



*European Economic and Social Committee*

# European Self- and Co-Regulation

# Contents

Foreword

Background

The institutional dimension

The foundations laid by the 2003 inter-institutional agreement “Better Lawmaking”

The development of European self-regulation and co-regulation

The role of self-regulation in an international and global context

What future for self-regulation after the financial crisis?

Conditions for the success of European self-regulation and co-regulation

Prospects and limits of European self-regulation and co-regulation

1. Prospects

2. Limits

What initial lessons can be learnt from the EESC database?

Conclusions

Appendix I Facts and figures of the self and co-regulation database

Appendix II - Appendix II – Useful internet references

# Foreword

The State has traditionally made use of "standard rule-making" to try to modify behaviour. Whether it be to tackle a problem, undertake an action or change an actual state of affairs, the response has always resulted in a "need for regulation".

However, since the 1980s, a new type of rule-making has increasingly appeared to be an alternative to this traditional approach. It was during the 1990s in particular that the shift in the role of the State led to a proliferation of various instruments of the "soft law" type (guidelines, agreements, declarations, compromises, codes of conduct) of a non-binding nature and, in particular, self-regulation and co-regulation, which aim to involve the stakeholders in the legislative process in a way that is binding (so that these two alternatives come under the heading of "hard law"<sup>1</sup>). The codes drawn up by commercial companies or associations, those which involve a number of actors, codes which have the value of a model and intergovernmental codes, are only some of the main examples that can be encountered in most business sectors.

The advantages of self-regulation are well known<sup>2</sup>, as are its limits and the risks that it involves. The biggest advantage is that companies accept responsibility for the social and environmental impact of their activities (CSR<sup>3</sup>). This opens up new prospects in terms of behaviour and promotes an interaction with suppliers, workers, consumers and society in general. In addition, there is a reduction of the costs of information and of the legislative process, greater compliance on a voluntary basis, a limitation of conflicts to small groups and less heavy-handed action on the part of the public authorities.

However, this type of regulation has its limits. Steps have to be taken to ensure that the codes are more than just general statements of professional ethics and that their implementation is followed up and verified. In addition, the absence of independent checks and sanctions can give the impression that they are simply promotional instruments without any real potential for practical application.

It must not be forgotten that codes of conduct may sometimes be seen as substitutes for regulation by the public authorities and as checks on companies, even when the general interest is at stake. It is important to point out that self-regulation is not the same as de-regulation but that it is another method of regulation, that it is an alternative solution or a complement to what is known as "hard law" – standard rule-making - in the context of optional regulation. It is with this in mind that the European Commission uses "soft law" instruments such as

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<sup>1</sup> For C. Scott (University College, Dublin), "soft law" and self-regulation are two different things. For example, OECD recommendations (pure "soft law") cannot be compared with binding codes of conduct (self-regulation), since non-state regulators (NSR) too can make their self-regulation systems binding.

<sup>2</sup> See *"Corporate Codes of Conduct: Self-Regulation in a Global Economy"*, Rhis JENKINS, UN Research Institute for Development, 2001.

<sup>3</sup> Corporate Social Responsibility. Corporate governance may be another area where self-regulation can be envisaged as this was advocated at an EESC public hearing on the *European Corporate Governance Framework* on 2 September 2011 in Sofia, Bulgaria. DG INFSO and their Director General, Robert Madelin, also launched an initiative early 2012.

recommendations; it supports voluntary initiatives and encourages the adoption of codes of conduct by the business sector in cooperation with the trade unions and consumers' associations.

Several directives give an idea of the prospects offered by self-regulation - particularly as regards advertising, data protection (Directive 95/46), e-commerce (Directive 2000/31) or unfair trading practices (Directive 2005/29). Recommendations 98/257 EC of 30 March 1998 and 2001/310 EC of 4 April 2001 aim to encourage the respect of certain essential principles by the bodies responsible for alternative procedures for resolving disputes. The Resolution of 25 May 2000 sets up the European Extra-Judicial Network EEJ-NET, to which has been added the FIN-NET network launched in February 2001, which seeks in particular to facilitate the out-of-court settlement of disputes in the financial services sector. A European code of conduct for mediators was drawn up by a group of interested parties with the help of the Commission and presented at a conference on 2 July 2004, while in 2003 the Council adopted a proposal for a directive on mediation (Directive 2002/8).

It is against this background that the European Economic and Social Committee (EESC) - which has always been proactive as regards improving the quality of legislation, since it involves organised groups of those who have to comply with the law in the Community decision-making process - decided to promote self-regulation and co-regulation as tools for simplifying the laying-down of rules. It therefore asked its Single Market Observatory (SMO) to devote a large part of its activities to following up and studying the codes of conduct that are in force. In addition to issuing a number of opinions on these alternative instruments, sending its members to take part in various conferences and seminars and including this topic on the agenda for its public hearings, the SMO, in collaboration with the General Secretariat of the European Commission, has developed a database dedicated to European self-regulation and co-regulation initiatives which, after a test phase at the end of 2007, was formally presented and launched on 30 March 2008 at a public hearing entitled "*The Current State of European Self-Regulation and Co-Regulation*"<sup>4</sup>. This database provides a one-stop shop for information and follow-up which has primarily an educational purpose.

The SMO is convinced that this instrument is important for the follow-up and the future development of self-regulation and co-regulation, both at national and European level. It enables the parties concerned to learn lessons and to profit from the experience of other sectors, so that they can either improve their existing codes of conduct or develop new ones in other areas of activity. At a time when we have to cope with the challenges of globalisation (the internationalisation of law), when we suffer the consequences of the financial crisis and ask ourselves why and how it could have happened - with a dramatic economic and social impact whose full extent we still do not know - it is essential to take stock of the current state of self-regulation and co-regulation and to judge whether the cause of the crisis is related to a failure of the rules in force and decide what measures need to be taken to prevent such a situation occurring again in the future.

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<sup>4</sup> See below the chapter on this data base.

The aim of this report is to assess the whole issue of self-regulation and co-regulation in the context of the European Union and think about, in particular, what qualitative criteria are needed for a reliable and effective implementation of these participatory standard-setting instruments, which illustrate the role that civil society can actually play in the legislative process.



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## Background

Self-regulation and co-regulation in Europe have evolved significantly in recent years. This development, which the European Economic and Social Committee has always supported, has for a long time needed a recognised European statute.

The social policy provisions of the Maastricht Treaty and then, more comprehensively, the Commission White Paper on European Governance and lastly the 2003 inter-institutional agreement on "Better Lawmaking"<sup>5</sup> (this has now been replaced by "Smart Regulation", whose scope seems to be broader)<sup>6</sup> have given self-regulation and co-regulation a role, as a complement to the regulations and directives laid down by the legislator. This framework will provide a boost for practices that are crucial to the completion of the Single Market, having already proved their effectiveness in a number of fields, such as technical standards, professional rules, social dialogue, services, consumers, and the environment.

Initiatives for self-regulation and co-regulation have taken many forms, such as codes of conduct, declarations, charters, agreements, rules, standards and labels. Their links with regulations are also extremely diverse, ranging from legally compatible autonomy, to requirements laid down in the wake of framework legislation (co-regulation) or even the local definition of rules then supported or even made mandatory by the legislator. Their success depends on several factors: the account they take of the general interest, the transparency of the system, the representativeness and skill of those involved, the effectiveness of the monitoring - including sanctions if necessary - and a mutual spirit of partnership between the parties concerned and the public authorities. They offer many advantages: they remove barriers to the Single Market, they simplify rules, they can be implemented flexibly and quickly while reacting "in real time" to technological and societal changes, they free up legislative capacity and ensure the co-responsibility of the stakeholders involved. They also have their limits, which depend primarily on effective monitoring and sanctions and total compatibility with all existing legal rules and on the need for an adequate legislative framework in areas affecting health, safety and services of general interest.

Greater emphasis should now be given to regulatory freedom; good practice should be better publicised and consultation with public authorities should be improved. Greater freedom for self-regulation and co-regulation will in future be in proportion to the sense of responsibility shown by those involved and to the effectiveness of their regulations for all users. The European Economic and Social Committee would like to contribute to this and will therefore continue to develop its observations and its discussions on the matter. It can also act as a bridge between the civil society organisations involved and the Community institutions – the European Commission and the European Parliament<sup>7</sup>.

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<sup>5</sup> OJ C 321, 31.12.2003, p. 1–5.

<sup>6</sup> EESC opinion on "Smart Regulation", CESE 984/2011, OJ C 248, 25.08.2011, p. 87.

<sup>7</sup> See the Declaration of Limelette of June 2006. This joint declaration by the chairmen of EP Committees recommended giving the Parliament a greater role in the context of "Better Lawmaking".

## The institutional dimension

The rules governing the operation of the Single Market are basically grounded in regulations and directives adopted, within the framework of the Treaty on European Union, by the EU institutions – complemented by case law established by the Court of Justice in Luxembourg. Industry organisations and trade unions directly affected by proposed Community regulations are consulted on the proposal and, on the basis of this consultation, the Commission carries out an impact analysis. These organisations then have the opportunity to lobby the Parliament and the Council in defence of their positions before a decision is reached.

Beyond this consultative and lobbying role, which generally makes up the major part of their mandate and their work, these organisations may also, in certain cases, be called upon to play a more direct role in defining the rules covering their areas of interest. This role might be one of co-regulation, where the European legislator focuses on setting out the basic requirements, leaving it to these organisations or to the standardisation committees in which they participate to define the technical data and specifications. Professions or organisations go for self-regulation when they set their own rules of conduct within the Single Market without direct intervention or a specific request from the European legislator.

These alternative rules may take various forms. They might consist of commitments, declarations, charters, labels or voluntary codes of conduct, adopted unilaterally whilst generally involving other associations. They might also be adopted under contractual agreements between the representatives of various sectoral or professional interests who could be social, inter-sectoral or sectoral partners or other categories of civil society stakeholders – such agreements include those concluded between particular industries and Consumers' associations.

Since the *Declaration of the Six Presidencies*<sup>8</sup>, EU Presidencies have included the strategic issue of “*Better Lawmaking*” in their respective programmes, which gives the Committee an extra stimulus to provide a structure for its activities in this area. At institutional level, the EU Commission, with the *Inter-institutional Agreement*<sup>9</sup> has committed itself to a policy of supporting non-binding instruments when legislation, while still essential in certain areas (as the financial crisis has shown) may be unnecessary or out of proportion<sup>10</sup>. The General Secretariat<sup>11</sup> of the EU Commission and some of its DGs have thus taken initiatives that favour the use of self-regulation and co-regulation as integrated tools within a more general strategy of “*Better Lawmaking*”. The basic idea is that codes of conduct or standards drawn up by various sectors of activity provide flexible and down-to-earth solutions as long as they are not at odds with Community legislation. Such “soft law” practices are not without potential risks and require constant follow-up on the part of the legislator. This was one of the – justified – arguments of the European Parliament, which in its Medina report<sup>12</sup> recommended that *“non-binding instruments (“soft law”) should be used with caution, as all too often they constituted an ambiguous and ineffective instrument which was liable to have a detrimental effect on Community legislation and institutional balance”*. These alternatives are only really binding if they are also coercive, i.e. flanked by measures such as sanctions aiming to guarantee that they are actually implemented. As early as 2000 the European Economic and Social Committee considered this issue in its *Single Market Observatory (SMO)*, which at the time was chaired by Bruno Vever (Group I, Employers – France). The late PRISM data base<sup>13</sup> was initially developed to offer an online catalogue of initiatives listed by the SMO. The current self-regulation and co-regulation data base, whose specifications were defined by a cooperation agreement signed by the Secretaries-General of the EU Commission and the EESC and which has been operational since the end of November 2007, is the first online information counter in this area (see special chapter below). It was hardly surprising that the EU Commission asked the EESC to develop this tool and make it accessible on its own website, since the EESC represented civil society organisations, i.e. organised users of Community law.

In its Resolution of 9 September 2010 on Better Lawmaking<sup>14</sup> (P7\_TA(2010)0311), the European Parliament *“warns against abandoning necessary legislation in favour of self-regulation or co-regulation or any other non-legislative measure; (it) believes that the consequences of such choices should be subject to careful examination in each case, in accordance with Treaty law and the roles of the individual institutions”*. It also *“stresses, at the same time, that soft law should be applied with the greatest of care and on a duly justified basis, without undermining legal certainty and the clarity of existing legislation, and after consultation of Parliament as underlined in its resolution on a revised Framework Agreement”*.

<sup>8</sup> December 2004.

<sup>9</sup> See p. 11 “*The foundations laid by the 2003 inter-institutional agreement on Better Lawmaking*”.

<sup>10</sup> COM(2007)724, SEC(2007)1518, p. 10.

<sup>11</sup> For more information on the choice of regulatory instruments: [http://ec.europa.eu/governance/better\\_regulation/instruments\\_en.htm](http://ec.europa.eu/governance/better_regulation/instruments_en.htm)

<sup>12</sup> Medina Report (European Parliament Resolution) on the “Institutional and legal implications of the use of ‘soft law’ instruments”, OJ C 187 E, 24.7.2008, p. 75–79.

<sup>13</sup> “Progress Report on Initiatives in the Single Market”.

<sup>14</sup> OJ C 308 E, 20.10.2011, p. 66–73.



However, the European Economic and Social Committee has long been interested in developing such socio-professional initiatives in Europe. This is a particularly useful way for the various civil society stakeholders to play a full role in the process of building Europe.

In October 2000, the Committee adopted a code of conduct designed to make a contribution to the simplification process, in which it gave a commitment to draw the attention of the EU institutions to the possible need to steer EU rules towards an approach based on contractual agreements, self-regulation and co-regulation. The aim of this commitment was to provide further alternatives to the standard method of rule-making, by attaching greater priority to freedoms and responsibilities in organised civil society. The Committee has frequently proposed to the European institutions, particularly in its opinions on numerous draft regulations<sup>15</sup>, that more consideration should be given to alternative methods of regulation. Such has been the case in the areas of e-commerce, electronics, the Internal Market for services, financial services, insurance, payment methods and deadlines, cross-border payments in Euros<sup>16</sup>, labelling and consumer information, the technical specifications of some products (for example frontal protection for motor vehicles), energy savings, tourism and environmental protection.

Sixty per cent of the European professional associations consulted in connection with the 2004 information report of the EESC on *"The Current State of Self-regulation and Co-regulation in the Single Market"* indicated that they had already been involved in self-regulation or co-regulation. Of the 40% who said that they had not been involved, more than half stated that they expected to be so in the future. Self-regulation and co-regulation therefore have strong development potential at the level of the Single Market.

The Committee has repeatedly called for the social partners to undertake more joint initiatives in its opinions on employment guidelines, local employment initiatives, the employment rate of older workers and on social conditions in various areas of activity, (health protection in the cement industry, the training of seamen and the working conditions of airline cabin crews, train conductors and those working in other modes of transport). It gave a commitment in its code of conduct to establish a dialogue with European economic and social players to encourage them to take on the kinds of responsibilities - particularly contractual responsibilities - that will enable them to make a direct contribution to Community provisions.

The Committee has also organised several seminars and public hearings to take stock, with social and economic organisations, of progress on self-regulation and co-regulation. Specific examples are:

- 3 May 2001, on co-regulation in the Single Market;
- 10 September 2002, on simplifying regulations in the Single Market;
- 24 May 2004, on the Single Market in services;

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<sup>15</sup> Also in its opinions (see, for example, the exploratory opinion on *Better Lawmaking* –OJ C 24, 31.1.2006, p. 39–51 – drawn up at the request of the UK Presidency).

<sup>16</sup> See the SEPA initiative setting up a single payments area covering 31 European countries (EU and EEA), which is an example of successful co-regulation.

- 1 October 2004, in connection with the drafting of the information report on *"The Current State of Self-regulation and Co-regulation in the Single Market"*;
- 31 March 2008, on *"The Current State of European Self-Regulation and Co-Regulation"*. This hearing also saw the formal presentation of the data base on European self-regulation and co-regulation initiatives.

The current publication is thus a direct extension of the European Economic and Social Committee's long-standing concern to expand self-regulation and co-regulation at European level. The main aim of this brochure is to help:

- To better understand and share understanding of a situation with which the European institutions and the Member States and even those in industry are still unfamiliar, and to facilitate the spread of best practice;
- To make a more thorough assessment of the contribution that such initiatives can and do make to the completion of the Single Market and to its smooth operation and of how they can complement the standard forms of legislation.

# The foundations laid by the 2003 inter-institutional agreement "Better Lawmaking"

For a long time, European self-regulation has developed outside any recognised legal framework, with considerable disparities between the various national situations. Some states, which were familiar with these practices, were generally inclined to support them, in particular English-speaking countries, who described them as "soft law"<sup>17</sup>. But other countries with different administrative and political traditions saw them more as a potential threat to the prerogatives of public authority and were instinctively inclined to reject them, more or less openly. The ambiguities inherent in this "grey" area of Community law, which is controversial and consequently without a statute, have certainly hampered the development of self-regulation and co-regulation at European level. Consequently, although all European associations are instructed by their members to lobby the EU institutions, a number of them still believe that they do not have a mandate to get involved in self-regulation or co-regulation initiatives. To give an example, certain players in the property sector (UIPI<sup>18</sup>) feel that such an initiative would only add extra rules in a sector which, in their view, is already much too regulated in their countries (particularly Germany).

The 1992 Maastricht Treaty started to rectify this situation by setting out the framework and the effects of European social dialogue between the social partners in their contractual role – incidentally at the express request of these very groups. Almost ten years later, the Commission started to lay down more general conditions for developing self-regulation and co-regulation, in the 2001 White Paper on European Governance and then in various communications and recommendations, in 2002 regarding environmental agreements.

A key stage in this political development was the inter-institutional agreement "Better Lawmaking"<sup>19</sup>, which was concluded on 16 December 2003 between the Parliament, the Council and the Commission. This agreement for the first time identified and provided a framework for the practices of self-regulation and co-regulation within the Single Market. It would have been a wise move to involve the EESC in this process in order to make use of the contributions of organised civil society on the theme of proportionality and of the Committee of the Regions on the subsidiarity aspect.

The agreement states that "the three Institutions recall the Community's obligation to legislate only where it is necessary, in accordance with the Protocol on the application of the principles of subsidiarity and proportionality. They recognise the need to use, in suitable cases or where the Treaty does not specifically require the use of a legal instrument, alternative regulation mechanisms". It also states that "the Commission will ensure that any use of co-regulation or self-regulation is always consistent with Community law and that it meets the criteria of

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<sup>17</sup> See footnote 1.

<sup>18</sup> International Union of Property Owners.

<sup>19</sup> OJ C 321, 31.12.2003, p. 1–5.

transparency (in particular the publicising of agreements) and representativeness of the parties involved. It must also represent added value for the general interest. These mechanisms will not be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States. They must ensure swift and flexible regulation which does not affect the principles of competition or the unity of the internal market".

**Co-regulation** is defined as "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). This mechanism may be used on the basis of criteria defined in the legislative act so as to enable 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".

The agreement adds that "the legislative act must abide by the principle of proportionality defined in the EC Treaty. Agreements between social partners must comply with the provisions laid down in Articles 138 and 139 of the EC Treaty. In the explanatory memoranda to its proposals, the Commission will explain to the competent legislative authority its reasons for proposing the use of this mechanism". Furthermore, "in the context defined by the basic legislative act, the parties affected by that act may conclude voluntary agreements for the purpose of determining practical arrangements. The draft agreements will be forwarded by the Commission to the legislative authority. In accordance with its responsibilities, the Commission will verify whether or not those draft agreements comply with Community law (and, in particular, with the basic legislative act). At the request of *inter alia* the European Parliament or the Council, on a case-by-case basis and depending on the subject, the basic legislative act may include a provision for a two-month period of grace following notification of a draft agreement to the European Parliament and the Council. During that period, each Institution may either suggest amendments, if it is considered that the draft agreement does not meet the objectives laid down by the legislative authority, or object to the entry into force of that agreement and, possibly, ask the Commission to submit a proposal for a legislative act".

"A legislative act which serves as the basis for a co-regulation mechanism will indicate the possible extent of co-regulation in the area concerned. The competent legislative authority will define in the act the relevant measures to be taken in order to follow up its application, in the event of non-compliance by one or more parties or if the agreement fails. These measures may provide, for example, for the regular supply of information by the Commission to the legislative authority on follow-up to application or for a revision clause under which the Commission will report at the end of a specific period and, where necessary, propose an amendment to the legislative act or any other appropriate legislative measure".

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

The agreement states that "as a general rule, this type of voluntary initiative does not imply that the Institutions have adopted any particular stance, in particular where such initiatives are undertaken in areas which are not covered by the Treaties or in which the Union has not hitherto

*legislated. As one of its responsibilities, the Commission will scrutinise self-regulation practices in order to verify that they comply with the provisions of the EC Treaty". It adds that "the Commission will notify the European Parliament and the Council of the self-regulation practices which it regards, on the one hand, as contributing to the attainment of the EC Treaty objectives and as being compatible with its provisions and, on the other, as being satisfactory in terms of the representativeness of the parties concerned, sectoral and geographical cover and the added value of the commitments given. It will, nonetheless, consider the possibility of putting forward a proposal for a legislative act, in particular at the request of the competent legislative authority or in the event of a failure to observe the above practices".*

It can thus be seen that the inter-institutional agreement of December 2003:

- Set out, for the first time, a statute both for self-regulation and co-regulation, and at the same time laid down precise definitions of them;
- Organised these practices into a set of legal rules and requirements, which will enable their co-existence, their compatibility and their complementarity to be better managed by means of legal provisions;
- Provided for monitoring and follow-up mechanisms, entrusted directly to the European Commission and to which the European Economic and Social Committee also wishes to contribute;
- Thus opened a new chapter in the development of self-regulation and co-regulation in the Single Market, with new prospects that are directly relevant to European integration and to the involvement of its economic and social stakeholders.

## The development of European self-regulation and co-regulation

The first initiatives for self-regulation and co-regulation initially focused on three areas: technical standardisation, professional rules and social dialogue.

European standards are drawn up by European committees, of which national standardisation bodies, which may also be certification bodies, are members. When these standards are drawn up, consensus is sought between the different interests that are present – producers, sellers, users, consumers, test laboratories, public authorities, research institutions, etc. Several thousand European standards have thus been adopted by the European Committee for Standardisation (CEN), the European Committee for electrotechnical standardisation (CENELEC), and the European Telecommunications Standards Institute (ETSI). While three-quarters of these standards are covered by self-regulation by the parties concerned, one-third constitutes a form of co-regulation, developed in conjunction with the European legislator in the last fifteen years under what is known as the "*new approach*". The European legislator thus confines its action to the 'essential requirements' of harmonisation, mainly linked to considerations of safety, health, the environment and consumer protection, whilst referring the corresponding technical specifications to the standardisation bodies linked to the Commission for this purpose by a standardisation contract. In this context, the mutual recognition of goods or services has also grown, especially under the auspices of the European Organisation for Conformity Assessment (EOTC).

Self-regulation in the professions has developed at European level in the last twenty years in a very broad range of activities, not least within the liberal professions, which had already been widely self-regulating at national level for a long time (often by means of time-honoured professional orders, such as those for lawyers, doctors or architects). These examples of self-regulation, generally based on codes of conduct and ethics, supported where appropriate by the social partners of the sector, have helped to establish codes of ethics and common practices, thereby facilitating the implementation of the principle of mutual recognition. We can refer in this context to European self-regulation in the following professions: engineers (1982), lawyers (1988), perfusion nurses (1991), advertising agencies and consultants (1992), restaurateurs (1993), solicitors (1995), travel agents (1996), Internet service providers, hairdressers, asset managers, estate agents (2001), hoteliers (2003). These agreements cover only some aspects of the profession, generally to do with qualifications, training or rules of conduct, but they do make it considerably easier to transfer the right to practise these activities from one Member State to another.

European self-regulation and co-regulation have also become established between social partners. At inter-sectoral level, the foundations for this were laid by the social dialogue encouraged by European Commission President Jacques Delors (the so-called Val Duchesse meetings), which resulted in a series of joint declarations by the European social partners. Subsequently, the contractual role of the social

partners was formally recognised – at their express request – by the Maastricht Treaty. Among other things, this provided for a special procedure for consulting the social partners – at sectoral or inter-sectoral level – before embarking on Community legislation on social matters. Such consultation could result in contractual agreements between them instead of regulation. Such agreements between social partners can, at their request, be ratified by the Council, acting on a proposal by the Commission, and thus take on the force of law.

Three directives have thus been adopted by the Council following this type of European inter-sectoral agreement. They deal with parental leave<sup>20</sup>, (1995), part-time working<sup>21</sup> (1997) and fixed-term work<sup>22</sup> (1999). A European social inter-sectoral agreement was also concluded in 2000 in the field of teleworking, which the signatories (BUSINESSEUROPE, CEEP, UEAPME and the ETUC) this time agreed to implement on a voluntary basis through their members and not by means of Council directives. The same voluntary approach resulted in an agreement between the social partners in 2004 on work-related stress.

- Social self-regulation has also grown significantly at sectoral level, often through sectoral committees for social dialogue set up by the social partners concerned. They have taken a very wide range of forms, from simple joint declaration or recommendations, through codes of conduct and guidelines, to binding agreements. The areas they covered were just as diverse, and included employment, social dialogue, working conditions, working hours, health, health and safety, and training.

Many European multinationals, especially those that have set up a European-level works council in line with the 1996 directive on information and consultation in European companies (Directive 94/45/EC<sup>23</sup>), have adopted codes of conduct on industrial relations within the company. Following the example of professional codes of conduct on international labour standards mentioned above, such codes of conduct in multinational companies have been more to do with industrial relations in the context of globalisation, in line with the guiding principles drawn up by the OECD or the code of conduct for multinationals produced by the European Parliament in January 1999 – the Howitt report.

European self-regulation and co-regulation initiatives have been extended in recent times to cover consumers, especially in the spheres of business, financial services and industry.

In business, self-regulation has developed in the form of agreements or voluntary commitments, as a result of pressure from three sources:

- First from consumers and their associations, who are anxious to have better information about products and services (labelling etc) and to enjoy security in transactions and an after-sales service, such as payments, guarantees, maintenance, claims;

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<sup>20</sup> OJ L 145, 19.6.1996, p. 4–9.

<sup>21</sup> OJ L 14, 20.1.1998, p. 9–14.

<sup>22</sup> OJ L 175, 10.7.1999, p. 43–48.

<sup>23</sup> OJ L 254, 30.9.1994, p. 64–72.

- From the advertising industry, which has been keen to complement legislation by voluntary approaches to make advertisers more responsible and improve public awareness<sup>24</sup>;
- Also from electronic commerce, which has grown considerably in the last fifteen years or so, placing particular emphasis on consumer needs.

This includes, mainly in the period from 1995 to today:

- Agreements on direct selling and disputes arising from direct selling;
- The development of security labels for e-commerce;
- The organisation of cross-border mail-order sales;
- The reporting of good practice and even certification for professional profiles in the information society, in particular for Internet service providers.

These provisions are also often accompanied not only by a system for monitoring their implementation, but also by simplified regulations on consumer disputes, vastly increasing their effectiveness.

Self-regulation has also grown in the financial services sector. In this area too, the growth of the Internet but mainly the introduction of the euro and of a single, more integrated European financial area have been a driving force<sup>25</sup>. The self-regulation initiatives of the social and economic stakeholders concerned have helped to break down several barriers within this financial area, for instance:

- the 1998 listing of Norex on the stock exchange and then the creation of Euronext in 2000, linking the Paris, Brussels and Amsterdam stock exchanges<sup>26</sup>;
- the pre-contractual information in 2001 concerning mortgages and insurance on the Internet.

In this area too, initiatives for simplified dispute settlement have been put in place, enhancing the impact of the procedure.

Self-regulation has also grown in recent years to cover relations between industry and consumers (B2C). Thus, an agreement was reached in 2001 between BUSINESSEUROPE (which represents European industry at inter-sectoral level) and BEUC (the European Consumers' Organisation). Among other things, this agreement sets out a framework for accrediting trust marks, detailing conditions for monitoring and verification with provision for assessment by an independent third party.

<sup>24</sup> See in particular the *Autorité de la régulation professionnelle de la publicité*, ARPP (formerly the *Bureau de vérification de la publicité*, BVP) set up in France during the inter-war period.

<sup>25</sup> The launching of the Single European Payments Area (SEPA) on 28 February 2008 is intended to make cross-border payments as easy as domestic payments, and is a major achievement in this context.

<sup>26</sup> NYSE Euronext since 2007.



Environmental protection has itself been subject to increased self-regulation and co-regulation in recent years. The Commission has actively encouraged this development, laying down a framework to promote these practices in its recommendation of 17 July 2002 on environmental agreements. These agreements can now be fully recognised at Community level, by means of an assessment and certification procedure:

- Either at the recommendation of the Commission monitoring the adoption of the agreement by an exchange of letters between the Commission and the representatives of the sector recognising the agreement;
- Or at the recommendation of the Commission accompanied by a Council and European Parliament decision establishing a monitoring and reporting system.

At inter-sectoral level, voluntary commitments have been established at the behest of the public authorities in several countries, Germany in particular, to comply with environmental requirements, especially those set out in international agreements on reducing CO<sub>2</sub> emissions in the atmosphere.

At sectoral level, such initiatives have been taken mainly with regard to reducing polluting emissions from motor vehicles.

Other self-regulation and co-regulation initiatives can also be mentioned in a great variety of areas. A few examples are:

- Codes of ethics concerning corporate social responsibility, such as in the advertising industry, which has developed codes of conduct in various member countries on the basis of shared principles and values (e.g. obeying laws, good faith, conforming with certain fundamental social values);
- Energy savings (example of a 1999 manufacturers' agreement on reducing energy consumption in washing machines).

## The role of self-regulation in an international and global context

The financial crisis, as well as the various other crises that we have gone through over the decades (economic, environmental and social in particular), call for the development of a multinational approach to law – an internationalisation of law. Of course, Community legislation offers an example of this essential choice, not least for European integration in general and the proper functioning of the single European market in particular. Alternative instruments however offer options that complement traditional “hard law”. It is understandable that the public authorities alone can no longer provide solutions, given the complexity of the international and global context. This means there has to be close cooperation between the public and private sectors in the interests of pragmatic – and even innovatory – rule-making.

Civil society organisations act as a driving force here as structures that represent users of the law. We are therefore witnessing a hybridisation of the law through this interaction between the public authorities (the legislator) and private actors (civil society). This interaction is, moreover, declined by interest groups that equip themselves with codes of conduct, to the extent that these are applied, for example, to a whole production line and involve the various stakeholders concerned, particularly the workers. There may even be some cross-fertilisation when certain codes of conduct or self-regulation initiatives inspire the legislator, who can incorporate them into law<sup>27</sup>. Another important factor is time: the legislator follows a procedure that is often complex, while the author of a self-regulation initiative, which by definition is empirical, will as a general rule get things done more quickly.

This leads us on to the concept of “multi-level regulation” from the global to the national, via the Community level (European Union), down to regional level, particularly for countries with a federal structure where local and regional authorities have real powers, as in the German *Länder* or Spanish *Generalitats*. But beyond this, it is also the role of self-regulation in a twenty-first century characterised by the interpenetration of the economies and production lines and by “legal porosity”<sup>28</sup>. Because of its pragmatic approach self-regulation may, in a way, transcend traditional legislation, a bit like the recommendations of the OECD, but with constraining parameters such as checks and the imposing of sanctions if breaches occur. Is the empirical nature of self-regulation capable of effectively overcoming difficulties such as cultural differences? The example of advertising gives us a very good illustration and despite the sensitivities of each of the countries involved, the code of conduct of the EASA<sup>29</sup> manages to impose strict rules on its members. We can thus see a pragmatic internationalisation of the law based not on decisions by the legislator (the regulations of the European Union) but on the drawing-up of a sort of “para-legislation” designed to regulate activities in a particular sector.

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<sup>27</sup> Like the standards drawn up by the Dutch Stock Exchange and incorporated into Dutch law.

<sup>28</sup> Expression used, though in another context, by Professor Teubner.

<sup>29</sup> European Advertising Standards Alliance.

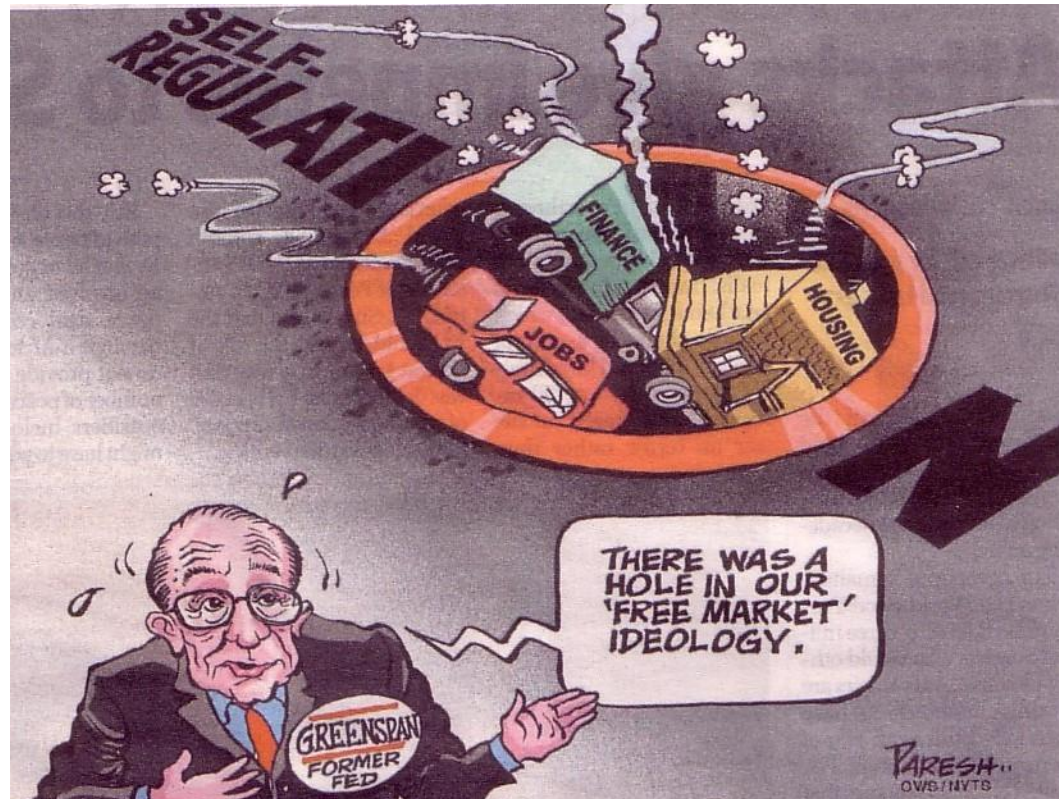
## What future for self-regulation after the financial crisis?

The crisis on the financial markets has raised a number of questions about the validity or the justification of the autonomy of the banking sector as far as “regulating” it is concerned. In fact, this sector is largely de-regulated – or the rules have not been applied – and we have seen in some cases a reaction to this and the emergence of a trend back towards regulation – even in the USA. However, financial services cannot be compared to advertising or direct selling and the “need to take control” which is emerging as a reaction to the trauma provoked by the lack of control by the legislator in the financial sector is not necessarily transferable or desirable in other self-regulated areas.

Self-regulation is not a fashion fad but a type of regulation that complements traditional law-making and a basic element of what we understand by “Better Lawmaking”. It translates the need – in a society that is complex and, when all is said and done, operates in a highly subtle manner – to make market players responsible by means of a “delegation of powers” (subsidiarity) and the provision of adequate rules (proportionality). Of course, on various occasions there has been overlapping between deregulation (“laissez-faire”) and self-regulation (also known in the English-speaking world and in university circles as *enlightened self-interest*<sup>30</sup>).

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<sup>30</sup> Which could be translated into French as *intérêt personnel éclairé*.



Source: *European Voice*, 30 October 2008 (cartoon by Paresh, *The Khaleej Times*, Dubai, © CAL/NYT SYNDICATION).

The aim of this publication is not to defend self-regulation blindly or at all costs, but to ask questions about what constitutes a balance between sectoral responsibility and surveillance by the legislator<sup>31</sup>, about the credibility and reliability of self-regulation (see the following chapter on *Conditions for the success of European self-regulation and co-regulation*) in particular areas<sup>32</sup> (which are particularly sensitive for consumers or workers and for the real economy in general) and the degree of intervention by traditional regulation, and, finally, to raise the issue of how to (re)define self-regulation. Self-regulation initiatives, which aim to lighten the legislative burden through subsidiarity and proportionality, must be closely followed by the legislator to as to prevent cases of abuse. This is exactly the belief of the EU Commission,

<sup>31</sup> "The market and regulatory failures that have led to this (financial) crisis must be addressed as a matter of urgency", Ban Ki-Moon, UN Secretary-General at the ASEM Asia-Europe Summit in Beijing.

<sup>32</sup> "The old principle of classical economics that markets which are provided with perfect information and are exempt from intervention from the legislator are capable of controlling themselves is called into question in periods of crisis", José Samaniego Ponce, 29.10.2008.

which sees its promotion of alternative instruments not as a policy of *laisser-faire* but as a means of controlled lightening of the *acquis communautaire* (which some estimate to be more than 80 000 pages)<sup>33</sup>.

The reservations expressed by the European Parliament's Medina Report on non-binding instruments<sup>34</sup> seem to be well-founded and, at the very least, steps will have to be taken to ensure that the sectors engaged in self-regulation initiatives cooperate across borders (like the codes of conduct in the EESC data base), equip themselves with early warning systems or adopt a preventive approach<sup>35</sup> while the legislator, who in the last analysis is responsible for the proper functioning of a company, will have a right of inspection, in his role as watchdog.

At a conference organised by the Hiil, *The Hague Institute for the Internationalisation of Law*, in The Hague on 8 and 9 October 2009 and entitled *Law of the Future*, Daniel Retureau<sup>36</sup> set out the EESC's position of self-regulation and co-regulation (abstract):

*"The 'best legislation' remains a goal to be achieved. The quality of legislation is essential for all the 27 Member States of the EU and those of the EEA (European Economic Area) as it obviously makes it easier for directives to be transposed into domestic law or for regulations to be applied uniformly. This quality is also of prime importance for those for whom the laws are destined: the citizens of Europe. However, the "weak spot" in international law has to continue its development against a backdrop of economic and financial globalisation: the weakness or inadequacy of the monitoring machinery and the means to oblige the parties concerned to comply with their international commitments. Too often, short-term special interests take precedence over the general interest and a long-term vision.*

*International law and domestic law, especially law derived from Community law, have started to take part in the changes necessary e.g. to reduce greenhouse gases, prevent the deforestation of the primeval forests and have respect shown for biodiversity. Without the active participation of civil society, environmental law, which already seems to be inadequate and still has to be developed, will not succeed in changing the current state of affairs sufficiently. Private actions and regulations may then give an impetus to or complement and refine the law that is applicable.*

*This is why NGOs have long been highly active in defending the environment. Now the trade union movement also wants to get involved so that changes provide plenty of new skilled jobs. Multinationals, driven by their directors, shareholders and customers, have committed themselves to applying concrete environmental provisions which respect the law in force but, above all, bring in tangible commitments that complement a law*

<sup>33</sup> In particular the withdrawal of texts that are obsolete, in short what makes the *Better Lawmaking* concept what it is, namely a collection of instruments that are varied, complementary but coordinated.

<sup>34</sup> OJ C 187 E, 24.7.2008, p. 75–79.

<sup>35</sup> See, for example, the EESC opinion entitled *"The proactive law approach: a further step towards better regulation at EU level"*, rapporteur: Jorge Pegado Liz, expert: Helena Haapio, OJ C 175, 28.7.2009, p. 26–33.

<sup>36</sup> Then member of the EESC, Group II, Employees (France).

*in the midst of change. They are inspired by scientific and technological advances aimed at alternative and sustainable development (which must not be treated as a new form of quantitative growth) based on the use of renewable basic products, a constant reduction in the carbon footprint and the productive management of waste. These firms use self-regulation, by which they enter into commitments that they make known to their customers; it is a legitimate sales argument and the labelling or advertising refer to it. At the same time they place themselves under public scrutiny.*

*The basic problem is the complementary self-regulation of laws which are still dispersed or incomplete and that of monitoring. The use of independent firms or NGOs for certification is a possible solution, especially as regards respect for the environment. But a co-regulation scheme that links up competent NGOs and representative staff organisations makes it possible to spell out commitments more clearly and provides a wider and more skilled base for the future development of co-regulation and the quality of monitoring.*

*With globalisation and because of certain displacements, concerns about respect for human rights at the workplace by firms and their sub-contractors are becoming legitimate. The basic conventions of the ILO, the solemn declaration of the International Labour Conference of 1999 or the tripartite declaration of principle of 1977 on multinationals and social policy, as well as universal or regional conventions on human rights, form a legal framework that has become universal and which contains many provisions that are “self-executing”; states are the recipients, but domestic law, or practice, does not always respect international obligations scrupulously.*

*The main provisions concerning work cover freedom to organise a trade union, the right to collective bargaining on pay and working conditions, a ban on work by children, and equal pay for men and women for equal work or work of the same value. Respect for these standards is a matter for the company and is a privileged area for co-regulation between the company and staff representatives.*

*Self-regulation complements Community and domestic law in the field of consumption and public health. Monitoring may be carried out by a certification body or an ONG panel. Complaints by individuals or groups may be subject to either ad hoc arrangements included in the regulation or external and alternative machinery for settling disputes<sup>37</sup>.*

*In the current period of transition a growing role is played by private regulation, which in some ways is like the law of contract.”*

*The world after the financial crisis (but the plural should be used, with the economic, social and societal implications) should no longer be anything like the world that we knew before - “should” in the sense that the banking sector follows models of behaviour that generate crises since, up to now, it has not reacted to the simple fact that society is no longer prepared to accept certain deviations. The argument of directors such as Josef Ackermann (Deutsche Bank) that regulating the sector runs the risk of putting a brake on growth must not mask the major risks that the lack of regulation has caused and, without any doubt, will continue to cause! Growth without value will remain artificial.*

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<sup>37</sup> DG SANCO ordered a report on self-regulation, *Self-Regulation Practices in SANCO Policy Areas*, which was published in 2008 . See too on the same theme: [http://lexfori.net/soft\\_lawen.htm](http://lexfori.net/soft_lawen.htm).

Thus, according to Neil Barofsky, “without a profound reform we will still always take the same rocky road, but this time with a faster vehicle”<sup>38</sup>. Barney Frank, member of the US House of Representatives, thinks that the crisis is “the result of a total lack of regulation [of the financial sector]”<sup>39</sup>.

As an example of its stance on financial markets, services and products, the EESC stated in an (April 2010) opinion<sup>40</sup> that “within the European economy, the impact of hedge funds and private equity funds is more serious in social and employment terms than in the economic and financial sense.” It nevertheless stressed that alternative investment funds have contributed to the increase of the leverage and the inherent risk within the financial system, a fact lately illustrated by the downgrading of Greek sovereign debt which is pushing the Euro zone country to the brink of default. **The EESC therefore endorses efforts to regulate the industry.** As for hedge funds' and private equity funds' future obligations to hand over systemic risk data about their operations, the EESC recommends taking over the internationally supported principles worked out by the International Organisation of Security Commissions (IOSCO), specifying eleven kinds of data including much needed information from large leveraged funds” – obviously a case for self-regulation.

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<sup>38</sup> Article in the *Süddeutsche Zeitung* of 1 February 2010, p. 19. Translation by the SMO secretariat.

<sup>39</sup> Idem.

<sup>40</sup> To read the opinion (rapporteur was Angelo GRASSO, Group III, Various Interests – Italy):  
[http://eescopinions.eesc.europa.eu/viewdoc.aspx?doc=\\esppub1\esp\\_public\ces\int\int488\en\ces631-2010\\_ac\\_en.doc](http://eescopinions.eesc.europa.eu/viewdoc.aspx?doc=\\esppub1\esp_public\ces\int\int488\en\ces631-2010_ac_en.doc).

## Conditions for the success of European self-regulation and co-regulation

Self-regulation and co-regulation – just like the alternative methods for dispute settlement often linked to them – can only work properly if a number of conditions are met. These relate mainly to safeguarding the public interest, the transparency of the system, the representativeness of the signatories and the effectiveness of the monitoring. The considerations gathered together in this chapter come from a variety of observations and sources, in particular:

- The recommendations or provisions laid down by the Community institutions, in particular those from the Commission (see the inter-institutional agreement of 2003<sup>41</sup> and the 2002 communication on environmental agreements<sup>42</sup>);
- The hearings organised by the EESC with socio-occupational organisations;
- A study of best practices gleaned from the self-regulation and co-regulation initiatives listed (especially in the data base of the EESC's Single Market Observatory);
- Conferences and seminars organised in recent years by think tanks, university circles or market players.

Firstly, self-regulation and co-regulation must form part of a general interest approach. Safeguarding this dimension as a matter of priority is particularly necessary in the case of co-regulation, which involves real legislative action. Even in the case of self-regulation, however, which is of concern mainly to category or private interests, the partners concerned must not act in a way that might appear damaging to this public interest. Thus, self-regulation and co-regulation must take place in an atmosphere of trust and shared responsibility, with a desire to respect and promote certain fundamental values such as honesty, good faith, respect for others, openness to partnership, and a competitive spirit. The mechanisms for self-regulation and co-regulation must in particular always chime with legislative and legal requirements in Europe, the most important of which are the aims and clauses of the EU Treaty. They must also be compatible with international trade agreements, especially the provisions of the WTO. They must remain under the control of Community and national jurisdiction.

Self-regulation and co-regulation must also be transparent and provide practical information to everyone, without access or cost being a deterrent. Their objective must be stated clearly and unequivocally. The degree of implementation must be measured with reliable indicators. If a long period for attaining an objective is proposed, it would be useful to set interim objectives. Greater publicity can be given

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<sup>41</sup> OJ C 321, 31.12.2003, p. 1–5.

<sup>42</sup> COM(2002) 412 final



to agreements by placing them on the Internet, with additional reports referring to them and the opportunity for all interested parties to submit comments.

Those involved in self-regulation and co-regulation must be representative and must have the means to ensure the effective implementation of the rules that are agreed on. This representativeness has a direct impact on the credibility and effectiveness of these measures.

When a code of conduct is concluded unilaterally, it should be supported by the proven ability of its signatory (for example, the company director), as a guarantee of the value of its provisions. The willingness to consult beforehand with those who are directly affected is also key to demonstrating their value and quality.

When a code of conduct is adopted by several partners representing complementary interests (for example in their capacity as social partners), this greater number of signatories can only increase the impact of such a code, whilst giving it a collective and even contractual nature. Taking into account the various interests involved in this way ensures balance in the provisions adopted, gives them greater legitimacy, facilitates their full recognition by all parties concerned and enables them to be implemented more effectively.

The representativeness of the signatory(ies) must be proportionate to the sector or sectors covered as well as to the scope and ambitions of the provisions adopted. This will result in appropriate and thus credible and effective representation in sectoral and geographical terms, which can be measured, if necessary in terms of quantity (the number and concentration of members of the organisation) and above all in terms of quality (the ability to act on the ground, to legitimise and then to ensure compliance with the provisions adopted).

Consequently, the European inter-sectoral agreements concluded by signatories such as BUSINESSEUROPE, CEEP and UEAPME on the one hand and the European Trade Union Confederation, ETUC<sup>43</sup>, on the other, are supported by the broad intersectoral, geographical, quantitative and qualitative representativeness of these associations and their members, who are themselves for the most part directly involved, at national level in their own country in such social self-regulation or co-regulation actions, usually through various intersectoral and collective agreements.

Because the monitoring and follow-up of self-regulation and co-regulation mechanisms can, where appropriate, involve sanctions, they have a very direct impact on their effectiveness. There are several possibilities. Some agreements and codes of conduct are subject to self-monitoring and self-discipline mechanisms, for instance:

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<sup>43</sup> See the CEPLIS code for the professions.

- A self-control mechanism established by the European association EFCA<sup>44</sup> to ensure that the 1992 code of conduct for engineering and consulting companies is implemented;
- The binding provisions of a code of ethics for EU lawyers, adopted in 1988 by the European Bar Association<sup>45</sup>;
- A disciplinary committee established by a code of conduct for asset managers to ensure that this code is implemented and, if necessary, to decide on sanctions such as warnings, reprimands or proposals to disbar;
- A European alliance for ethics in advertising created in 1992 to promote and coordinate self-regulation in the advertising industry;
- Monitoring by the BDI<sup>46</sup> of the proper implementation of the agreement concluded in 1995 in Berlin between the government and businesses on the conditions and monitoring of the reduction of CO<sub>2</sub> emissions in Germany, in accordance with the international conventions in this field.

Databases can be set up to ensure that monitoring of self-regulation is more effective. One such database for engineering training establishments was set up in 1987 by the *European Federation of National Engineering Associations* (FEANI), in accordance with a European code of ethics which guarantees the mutual recognition of training and qualifications, with a registry of 30 000 engineers who put this code into practice.

Compliance with a code of conduct can also be attested by means of a quality mark, for instance:

- The mark created by the members of the European Insurance Committee to certify application of a European code of good practice for the Internet;
- Security marks for e-commerce following on from the code of conduct on distance selling.

A European code of conduct can also be implemented through the conclusion of national codes drawn up for this purpose, e.g. the European code of conduct adopted in 1995 – and amended in 2004 – by the Federation of European Direct Selling Associations.

Technical requirements, like standards, can be established to lay down a voluntary code, such as the quantified requirements to reduce the energy consumption of washing machines agreed on in 1999 by the European Committee of Domestic Equipment Manufacturers in conjunction with the European Commission.

The provisions of a code can be set out in clear, practical terms and disseminated in a guide. Examples are:

<sup>44</sup> European Federation of Engineering Consultancy Associations.

<sup>45</sup> European Bar Association.

<sup>46</sup> *Bundesverband der Deutschen Industrie* – German Employers' Federation.

- The training standards, with a guide, established pursuant to a code of professional rules for European conservators-restorers;
- A user’s guide for Internet service providers drawn up in 2001 by the Milan Chamber of Commerce to promote good practice in this field.

Lastly, the European institutions can decide to act in support of a given self-regulation process and even to make it compulsory by making it a binding legal instrument. This would mean *ex post* legislative co-regulation, with legislative provisions drawing on self-regulation, whereas co-regulation is generally socio-professional self-regulation drawing on an *ex ante* legislative framework. For instance:

- In the case of non-binding public support, a recommendation from the Commission supporting a voluntary code of pre-contractual information on mortgages agreed in 2001 by associations in the credit sector and consumer associations;
- In the case of a binding legal instrument, the three directives adopted by the Council following the agreements with the social partners concerning parental leave, part-time work and fixed term employment contracts.

Ultimately, there must be an option to review and revise self-regulation and co-regulation mechanisms, so as to adapt to changes in the situation, in legislation and in people’s aspirations. Such clauses have been often added through existing instruments.

The table below<sup>47</sup> gives an initial view of the criteria that are needed if self-regulation is to be successful:

<b>Success-Failure Criteria</b>	<b>Remarks</b>
<b>Pragmatism, realism (i.e. real benefit) and effectiveness</b>	<p>Does the initiative respond to a concrete need from businesses or professional organisations?</p> <p>Does it fill a legal gap (e.g. hard law not matching reality/needs, being too slow, implementation costs are too high)?</p>

<sup>47</sup> Sources for this reflection:  
 Single Market Observatory - <http://www.eesc.europa.eu/?i=portal.en.self-and-co-regulation>  
 Single Market Observatory – Minutes of the public hearing on *The Current State of European Self- and Co-Regulation*, 2008  
 Internet Advertising Bureau, IAB – *Ofcom Consultation Paper: initial assessments of when to adopt self- or co-regulation*  
 Carnegie Endowment, *Beyond Government: Business Self-Regulation in International Affairs*, 2008  
 Community Alcohol Action Network, Australian Drug Foundation – *A decade of failure: self-regulation of alcohol advertising in Australia*, 2006  
 P. ten Brink, Institute for European Environmental Policy, IEEP, *Self-regulation – in which contexts can voluntary agreements be effective and can benefit business as well as consumers?*, 2007  
 HiIL conference on the “*Law of the Future*”, The Hague, 8-9 October 2009. Contributions from F. Cafaggi (European University Institute, EUI), J. Black (London School of Economics, LSE), L. Senden (University of Tilburg)  
*New Perspectives on Regulation*, éd. D. Moss et J. Cisternino, The Tobin Project, Cambridge (Massachusetts) 2009

Are the objectives and measures realistic?  
 Compliance costs of private law lower than implementation cost of European legislation?  
 Initiative is more reactive and “problem-addressing” than classic legislation.  
 Subsidiarity/proportionality and impact assessments/cost-benefit analyses as expected instruments of modern lawmaking.  
 Positive intentions (responsibility, taking part in civil society life).  
 Bridging role (e.g. short or medium term initiatives leading to regulations).  
 Clear objective (see transparency under “Involvement”).  
 European dimension (“*L’union fait la force*”) as integration/solidification factor.  
 Appropriateness.

**Compliance**

Close relation with the relevant public control authorities/legislator.  
 Participation in the legislation process?  
 Is the initiative supported/guided by the European Commission to replace legislation in this area and does it comply with general Commission priorities (e.g. clearing and settlement)?  
 Are there any additional costs or effects, other than compliance costs, and is this initiative the cheapest and simplest means to reduce these costs?  
 No Trojan horse (see also “Trust”).  
 Does the initiative fit into an overall policy set-up?  
 Is it compliant with legislation?

**Involvement**

Does it get homogeneous, strong support from (many/all relevant) stakeholders?  
 Strong organisations more likely to succeed in self-regulatory regimes.  
 In case of voluntary measures (e.g. self-declaration, commitments) how could stakeholders be attracted to participate?  
 How binding is the initiative ultimately (see monitoring)?  
 Building and maintaining of networks/clusters in – and outside the effected sector to share information (database with access to (non-)members, seminars, workshops etc.)  
 Transparency for understanding and support.  
 Information policy and awareness raising within the sector on the life of the initiative.  
 Interaction with related players (e.g. consumers, workers).  
 Interaction and networking with other related sectors to share experiences  
 Interaction between national branches and the supra-national umbrella organisation (differences between Member States in administrative and legal traditions, culture etc.).  
 Coherence of interests between the sector and politics or policy-making.  
 Incentives-bases approach.

**Trust**

Are stakeholders (e.g. consumers, trade unions) behind the initiative?  
 Do involved parties trust each other?  
 Do public authorities/the legislator trust the initiative or the initiators?  
 Initiative is not a Trojan horse (credibility).  
 Setting of clear criteria for the purpose of the initiative. Clear assessment ahead of the initiative.  
 Incentives for complying rules?  
 Necessity of enforcement measures, if rules are breached?  
 Information campaign for potential new stakeholders and related sectors?  
 What is the image of the sector? Image building measures necessary?  
 Are collective agreements jeopardised?

**Efficiency**

What is the benefit in relation with hard law?  
 What can self-regulation do which regulations can't?  
 Can an initiative improve corporate governance?  
 Awareness-raising.  
 Representation of sector in other Member States?  
 Networking with European Institutions, stakeholders, and other related sectors.  
 Sector-strengthening (e.g. more power/influence/cohesion).

**Support and commitment from public authorities/legislator**

Is the legislator behind the move or sharing responsibility?  
 If not, factual situation of the sector in MS (infringement proceeding etc.)?  
 Is there a long-term monitoring by the public hand/the legislator?

**Innovation**

Does it open new (realistic) prospects?

**Monitoring**

How is the monitoring organised (spot-checks, regular survey of actors, reliable complaints procedures, regular reporting and information, reflexive dialogue)?  
 Gathering evidence in case of code breach.

How independent is it (legislator, NGO, own, mandated experts)? Self-regulation means that the regulated is also the regulator!

Monitoring must be flanked with enforcement measures.

Monitoring means some kind of secretariat dedicated to the supervision of the initiative.

National correspondents for coherence and control.

Regular review of the initiative to match developments (societal trends, environmental constraints and limits etc.).

Validation by the legislator?

<b>Sanctions/enforcement</b>	Monitoring needs sanctions or enforcement measures. How efficient are the sanctions (re-labelling, removal of logo, fine, name and shame action, exclusion, judicial measures)? Dispute resolution?
<b>Financing</b>	How appropriate? Enforcement of member fees necessary?
<b>Accountability</b>	The “principle/agent” relationship may pose problems in a multilevel context due to the complexity of the delegation chain (i.e. how to guarantee for homogeneity in multilevel self-regulation?), What about interest group captive approaches (e.g. vested interest)? Justification of certain options?
<b>Legitimacy</b>	Is the self-regulatory authority accepted? Pragmatism, moral value(s). Is there such a thing as “enlightened self-interest”? Legitimacy through the setting up of a network (see EASA) and/or functional claim (see ISO). Regular updates of legitimacy. Role of legitimacy in a competitive context?
<b>Other aspects</b>	Training (“secretariat”, seminars for representatives of member organisations etc.). Information. Methodology of agenda setting.

For E.J. Balleisen and M. Eisner<sup>48</sup> the success criteria for co-regulation, i.e. for its credibility, are a) the depth of concern for reputation, b) the relevance of flexibility in the regulatory detail, c) the administrative capacity and autonomy of the nongovernmental regulator, d) the transparency of the regulatory process and e) the seriousness of accountability.

<sup>48</sup> *The Promise and Pitfalls of Co-Regulation: How Governments Can Draw on Private Governance for public Purpose*, in *New Perspectives on Regulation* p. 127-149, edited by David Moss and John Cisternino, The Tobin Project, Cambridge MA, 2009.

# Prospects and limits of self-regulation and co-regulation

## 1. Prospects

Initiatives for self-regulation and co-regulation, just like alternative methods of settling disputes, have already made a significant contribution to the smoother operation of the Single Market, involving social and economic stakeholders more directly in removing barriers. These initiatives bring many advantages that justify encouraging their development.

Firstly, self-regulation and co-regulation initiatives help to remove often complex barriers to the functioning and the completion of the Single Market, by agreeing on the same common professional rules at European level or arranging the mutual recognition of national rules.

This harmonisation or mutual recognition helps to simplify rules in the Single Market in that they automatically have the support of the organisations concerned and therefore have the best chance of being accepted and properly implemented by them.

Self-regulation and co-regulation mechanisms generally help to make action more flexible and rapid than legislative channels. The same could be said of alternative dispute settlement mechanisms compared with legal proceedings. For the professions and sectors concerned, they therefore provide an opportunity for adapting more easily to the increasing pace of economic, social, technological and environmental change.

These initiatives by the social and economic stakeholders help to free up legislative channels or, in the case of alternative methods for settling disputes, the courts. In doing so, they help to achieve potentially significant savings of public money. They help to ease the often excessive workload of legislators and judges and thus enable them to focus on the issues that genuinely fall within the scope of their core competence, whilst also giving them the opportunity to exercise their authority if these alternative methods appear to have failed to meet the expectations placed in them or created new problems as regards legislative or judicial rules.

Another considerable advantage of self-regulation and co-regulation initiatives is the way in which they lead to a sense of co-responsibility among economic and civil society stakeholders, genuinely making them full partners in the process of European integration. These initiatives have had a very positive impact on civic education, further training, social dialogue, respect for the environment and on greater attention being paid to consumer issues. They thus play a key role in strengthening organised civil society and in ensuring that stakeholders shoulder their responsibilities, something that the Committee has always supported and encouraged.

Whilst offering many advantages, self-regulation and co-regulation are not universal panaceas, capable of solving any problem that might arise. They have their limits in various fields and can even create new problems if they are not undertaken with a deep-seated sense of co-responsibility and unless they are backed up by appropriate legislation. The same comments often apply to alternative dispute settlement mechanisms – with the difference that it is still possible to appeal to the courts to obtain redress if prejudice is legally established and may be punishable, whereas it is clearly less practicable to obtain a response from the legislator where no legal provisions exist.

## 2. Limits

The limits of self-regulation and co-regulation lie primarily in the conditions under which the rules are implemented and the sanctions that may apply if they are breached.

Although many self-regulation and co-regulation initiatives are subject, as mentioned above in various examples, to monitoring and even to sanctions if their provisions are breached, this is not always the case. There is a problem with self-regulation or co-regulation where they do not contain such provisions. Such lacunae can have serious effects on the real value of the self-regulation and co-regulation in question and can jeopardise their comparative advantages over legislative provisions.

Monitoring and sanctions arrangements can be very variable in their impact. Expulsion from professional associations, withdrawal of advertisements, or unfavourable public announcements on the “name and shame” principle can be effective due to their economic or professional consequences. However, some sanctions can prove to be difficult to implement, overly complex, and ineffective. Situations of this type can only raise the same concerns and dangers as those described above.

Whilst being effective themselves self-regulation or co-regulation can also cause problems as regards legal provisions. The problem may involve an issue of ethics, of non-discrimination, of freedom of competition (especially restrictive practices and abuse of a dominant position) or of other legal obligations in the economic, social or environmental fields. Risks of this nature require controls, provided for in an appropriate manner by the inter-institutional agreement of December 2003.

In areas that very directly affect health and safety, and more broadly in the case of services of general interest, self-regulation and co-regulation – even if backed up by sanctions – can prove inadequate in the absence of legislative provisions. Their role in such cases is, above all, to complement legislation, a role which is generally very useful or indeed essential to the extent that, whilst helping to ensure that legislation is proportionate and simple, they help to raise awareness, to inform, to prevent and to encourage responsibility, and can thus play a key role in improving the implementation of legislation.



The Medina report on *institutional and legal implications of the use of 'soft law' instruments*<sup>49</sup>, which was adopted by the European Parliament in September 2007, particularly stressed that non-binding instruments could not take the place of legal acts and instruments which guaranteed the continuity of the legislative process. It also insisted on the need for transparency, visibility and public responsibility, as well as on impact assessments and paths of redress for consumers, while drawing attention to the participation of democratically-elected bodies in more effective monitoring of the need to adopt such instruments (see the table of factors for success and failure above).

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<sup>49</sup> OJ C 187 E, 24.7.2008, p. 75-79

## What initial lessons can be learnt from the EESC database?

The Self- and Co-Regulation Database currently contains 129 initiatives with 19 obsolete cases (with 12 successors) in various sectors. The attribution to a certain sector reflects the organisational structure of the European Commission in General Directorates. The sectors most affected by self- and co-regulation initiatives are Internal Market and Services (MARKT) 37 with 1 obsolete case, Health and Consumers (SANCO) 22 with 1 obsolete case, Enterprise and Industry ENTR: 19 with 4 obsolete cases, Energy (ENER): 11 with 7 obsolete cases, followed by Employment, Social Affairs and Equal Opportunities (EMPL): 15 with 1 obsolete case, Environment (ENV) 7 cases with 3 obsolete cases, Mobility and Transport (MOVE): 2 cases, Agriculture and Rural Development (AGRI): 2 cases and Education and Culture (EAC): 1 case. In the sectors Competition (COMP), Development: (DEV), Economic and Financial Affairs (ECFIN), Justice (JUST), Home Affairs (HOME), Regional Policy (REGIO), Taxation and Customs Union (TAXUD) and Trade (TRADE) no self- and co regulation initiatives have been added to the database as an example of best practices (this does of course not necessarily mean that there are no initiatives at all in these sectors).

As the self- and/or co-regulation initiatives are an alternative to traditional legislation and replace existing EU and/or national legislation in certain areas it should be of utmost importance that this self- and/or co-regulation system works. Therefore effective monitoring and enforcement mechanisms should be in place to guarantee the well functioning of alternatives to legislation. The database contains a monitoring and enforcement table, as well as a succinct description of the type of monitoring and enforcement.

A first evaluation of the database shows that monitoring actions are more often used by private independent parties with a mandate, national public authorities or self appointed parties e.g. NGO rather than by the code-owners. When evaluating monitoring actions, the actions "the reception of complaints and verification if norms were breached or not", "initiating complaints procedures", "Conducting an initial survey of compliance capacity of future regulatees" and "production of regular reports" are more often used than "holding reflexive dialogue with the stakeholders" and "conducting regular visits and spot checks".

An assessment of the enforcement actions shows that the instruments "faming, shaming and blaming and "membership suspension exclusion" are more often used as enforcement tools than "private fines" and "judicial sanction" or "other actions".

Surprisingly only less than one-quarter of the initiatives (38/129) have been monitored by the Commission. Half of these initiatives had a positive scoring (19/38), whereas 8 initiatives had each mixed and negative scorings, 1 initiative had a mixed negative scoring and in 2 cases no results of Commission monitoring were available. EMPL (10), ENER (8) and ENTR (9) were the Commission DG with the highest monitoring rate. Negative Commission monitoring led in 6 out of 8 cases to a new legislative act, replacing a voluntary agreement.

The Self- and Co-Regulation Database also tries to give some information on the type and level of financing. In less than one third (28/129) of the cases, information on the type of financing has been provided; the initiatives are mostly carried by member fees, but also by private financing. Only 3 organisations have provided information on the level of financing.

As the Self- and Co-Regulation Database aims to be a one stop shop for Self- and Co-Regulation and a shop window for best practices in this sector, permanent updating of the database is of outmost importance. Therefore the Secretariat of the Single Market Observatory must stay in permanent contact with the private code-owners, as well as with the European Commission to keep the database up to date. Recently 5 new cases coming directly from private code owners have been added on the database; another 9 new cases related to Health and Consumers (DG SANCO) were also uploaded on the database. We are expecting other new initiatives directly from the code owners as the database is now known as a good promotion tool for best practices on self- and co-regulation.

## Conclusions

Full advantage must thus be taken of the opportunities provided by self-regulation and co-regulation whilst mitigating their limitations.

To **take full advantages of the opportunities**, we would need to:

- Leave greater scope for regulatory freedom (principle of subsidiarity): preliminary impact studies should systematically seek out alternatives to a new regulation, and the means of keeping the regulation proportionate to what is absolutely necessary (principle of proportionality), checking in particular with the social and economic organisations concerned their possible intentions for self-regulation or their ability to cooperate on a self-regulatory approach;
- Better publicise initiatives by the social and economic stakeholders, particularly through the data base of the Single Market Observatory.

To **mitigate the limitations**, we should:

- Better publicise best practice in self-monitoring and follow-up, including on the issue of sanctions. When developing its cover of new self-regulation initiatives in its data base, the Committee places particular emphasis on these monitoring and follow-up mechanisms and on the results they provide;
- Promote consultation between those implementing self-regulation and the public authorities: the inter-institutional agreement of 2003 paved the way for a new European partnership between political decision-makers and stakeholders in organised civil society. This will form a key framework for extending these mutual exchanges. The Committee for its part would like to provide ongoing support and assistance to this improved consultation between those implementing self-regulation and co-regulation and the European legislative bodies (European Commission and European Parliament).

Self-regulation and co-regulation initiatives will progress all the more smoothly and productively when everyone stands to gain from their success:

- The public authorities, as a result of being able to concentrate on more focused and higher quality legislation, whilst ensuring the ongoing monitoring of complementary self-regulation and co-regulation;
- Businesses and social and economic groups, who will benefit from greater economic freedom, from improved partnership with public authorities and with other civil society players, and from rules governing their activities that more accurately match their needs<sup>50</sup>;
- Users, who will enjoy more secure access to products and services due to simpler and often more effective rules, which are themselves monitored both by the associations and by the public authorities;
- The Single Market, which will move further towards true completion on the ground as a result of the increase in these initiatives.

<sup>50</sup> See too the own-initiative opinion *The proactive law approach: a further step towards better regulation at EU level*, rapporteur Mr J. Pegado Liz (CESE 1905/2008).

It thus appears that greater freedom in self-regulation and co-regulation will in future be proportionate to the responsibilities that these generate in all stakeholders and to their effectiveness in the eyes of all users, thereby making the concept of European citizenship more tangible and more relevant for everyone. For its part, the European Economic and Social Committee will continue to develop its observations and debate on ways of promoting self-regulation and co-regulation on the scale of the European Single Market.

In addition, the following key findings emerged from the public hearing of 31 March 2008 on “The Current State of European Self- and Co-Regulation”, which was organised at the headquarters of the EESC by the Single Market Observatory:

1. The Commission services now systematically envisaged the option of alternative instruments. It implemented a resolute simplification programme and targeted a complete screening by the end of the current Commission mandate<sup>51</sup>.
2. *Self- and co-regulation as well as regulation per se could not be considered to be static as they developed over time. However, changing the Interinstitutional Agreement on Better Lawmaking<sup>52</sup> would be a very difficult task that could not be expected during the current Commission mandate<sup>53</sup>.*
3. The self- and co-regulation database would be instrumental in allowing institutions and stakeholders to see how alternative instruments functioned in practice and to develop models (e.g. enforcement, monitoring, financing). Transparency is essential to evaluate how alternatives to regulation are delivered.
4. *The success of self-regulation was directly related to credibility and compliance with existing policies and legislation. Clarity in implementation and enforcement as well as effective response to clearly identified market failure are crucial.*
5. Better regulation meant simple and credible legislation, both easily applied and enforced while involving shared responsibility of all actors so as to guarantee that all abide by the rules.
6. *Self-regulation is a dynamic process and the Commission should more systematically state in its annual programme what it expects from stakeholders while drawing lessons from previous years.*
7. Voluntary agreements should be flanked with *ex ante* and *ex post* impact assessments. These would allow for the definition of indicators for the identification of effectiveness.
8. *The legal framework needs to be improved in order to respond to the alleged deficit of accountability of soft law. Good governance, liability and market accountability are prerequisites. The freedom of contract (self-regulation) as well as competition issues must be kept in mind (e.g. market segmentation).*

<sup>51</sup> At the date of publication of this report.

<sup>52</sup> OJ C 321, 31.12.2003, p. 1–5.

<sup>53</sup> *Idem*.

9. Better recognition of efficient self-regulation interacting with law in a modern European regulatory framework while weighing and balancing the costs and benefits of different options.

10. *Self- and co-regulation target simplification in the form of a trade-off between simple language, clarity and representativity of all interests at stake.*

## Appendix I

# Facts and figures of the Self- and Co-Regulation Database

129 initiatives with 19 obsolete cases (with 12 successors);

- 95 Commission initiatives, 25 EESC initiatives and seven from private code owners;
- 72 (4 obsolete) self-regulation and 67 (15 obsolete) co-regulation initiatives;
- Commission monitoring: 78 initiatives (incl. the 19 obsolete cases);

### Initiatives pre-selected by sector/ DG:

- Agriculture and Rural Development (AGRI): 2
- Competition (COMP): -
- Development: (DEV): -
- Economic and Financial Affairs (ECFIN): -
- Education and Culture (EAC): 1
- Employment, Social Affairs and Equal Opportunities (EMPL): 15 with 1 obsolete case
- Energy (ENER): 11 with 7 obsolete cases
- Enterprise and industry ENTR: 19 with 4 obsolete cases
- Environment: ENV: 7 with 3 obsolete cases
- Eurostat (ESTAT): -
- External relations (RELEX): -
- Maritime Affairs and Fisheries (MARE) 1
- Health and Consumers (SANCO): 22 with 1 obsolete case
- Information Society and Media (INFSO): 7 with 2 obsolete cases
- Internal Market and Services (MARKT): 37 with 1 obsolete case
- Justice (JUST): -
- Mobility and Transport (MOVE): 2
- Regional Policy (REGIO): -
- Research (RTD): 3
- Secretariat General (SG): 2

- Taxation and Customs Union (TAXUD): -
- Trade (TRADE): -



## Appendix II

### Useful internet references

<http://www.eesc.europa.eu/?i=portal.en.self-and-co-regulation>

To consult the database and, where appropriate, get involved in initiatives concerning self-regulation or co-regulation

<http://ec.europa.eu/solvit/index.htm>

To overcome administrative and other barriers encountered by firms or individuals in the Single Market

[http://www.enterprise-europe-network.ec.europa.eu/index\\_en.htm](http://www.enterprise-europe-network.ec.europa.eu/index_en.htm)

To inform smaller firms and others about the rights and opportunities in the Single Market

<http://ec.europa.eu/eures/>

To find out about employment, education and training opportunities in Europe

<http://ec.europa.eu/consumers/ecc/>

and [http://ec.europa.eu/internal\\_market/fin-net/index\\_en.htm](http://ec.europa.eu/internal_market/fin-net/index_en.htm)

To facilitate the settlement of consumer affairs litigation within the Single Market

<http://ec.europa.eu/europedirect/>

To answer the numerous questions about the European Union

<http://ec.europa.eu/yourvoice/>

To express your opinion on European policy-making

<http://ec.europa.eu/citizensrights/>

To find out about citizens' rights and practices within the Single Market

[http://ec.europa.eu/youreurope/business/index\\_en.htm](http://ec.europa.eu/youreurope/business/index_en.htm)

To help European citizens and firms to carry out their activities across borders

[http://ec.europa.eu/economy\\_finance/euro/index\\_en.htm](http://ec.europa.eu/economy_finance/euro/index_en.htm)

To keep up to date about the euro

<http://www.ecb.int/home/html/index.en.html>

ECB – European Central Bank  
in Frankfurt

The ECB is responsible, among other things, for framing and implementing the EU's economic and monetary policy.

<http://www.cedefop.europa.eu/>

CEDEFOP – European Centre for the Development of Vocational Training  
in Thessaloniki

To find out about vocational training schemes and data in Europe

<http://www.eurofound.europa.eu/>

EUROFOUND – European Foundation for the Improvement of Living and Working Conditions  
in Dublin

To find out about schemes and data concerning living and working conditions in Europe

<http://www.emea.europa.eu/>

EMA – European Medicines Agency  
in London

To find out about schemes and data concerning medicines and health in Europe

<http://oami.europa.eu/>

OHIM - Office for Harmonisation in the Internal Market (Trade Marks and Designs)  
in Alicante

To register a trade mark or design at Community level

<http://www.epo.org/>

EPO – European Patents Office

To obtain a European patent (pending a Community patent)

<http://osha.europa.eu/>

EU-OSHA – European Agency for Safety and Health at Work  
in Bilbao

To find out about schemes and data concerning safety and health at work in Europe

<http://www.efsa.europa.eu/>

EFSA – European Food Safety Authority  
in Parma

To find out about schemes and data concerning food safety in Europe

<http://easa.europa.eu/>

EASA – European Aviation Safety Agency  
in Brussels

To find out about schemes and data concerning aviation safety in Europe

<http://www.emsa.europa.eu/>

EMSA – European Maritime Safety Agency  
in Brussels

To find out about schemes and data concerning maritime safety in Europe

<http://www.cenelec.eu/>

CENELEC – European Committee for Electromechanical Standardisation

For the harmonisation of electrical and electronic goods in the Single Market through the preparation of voluntary standards

<http://www.cen.eu/cen/pages/default.aspx>

European Committee for Standardisation

For the harmonisation of technical goods in the Single Market through the preparation of voluntary standards

<http://www.etsi.org/WebSite/homepage.aspx>

ETSI – European Telecommunications Standards Institute

For the preparation of telecommunications standards

<http://echa.europa.eu/>

ECHA – European Chemicals Agency (Helsinki)

Co-ordinates the duties introduced by the REACH regulation. It will manage the registration, evaluation, authorisation and restriction processes for chemical substances to ensure consistency across the European Union.



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