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Self-Regulation and European Contract Law
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Self-regulation and European Contract Law (ECL)

- Self-regulation (SR) as part of the harmonisation strategy in relation to the Common Frame of Reference.
- Specific references in the Action Plan of 2003 and the 2004 Communication, the Resolution of the European Parliament

Self-Regulation and ECL

- Communication from the Commission to the European Parliament and The Council. European contract law and the revision of the acquis: the way forward
- “ 2.2. Promoting the use of EU-wide standard terms and conditions (Measure II of the Action Plan)
- 2.2.1 The second measure sought to **promote the development by private parties of Standard terms and Conditions (STC)** for Eu-wide use rather than just in a single legal order”
- 2.2.2 The content of STC is for market participants to determine and the decisions whether to use STC is also one for economic operators. The Commission only intends to act as a facilitator and an “honest broker”, i.e bringing interested parties together without interfering with the substance.”
- Which institutional framework is the Commission envisaging?
- How should private parties and market participants define Standard Terms and Conditions? Which role is envisaged for trade and consumer associations?

The aims of the paper

- The paper has two aims:
- 1) The broader aim is to examine the current and potential role(s) of Self-regulation in the process of harmonisation of European Contract law
- 2) The narrower scope is to analyse the current limits of self-regulation under competition and contract law
- In particular the paper analyses competition and fairness tests in relation to decisions of associations of undertakings and consumer associations concerning standard forms and framework contracts

The questions (I)

- The paper addresses several questions:
- 1) What should be the role of SR in the integration/differentiation process of European Private Law?
- 2) In particular what should be the functions of SR in setting standard terms and conditions related to the CFR?
- 3) Which type of SR is desirable? Pure private SR or regulated SR?
- 4) What are the legal bases for each type of SR? Is there a legal basis for Regulated SR? Is the legal basis limited to Consumer contract law or can it be expanded to the whole field of European contract law?

The questions (II)

- 5) What should be the relationship between the role of SR in general contract law and in specific areas of contract law, such as banking, insurance, securities, sales etc.?’?
- 6) Does the role of SR change in relation to the legal level of harmonisation? For example it increases in low harmonised fields and decreases in highly harmonised fields?
- 7) Does the role of SR change in relation to the modes of legal regulation? For example it differs in contexts characterised by regulatory competition and contexts characterised by regulatory coordination?

The foundations and functions of SR in European Contract law

- SR as an expression of private autonomy
- SR as the expression of private regulatory powers
- SR in delegated self-regulation or in co-regulation
- What are the consequences of using freedom of contract as a regulatory device?

The self-regulatory model in directive 2005/29 Ec concerning unfair business to consumer commercial practices

- The definition of code of conduct and the emergence of two models: purely private regulation and administrative regulation. Which room for co-regulation?
- Art. 2 (f) : “ ‘code of conduct means an agreement or set of rules not imposed by law, regulation or administrative provision of a Member state which defines the behavior of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors”
- Art. 2(g) ‘code owner’ means any entity, including a trader or group of traders which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it”
- Separation or coordination between the two?
- The difference with the proposal
- Which indications for SR in European Contract law?

SR and ECL

- The different potential roles of SR in ECL
- SR and standard setting. In particular SR and common terms and conditions
- SR and monitoring. Monitoring the implementation process of European Contract law in national legal system and governing differences
- SR, dispute resolution and enforcement

The different functions of SR in ECL

- SR and contract standardization
- SR and exchange of information
- SR and contract differentiation
- SR and firms' competition

SR and standardisation

- The benefits of standardisation of European contract law and the potential role of self-regulation
- Economics of standardisation and its application to contract standardisation
- The benefits of standardisation for consumers: reduction of search costs
- The benefits of standardisation for firms: to increase the ability for strategic planning
- Network externalities and the benefits of standardisation
- In search for the optimal combination of standardisation and differentiation through self-regulation

Contract standardisation in banking and telecom: the case for network externalities

- In industries where network effects are particularly significant such as banking or telecom, contract standardisation contributes to interoperability
- In the case of banking standardisation can help to have coordinated payment systems
- In the case of telecom standardisation can have the function of allowing customers of different operators to be able to interact
- In both cases standardisation can also help to shift from one to the other operator.

Sr and exchanges of information

- SR can also be used to gather information about contractual practices employed in different sectors and/or different legal systems
- In this case the role of SR is that of selecting best practices and promoting benchmarking

SR and differentiation

- SR can promote organised differentiation of products/services and 'attached' legal rules.
- Differentiation may be an intentional pro-competitive strategy or the 'unintentional' outcome of different institutional frameworks. Implementation of the same rules in different legal systems may bring about different interpretations due to the necessity to preserve internal consistency of each legal order.
- SR can also coordinate contracts differentiation. Excessive product differentiation can increase search costs for customers. Such a problem becomes relevant in relation to consumers whose resources for search can be limited. Analogous problems can arise in relation to contract differentiation.

SR and competition

- The relationship between Contract standardisation and competition
- Contract standardisation plays a very important role for industries where customers use more than one operator or where there has to be ability to change service supplier at low costs
- Often in these cases differentiation may be an anticompetitive device. Firms differentiate their products or the necessary technology to use a specific product. They increase specific investments to make exit very costly.
- Standardisation plays a pro-competitive role

Standardisation of contract clauses and competition effects

- Standardisation of contract terms and conditions in relation to competition effects can be:
 - Anti-competitive
 - Neutral
 - Pro-competitive (to avoid anticompetitive differentiation)

when drafting standard terms and conditions and standard form contracts at European level

- Competition law
- Substantive contract law

Two premises concerning SR

- 1) The different types of Sr in relation to the private/public divide
- 2) The different SR models: the alternative between contractual and organisational models

Different types of SR

- Purely private SR
- Regulated SR
- The two types have different constitutional foundations and different legal basis.
- Purely private Sr is grounded on private autonomy even if primarily performs regulatory functions. Therefore no European formal competence is needed to operate.
- Regulated SR has to have some link to competences in the Treaty. Such a competence does not have to be necessarily sector specific but it may find its legal basis directly on market integration (article 95).

Different models of SR and their influences on the harmonisation process.

- Contractual versus organizational models of SR
- Contractual models of SR concerning European Contract law
- Organisational models of SR concerning European Contract law

Contractual models of SR

- Contractual models define the content of the final contract by designing framework contracts or master agreements.

Examples

- Framework Contracts master agreements can be classified as :
 - Unilateral, when only one class of parties (for example producers) participates in the drafting process.
 - Bilateral when producers and consumers or a different class of firms participate
 - Multilateral when several constituencies participate into the drafting process

Contractual models of SR

- The unilateral contractual model is the most common
- Bilateral negotiations are becoming frequent. Different associations, trade and consumers, negotiate the content of framework contract that will be used in B to C relationship

Organizational models of SR

- When SR uses organisational models often not only the organisations provide framework contracts but they also monitor the implementation of these contracts and in particular the behavior of their their members.
- Compliance may be mandatory or voluntary.
- Organisational models can also take different forms and be classified as unilateral, bilateral or multilateral
- The most common model is unilateral where trade associations draft standard forms for their members.
- Less diffused is an organizational model where different constituencies participate in the same organisation

The limits of SR imposed by competition law

- Competition law considers both contractual and organisational models of SR
- Contractual models generally correspond to agreements or concerted practices under article 81.1
- Organisational models operate through decisions of associations of undertakings under article 81.1
- Both contractual and organisational models can also be scrutinized under article 82 as the expression of abuse of collective dominant position

Which self-regulatory arrangements concerning contract law can be scrutinized under article 81.1?

- Criteria to define what are the potential SR arrangements concerning determination of standard form contracts, framework contracts and Standard terms and conditions
- A useful starting point are the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation. The guidelines clearly indicate that
- “ 24 Some categories of agreements do not fall under Article 81(1) because of their very nature. This is normally true for cooperation that does not imply a coordination of the competitive behavior in the market such as
- Cooperation between non competitors
- Cooperation between competing companies that cannot independently carry out the project or the activity covered by cooperation
- Cooperation concerning an activity which does not influence the relevant parameters of competition”
- The key question is to identify to what extent the definition of standard terms and conditions, framework contracts and standard forms imply coordination of competitive behavior.

The competition law test

- The scrutiny of SR agreements and decisions of associations concerning standard forms and framework contracts
- 1 the agreements
- 2 the concerted practices

The competition law test

- 3) Decisions of associations of undertakings
- The relevance of the binding or not binding nature.
A different test for binding and not binding rules
- When the decisions are binding for the members of the association they are generally considered to be unlawful
- When they are not binding there is a test to scrutinize the anticompetitive object and effect

The relevance of the binding or not binding nature of the recommendation

- Verband case 45/85, Judgement of the Court 27 January 1987
- Pp. 26 ff.

Competition law test

Some examples

- The distinction between complete and incomplete standardisation
- AGCM Provvedimento n. 13697 Bollettino n. 44 15.11.2004

The competition law test and the organizational models

- To evaluate the potential anticompetitive nature of decisions of associations of undertakings are generally considered to be irrelevant:
- A) the entrepreneurial nature of the association i.e whether or not the association can be considered an enterprise itself

The competition law test and the organizational models II

- Are generally considered to be irrelevant:
- B) The scope of the association, i.e whether it is for profit or non profit
- C) The composition of the association, whether it is purely private or mixed, with public and private members
- It is decisive that the members of the association are enterprises
- The consequence is that a consumer association that defines or contributes to design framework contract could not be scrutinized under article 81.1

ECJ on decisions of association of undertakings

■ Case C-309/99 Wouters

Commission decision 2005/8 EC 24. June 2004“ According to the Wouters case-law of the Court of justice a decision by an association of undertakings does not infringe Article 81(1) of the EC Treaty when, despite the effects restrictive of competition that are inherent in it, it is necessary for the proper practice of the profession, as organised in the member state concerned. The Commission takes the view that the establishment of a (recommended) minimum fee scale by the Architects’ association cannot be considered as necessary in order to ensure the proper practice of the architect’s profession.”.

Remedies for anticompetitive framework contracts defined by SR bodies

- When framework contracts or terms and conditions defined through Sr are unlawful under competition law there are two questions
- 1) what happens to those framework contracts?
- 2) what happens to contracts executing those framework contracts?

Framework contracts or Terms and condition in violation of competition law

- When FC are held to be unlawful because in violation of competition law
 - A) They are void
 - B) They are considered to be unlawful and parties negatively affected can ask for damages (Courage v. Crehan)
- Unclear whether they can ask for injunction to modify the FC. Applicability of directive 98/27.

Contracts executing void framework contracts

- Contracts that represent execution of void FC for violation of competition law are generally considered void (see Italian SSUU 2207/2005)
- Unclear whether these contracts can be modified by judges to eliminate anticompetitive clauses (application of directive 27/1998 on injunction)

Agreements, concerted practices and decisions of associations of undertakings concerning exchanges of information

- 2004/138/EC Commission decision of 11 June 2002 Lombard Club
- Definition of agreement p.412
- Definition of concerted practice p. 413,4,5,6
- P. 420 “ As explained above the banks concerned had created a dense network of more than 20 different committees which communicated with one another and some of which had overlapping terms of reference. There were in addition large numbers of regional committees throughout Austria....”
- P. 423 “ through the ongoing, regular, institutionalised and comprehensive exchange of usually confidential information, the participating banks established a very high degree of mutual understanding, reciprocity and, at least conditional and partial, agreement on their current and future market conduct and thus systematically eliminated or at least very considerably reduced any uncertainty as to the competitive conducts of other banks. This applied not only to interest rates, but also to charges of all kinds, common calculation bases or advertising on the bases of interest rates. Going alone by individual banks was the exception here and drew immediate criticism, sometimes fierce, from other banks.”

Some example about the banking sector

- Commission decision Lombard Club P. 469 “ It can be said therefore that the network consisting of a number of closely interconnected committees was liable to have an appreciable effect on trade between member states in view of its proven comprehensive geographic and substantive coverage, its undisputed anticompetitive purpose and its similarly proven impact throughout the territory of Austria. In addition, the network was liable, on the other hand, to affect behavior on the demand side directly or indirectly geared to cross-border flows of goods and on other, market entry decisions on the supply side.”.

Competition law and delegated self-regulation

- Arduino p. 34,35 “: The Court has held that Articles 5 and 85 of the Treaty are infringed where a member state requires or favors the adoption of agreements, decisions or concerted practices contrary to article 85 or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (Van Eycke paragraph 1, Reiff, para 14; Delat Schiffahrts para 14; Centro servizi Spediporto para 21, Commission v.Italy, para. 54), (36) In that regard, the fact that a members state requires a professional organisation to produce a draft tariff for services does not automatically divest the tariff finally adopted of the character of legislation.”.
- Arduino p. 36,37 : “ ... the fact that a Member State requires a professional organisation to produce a draft tariff for services does not automatically divest the tariff finally adopted of the character of legislation. (37) That would be the case where the members of the professional organisation can be characterised as experts who are independent of the economic operators concerned and they are required under the law, to set tariffs taking into account not only the interests of the undertakings or associations of undertakings in the sector which has appointed them but also the public interest and the interests of undertakings in other sectors or users of the services in question (Commission v. Italy par. 44).

Competition law and delegated self-regulation

■ Arduino

- Arduino p. 43: “ the italian state cannot be said to have delegated to private economic operators responsibility for taking decisions affecting the economic sphere, which would have the effect of depriving the provisions at issue, in the main proceedings of having the character of legislation...”
- Arduino p. 44: “ Articles 5 and 85 of the Treaty do not preclude a Member State from adopting a law or regulation which approves, on the basis of a draft produced by a professional body of members of the bar, a tariff fixing a minimum and maximum fees for members of the profession, where the State measure forms part of a procedure such as that laid down in the Italian legislation.”.

The fairness test for framework contracts defined by European SR bodies

- The fairness test in B to C relationships and dir. 93/13
- The fairness test in B to B relationships as a consequence of the application to firms of dir. 93/13
- The fairness test based on contract law as applied to B to B relationships in relation to framework contracts outside of the scope of directive 93/13.

The fairness test to framework contracts or master agreements drafted by SR bodies at European level

- The fairness test can be implemented following directive 93/13 when related to framework contracts concerning B to C relationships or when it is held to be applicable to B to B
- The fairness test can be implemented through traditional devices of contract law when the directive is not applicable, in particular with references to procedural and substantive unconscionability

The role of associations in the definition of standard forms

- The presumption of unfairness does not apply when there has been individual negotiation (Dir. 93/13 art 3.1)
- When collective negotiations between trade and consumer associations have taken place the directive still applies
- In some legal systems (evidence from Germany, The Netherlands, Spain) the occurrence of collective negotiations over standard forms between trade and consumer associations allows evaluation of fairness but shifts the burden of proof concerning unfair contract terms
- In other legal systems there are examples of negotiations between different business associations (example the italian law on subcontracting art. 2 L. 192/1998) that may affect the evaluation of abuse of economic dependence.

Standard forms, regulation and self-regulation

- Dir. 93/13 states that when contract clauses comply with legislation or regulation they cannot be scrutinized in relation to fairness.
- (art.1.2 “ The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions of principles of international conventions to which the member states or the Community are party, particularly in the transport area, shall not be subject to the provisions of this directive).
- MS have implemented this provision differently. Italy for instance has only referred to legislation while excluding regulation
- What is the relationship between this provision and purely private self-regulation? The fairness evaluation should still be made
- What happens in the case of delegated self-regulation? In this example the legislator or a public regulator delegates the association to draft standard forms. Can the judge scrutinize the standard form to verify the fairness of contract terms?
- Are standard form contracts subject to judicial review?

Comparative assessment of competition and fairness evaluation of framework contracts in European law

- Distinguishing the institutional and substantive aspects:
- Institutional aspects are related to the different roles that institutions are called to play in performing the two different tests. In particular what is the relationship between antitrust and other administrative authorities ?
- Substantive aspects: what is the relationship between scrutiny of competition aspects and substantive contractual aspects related for example to unfair contract terms

The institutional dimension

- The competition scrutiny is performed by antitrust authorities. In theory it operates ex post i.e. once the agreement is made or the decision is taken.
- The fairness scrutiny under the directive 93/13 operates ex post when there is judicial control ex ante when there is administrative control

The institutional dimension

- In practice often the competition test operates ex ante since trade associations submit the agreement to antitrust authorities for ex ante evaluation before it enters into force.
- When antitrust authorities evaluate the agreement ex ante they tend to incorporate other evaluations as well. Therefore antitrust and contract analysis tend to blur. This is particularly relevant in relation to B to C relationships to evaluate consumer detriments or welfare reduction.

The institutional dimension

- While in the evaluation of potential anticompetitive aspects the presence of SR and in particular negotiations between business and consumer associations does not play a significant role, it plays important functions in the evaluation of fairness aspects.
- Open questions: Is there any reason why the involvement of consumers associations should not play any role in relation to competition evaluation while having important effects on the fairness evaluation?

The substantive dimension

- Control of definition of framework contracts and General terms and conditions under competition law test and fairness test operates in different ways.
- While the aim of competition test is to ensure that sufficient differentiation or an optimal combination of differentiation and standardisation is preserved, the aim of the fairness test is to ensure that procedural negotiations are fair.

The current models of SR for harmonisation of ECL

- Current models of SR play a significant role for the harmonisation of Contract law.
- However they are:
 - 1) Predominantly sector specific
 - 2) Unilateral oriented (often the expression of business associations more than the result of a negotiation process between different associations).
- Such models though relevant contribute only modestly to the process of creation of a European Common Frame of reference.

The desirability of regulated SR at European level

- SR may instead have a very significant role for the integration of European private law.
- First it may contribute to 'bottom up' harmonisation to the extent that trade associations and consumer associations, federated or coordinated at EU level, can produce homogeneous terms and conditions.
- Second it may contribute to reduce and to govern differences that occur in the implementation process of European law and do not amount to violations of directives. Often a relevant discretionary space is left to member states to accommodate uniform norms with national institutional differences.

Regulated SR for European Contract law

- We should distinguish SR as a concurrent source to produce general contract law and SR as a device to produce standard forms in specific sectors.
- Currently SR plays an important role in individual sectors where the dangers of anticompetitive use are higher. The broader the field of application of terms and conditions the lower the risk of anticompetitive use of SR
- SR as a device to define common standard terms and conditions require to be scrutinized under competition law but also under general principles of contract law
- In order to minimize the risks of generating standard terms and conditions that would have anticompetitive effects and produce unfair terms multilateral negotiations should be preferred over unilateral formation.
- Multilateral negotiations however ncrease transactions costs

Regulated SR for European contract law

- Even if the problem of high transaction costs is overcome there is still the problem of associations' representativeness.
- Control over representativeness may be very onerous and arbitrary
- We would still have the necessity to permit individual protection for consumers and competitors against standard contracts that are collectively negotiated both in relation to competition goals and fairness.

Regulated self-regulation for European Contract law

- A form of European regulated self-regulation is needed to grant a balance that would allow private regulatory powers to participate into the formation of ECL while preserving the accountability and the legitimacy of the overall process of european legal integration.
- Within such a framework ex ante control of compliance with competition rules should be ensured. The costs of pure ex post control in this field might be too high

Regulated Self-regulation for European contract law

- Additional ex ante control of compatibility with the principles in the Charter should be provided. Such control can go from
- 1) self-evaluation (obliging the drafter to show the compatibility or even the promotion of fundamental rights through contract law)
- 2) to an evaluation by an independent committee or by a regulatory body
- 3) Evaluation by an administrative authority

Regulated self-regulation for European contract law

- The regulated self-regulation framework should favor aggregation of existing national SR bodies at European level and should define general guidelines concerning compatibility with competition law
- These general principles should affect both
 - a) General terms and conditions of contract law
 - b) Specific terms and conditions related to individual fields such as banking, telecom, insurance etc.
 - c) Best practice selection and benchmarking

More general lessons

- The use of SR in formation and consolidation of European contract law shows:
- A) the growing importance of revising the relationship between mandatory and enabling rules in the light of regulatory function of contract law.
- A1) The regulatory function of contract law is not limited to mandatory rules but can be implemented also with enabling rules in the light of new regulatory models

More general lessons

- B) the relationship between governance of the process of Europeanisation of private law and the content of substantive contract rules
- B1) the presence of certain actors (associations) and the existence of predefined procedures (negotiations) concerning standard forms or framework contracts might affect the nature of substantive contract rules: for example the definition of fairness of certain contract clauses.
- B2) A specific link between the governance structure of these associations, their representativeness and accountability and the presumed fairness of negotiated contract clauses may be established
- This process however should never reduce the level of individual protection granted to consumers, depriving them of remedies they would have had if negotiations had not taken place

More general lessons

- The double dimensions of SR: Political and legal
- SR has a political dimension for the creation of European contract law and may contribute to harmonise it
- SR has a legal dimension that can reduce transaction costs and promote common rules. But the increase of collective interest protection can not reduce the degree of individual protection of contractual parties