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**Public hearing on Self-Regulation and  
Co-Regulation**

**Private lawmaking and  
European legal integration**



# Private lawmaking (PLM) (1)

- **Private lawmaking** (collective production of rules primarily to channel behaviour of members which influences also non-members) v. **private rule-making** (coincides with the conventional rule-making activities of private parties grounded on freedom of contract).
- Private lawmaking can proceed either through
  1. pure self-regulation,
  2. delegated self-regulation or
  3. co-regulation.



# Private lawmaking (PLM) (2)

- Focus: production of private law rules (contract, property, civil liability),
- Forms of market-integrating private lawmaking:
  1. total harmonisation,
  2. minimum harmonisation,
  3. mutual recognition.
- New phenomenon: production of rules reaching beyond the members of the organisation.



# Private organisations

## A taxonomy

- Interest-based (associations of undertakings, networks of firms) v. semi-independent organisations (stock-exchanges),
- Meta organisations (organisations integrating organisations) v. direct organisations (associations of undertakings),
- Open (any firm in the industry can enter) v. strategic organisations (limited and controlled access),
- Monopolistic organisations v. competing organisations.



# Different approaches to Private Lawmaking

## The institutional complementary approach:

1. PLM in a liberal State,
2. PLM in a corporatist State,
3. PLM in a regulatory State.



# Private lawmaking at the global level

- The different species of private organisations and the difficulty to maintain the 'state based' public/private divide,
- Intergovernmental organisations,
- The role of NGO's as private lawmakers.



# Institutional explanations for PLM at EU level

## Institutional explanations:

- Better Regulation,
- The effects of the proportionality principle,
- Market-driven explanations.



# Why is private lawmaking growing at EU level? (1)

## Better Regulation

- The search for alternatives to legislation is driven by:
  - a) broader stakeholders' involvement,
  - b) stronger effectiveness,
  - c) higher responsiveness.





# Why is private lawmaking growing at EU level? (2)

## The principle of proportionality

- The application of the principle of proportionality requires the adoption of the legislative strategy that maximizes effectiveness and efficacy of lawmaking,
- The principle of proportionality forces to engage into comparative institutional analysis to choose between public and private lawmaking,
- The use of private lawmaking may be preferable over public lawmaking when more effective as long as it complies with the rule of law principle.



# Why is Private lawmaking growing at EU level? (3)

## Market driven explanations

- Private lawmaking, especially when aimed at regulating market failures, may be driven by the market,
- Market forces can support the introduction of regulation when it generates new business opportunities,
- When the introduction of new rules triggers new economic activities the market often is the major driver,
- Examples:
  - Financial private regulation: Financial transparency may require the introduction of gatekeepers that verify compliance with rules. The activity of the gatekeepers therefore is often regulated by private lawmaking,
  - Product and services standards.



# Problematic aspects

- Private lawmaking is not subject to democratic scrutiny,
- Private organisations are not sufficiently accountable both to regulatees and to the public,
- Private lawmaking is not subject to judicial review,
- Private lawmaking often is the output of monopolistic organisations - it may violate competition law and the principles of normative pluralism.



# The accountability deficit and its potential responses

- Three potential responses to the weaknesses of private lawmaking:
  - a) Ensuring good governance and liability,
  - b) Fostering public-private coordination,
  - c) Promoting market accountability.



# Governance

- The governance response is associated to the adoption of forms of organisational governance of private regulators which best suit the regulatory functions,
- Examples concerning governance choice of the private lawmaker:
  - a) For profit/non profit,
  - b) Company, associations, foundations,
  - c) Membership,
  - d) Voting power,
  - e) Exit.



# Liability of private lawmakers

- The current systems provide little evidence for efficiency,
- Question:
  - Should/can we transpose the liability system adopted for agencies or should we adjust the liability regime usually applied to private organisations?



# Public/Private coordination

- Different models of interaction between public and private actors:
  - a) the *ex-post* approval model (formal or informal),
  - b) the delegation model (rule-making based on principles defined by legislation),
  - c) the cooperation model (“co-making”),
- What are the implications of these three models for accountability?



# Market accountability

- Plurality of private lawmakers competing for regulatees within a common frame of rules,
- The structure of market accountability:
  - a) common rules concerning competition and cooperation among private lawmakers,
  - b) individual rules concerning the relationships between regulators, regulatees and third parties.
- The competition among private lawmakers is achieved by minimizing switching costs.





# Proposal: a new framework for European private rule-making

- **Proposal:** the introduction of a new legal framework to regulate European private rule-making and its interaction with public rule-making:
  - a) Common principles concerning both public and private lawmaking,
  - b) Transparency, accountability, proportionality and consistency,
  - c) Specific rules concerning private rule-making,
  - d) Detailed sector-specific rules.



# Conclusions

- Private organisations both self-interested and semi-independent play a major role in creating European rules and integrating legal systems,
- They contribute to the creation and regulation of the Single Market,
- The complementarity of public and private lawmaking should redesign the multilevel governance strategy and the interaction between Member States and the EU,
- The current trend towards total harmonisation should be replaced by a combination of minimum harmonisation through public lawmaking and further harmonisation through private lawmaking,
- The traditional partitioning between public and private lawmaking at national level appears inadequate for the European setting,
- The accountability deficit requires the introduction of new rules,
- A new legal framework should:
  - 1) guarantee the benefits of private lawmaking while
  - 2) ensuring its compatibility with democratic principles, primarily the rule of law.

