for being applied to private regulatory authority. Not only because the formalistic, state-centred understanding of these

⁷⁸ Cf. S. Velluti (2013): "Exploring Possible Encounters between New Governance, Law and Constitutionalism in the European Union.", in: *Beijing Law Review*, Vol. 4, No. 1, p. 8.

⁷⁹ D. Levi-Faur (2012): "From 'big government' to 'big governance'"., in: D. Levi-Faur (ed.), *The Oxford Handbook on Governance*, Oxford University Press, Oxford, (pp. 3-18) p. 4.

⁸⁰ See e.g.: K. Lachmayer (2016): "Rechtssetzung durch Private im Eisenbahnrecht. Rechtswissenschaftliche Studie", in: *Verkehr und Infrastruktur*, 59, p. 1, [https://media.arbeiterkammer.at/wien/Verkehr und Infrastruktur_59.pdf](https://media.arbeiterkammer.at/wien/Verkehr_und_Infrastruktur_59.pdf) (latest access: 1/10/2017).

⁸¹ G. F. Schuppert (2012): "New Modes of Governance and the Rule of Law. The Case of Transnational Rule Making.", in: M. Zürn, A. Nollkaemper and R. Peerenboom (eds.): *In an Era of International and Transnational Governance*, Cambridge University Press, (pp. 90-107) p. 91.

⁸² Kötter and Schuppert (2014) came to this conclusion, stating: "if non-state norm-setting substitutes for state lawmaking in certain contexts, it follows that the production process of these rules should be held to the same standards as the creation of legal principles." (M. Kötter and G. F. Schuppert (2014): "Chapter 6. Applying the Rule of Law to Contexts Beyond the State.", in: J. R. Silkenat (ed.), *The Legal Doctrines of the Rule of Law and the Legal State*. Springer, p. 89.)

⁸³ http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf, (latest access 27/9/2017)

⁸⁴ *Ibid.*, p. 24.

⁸⁵ V. Hatzopoulos (2012): "Regulating Services in the European Union.", Oxford University Press, p. 295.

principles is still dominant in legal doctrine. But also because of the abstractness of these constitutional maxims⁸⁶, which makes it highly difficult to translate them into concrete instructions for disciplining private regulatory authority.

In the scholarly debate, some attempts have been made to find alternative pathways to effectively infuse constitutional aspirations of the “Rule of Law” into alternative governance structures.⁸⁷ Concepts that have been brought forward in this respect, build upon alternative notions of constitutionalism, such as “private” or “corporate constitutionalism”. However, further research needs to be conducted on how these theoretical concepts may be effectively implemented in practice, especially in the European context.

⁸⁶ However, as Gerbrandy rightly points out: “Concepts like the ‘rule of law’ or ‘democracy’ are equally vague. And their vagueness has not led to them being devoid of practical value. Yes, their precise meaning is unclear. However, it is at the core of these concepts that a call for action can be established.” (A. Gerbrandy (2013): “Competition Law and private-sector sustainability initiatives.”, in: A.L.B. Colombi Ciacchi, M.A. Heldeweg, B.M.J. van der Meulen & A.R. Neerhof (eds.): *Law & Governance. Beyond the Public-Private Law Divide?*, The Hague: Eleven International Publishing; p. 85.)

⁸⁷ Cf. J. Freigang (2002): “Scrutiny. Is Responsive Regulation Compatible with the Rule of Law?”, in: *European Public Law*, 8(4), pp. 464-472.; C. Engel (2001): “Hybrid Governance Across National Jurisdictions as a Challenge to Constitutional Law.”, in: *European Business Organization Law Review*, Vol. 2, pp. 569-583; C. Scott (2010): “Regulatory Governance and the Challenge of Constitutionalism.”, in: *EUI Working Papers*; Robert Schuman Centre for Advanced Studies, Private Regulation Series 02. See also: V. Hatzopoulos (2012): *“Regulating Services in the European Union.”*, Oxford University Press, p. 290.