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Research project: New Modes of Governance, NewGov

Project supported by the 6th Framework Programme of the European Union

Project homepage: www.eu-newgov.org

Responsible: Udo Diedrichs (Dr.), Wolfgang Wessels (Prof. Dr.).

Coordinator of the Integrated Project: [Robert Schuman Centre](#) (RSCAS) at the European University Institute (EUI)

Commencement date: 1 September 2004

Project duration: 4 years

Organisation:

The research project is organised into four different CLUSTERS each of which contains a set of inter-linked component projects and places a particular emphasis on one or two of the “four E” questions of *Emergence*, *Execution*, *Evaluation* and *Evolution* of new modes of governance while overlapping with each other, creating an integrated structure. Two task forces, one on ‘legal issues’, the other on issues of ‘legitimacy and democracy’, interacts with all participants.

Prof. Cafaggi is leading with Prof. H. Muir-Watt one of the three sub Task Force belonging to the legal task force labelled “Which governance structures for European Private law?”

Content:

The process of European integration, seen in the light of the new Constitution, poses new challenges to regulatory strategies concerning the desirable degree and quality of Europeanization of private law. The presence of multiple levels of normative competence constitutes an institutional reality, and it is clear that their potential conflicts can not be solved through the use of hierarchy or traditional conflict of law principles. The sorts of issues emerge, which involve the design of institutional structures (I), the function of self-regulation (II), and the need to take account of impact of the global economy on regional integration (III).

The research project attempts to:

- a) address the methodological question concerning the relation between harmonising normative and institutional strategies in the light of the new constitution
- b) identify the current techniques and instruments used to combine the processes
- c) define the different regulatory strategies that can be used to achieve the desired degree of harmonisation and differentiation
- d) make some policy proposals affecting the current debate on Europeanisation of private law

The wider research brings to bear an interdisciplinary, comparative perspective on the study of contemporary transformations of instruments, methods, modes and systems of governance in Europe. New modes of governance include a wide range of different policy processes such as open methods of coordination, voluntary accords, standard setting, regulatory networks, regulatory agencies, regulation through information, bench-marking, peer-review, mimicking, policy

competition, and informal agreements. They also cover new mixes of policy process involving public and private actors. This is where the project on regulatory strategies and governance in European private law fits in and hopes to contribute to a wider reflection on new modes of governance.

The research project encompasses **two major themes**:

I. Regulatory strategies and governance in European private law

The current debate on desirability and modes of formation of European private law is engaging a wide number of scholars and institutions. Current work concerns the search for common core of European private law, rationalisation of *acquis communautaire*, design of a European Civil Code. These ongoing projects raise at least two related questions concerning the challenges to Europeanisation of private law:

- What is the often implicit definition of private law standing behind the debate about the creation of European Private law?
- Does the process of creation of European private law need some type of governance structure?

Comparative legal analysis suggests that even acknowledging the differences between and within legal families a workable definition of private law at national level has been reached. This definition however often presupposes a clear distinction between public and private law and between State and market. However, these distinctions are differently framed at the European level, assuming that they play a relevant role whatsoever.

At least two different phenomena have arisen that question this definition even at national level and pose new challenges at European level

- the emergence of the regulatory function of private law
- the increasing contribution of public and private regulators to the production of legal norms concerning private law. They relate to contracts, property and torts but they also affect fundamental rights.

By regulatory functions of private law we mean the ability of private law in particular contract, torts and property to address market failures. As to the production of private law rules by Independent authorities and administrative agencies we refer to sector regulation that designs predominantly contract law and property rights consistent with the regulatory goals that have to be pursued. These phenomena play an even more relevant role at the European level.

On the one hand the relation between market integration and market regulation has influenced legislation in such fields as consumer protection or environmental protection reinforcing their regulatory function. When pure negative integration has shown to be inadequate, the link between positive integration and regulation has become significant. Integration of European private law systems has therefore often been associated with a stronger (than in national system) regulatory function.

On the other hand often the lack of direct regulatory competences or weaknesses of the institutional framework has led to preference for contract and tort legislation instead of traditional administrative regulation.

To a lesser extent and with more emphasis in the last period of time new modes of regulation moving from command and control to responsive regulation or economic incentive based regulation have promoted the use of private law instruments to pursue regulatory goals.

The process of harmonisation has often proceeded by keeping separate private law and international private law. The 'substantive' role of IPI and its regulatory functions have only recently been

acknowledged. If adequately considered in a multilevel system they can affect the design of European private law and the definition of its core and boundaries. These changes pose a set of relevant questions concerning the definition of what is European private law for the purpose of the harmonisation debate.

The creation of a European private legal system has been and will be based on a multilevel structure where the different legal systems of member states will coexist with a uniform European system of private law. Such a structure will imply the necessity of a higher level of vertical and horizontal coordination among different layers of the involved legal systems. But differences will have to be governed; otherwise there is a serious risk that the goal of harmonisation will be seriously undermined.

Furthermore the development of the European legal system does not occur in a vacuum but it is stimulated or prevented by globalisation of legal rules, particularly strong in the realm of private law. Institutional and economic factors that operate at transnational level influences the modes and the content of harmonisation. The relationship between world trade rules, *lex mercatoria* and international conventions are only few examples. The interplay between these phenomena and the activity of European harmonisation requires strong coordination as well.

Coordination can not be limited to law-making, leaving to the judiciary the task to verify the correct implementation of European law in member states and the consistency between national administrative and judicial interpretation and European law. The physiological development of differences correlated to existing different legal and socio-economic cultures of the relevant actors will have to be governed by a more complex mechanism than that employed in the last two centuries by European member states.

Even if we acknowledge different definitions of European private law for the purpose of determining the necessity or desirability of harmonisation the question of governance has to be addressed. In the research project we intended to focus particularly on two questions:

First, does European private law need a governance structure that will accompany its formation, consolidation and changes? If the answer to the first question is affirmative, is there a relation between the governance design and the definition of European private law? We believe that even if one takes the most conventional perspective concerning the definition of private law, the traditional governance structure employed by national legal systems will not be adequate to manage European legal integration of private law.

But if we take into consideration the internal transformation of private law and its increasing regulatory function in addition to the role of private law in regulated sectors we witness several phenomena that require to be considered in the governance design.

- The system of sources in private law has changed. This change has to be translated into a governance system able to coordinate new and old institutions. The relationship between law-making and adjudication and legislative power and judiciary does not fully represent the relevant actors. Public and private regulators play a very relevant role and may be powerful engines to promote or to prevent European harmonisation of private law.
- The creation of European private law system is a process that could never be crystallized in a single comprehensive piece of legislation- The procedural nature of Europeanisation might require a governance system that may reflect the structure of this process. Therefore, in connection with a newer regulatory definition of private law, the appropriate governance structure might change accordingly.

II. Self-Regulation as a Regulatory Strategy: A Comparative Law Perspective

Theme

European legal and political science is paying growing attention to the circumstance that the European Community (EC) is increasingly promoting self-regulation as a regulatory strategy in order to implement supranational policies. As a matter of fact, well beyond the classic example of the «new approach» to standardisation, the EC is nowadays developing a differentiated typology of interventions based, directly or indirectly, on self-regulation at the Member States' level. Such development of the European legal order is certainly impressive in quality and marks a new orientation in the shaping and management of the Community policies. Moreover, its emergence has to be situated in a more general tendency towards the identification, within the Nation-States, of new mechanisms of regulation based on a stable combination of public and private action, as well as in the tendency to the strengthening of juridical pluralism in the global legal space. Conceptually original as it can be, the increasing recourse to self-regulation as a regulatory technique in the European context is nevertheless highly problematic and certainly in need for a great deal of systematic legal investigation, both at the empirical and theoretical level.

So far, the debate has focussed either on specific sectors where self-regulation has been traditionally experienced or on certain general issues, such as the simplification of the rule-making process and the definition of the function and the mode of self-regulation as a European regulatory technique. As for the first issue, it has been registered a remarkable transformation in the law-making process, which is moving towards co-regulation, delegated self-regulation and purely private self-regulation ex post recognized by public powers. As for the second, new modes of governance not based on legislation or involving private actors in policy formulation have been advocated as a panacea for speeding up European decision-making.

And yet, the reflection on self-regulation as a tool for European integration is only at its very first stage and it is far from clear that the promise of self-regulation which is made by the Commission will be positively kept and developed in the next future. Actually, most of the statements at the European level disregard the often deep differences among the various national traditions and the simple fact that the promotion of self-regulation might not have the same impact from one country to the other. In this sense, a serious problem of effectiveness of EC law is connected with the development of self-regulation as a European regulatory technique. This pushes back to the study of the status of self-regulation in the national laws of the Member States before the intervention of the European institutions and to the careful analysis of the processes of impact, reaction and adjustment taking place after the EC move. Understanding and evaluating the supranational dimension implies the reconstruction of the existing national structures and procedures, which ultimately determine the shape and character of European self-regulation.

Problems

The project is centred around two macro-questions. The first relates to the reasons why self-regulation is used as a general regulatory technique, rather than as an instrument specific to one single sector. The second question concerns the role, the structure and the dynamic of self-regulation as a regulatory technique. In line with what has been above explicated, national rapporteurs had, in addressing the mentioned general questions, to pay particular attention to the inter-play between EC law and national law. If national experiences pre-exist to the supranational intervention and could be meant as independent of the EC developments, the EC dimension is essential in so far as it turns those experiences towards the achievement of EC objectives, thus putting into relation a variety of different traditions and legal environments.

The project aims at identifying the legal framework applicable to self-regulation in different national systems operating under the direct or indirect influence of EC institutions. Its intention is to create a database for a set of countries, containing the relevant aspects to be found in private and public law and then to proceed to a comparative law analysis of the results.

Three dimensions of self-regulation are considered in the national reports.

- *Firstly*, the constitutional law dimension. Constitutional law might envisage a number of legal provisions capable to affect, directly or indirectly, the recourse to self-regulation, either promoting or prohibiting it. Thus, it becomes crucial to identify the whole of such provisions and to evaluate their relationships within the context of the constitutional order and their overall relevance *vis-à-vis* the practice of self-regulation.
- The *second* dimension is that concerning the determination of the nature of the regulatory body as well as the nature of its activity. These two aspects constitute an essential profile of the understanding of self-regulation within the European States, both in conceptual and practical terms, given the number of legal implications deriving from the choice of one regulatory scheme or another. Thus, the recognition of a public or private nature of the regulatory body and of the activity that such body carries out might be decisive in order to verify the application of a public, private or mixed law regime to its action and functioning. More in general, self-regulation is directly connected with the phenomenon of the increasing differentiation of the intersections between administrative law and private law instruments.
- The *third* and final dimension relates to the way in which national law would discipline the liability of regulatory bodies.

Events:

1) Background Paper - Final research project outline

2) Intermediate Workshop: The Making of European private law – Regulation and Governance Design

3) Report: Intermediate Workshop – Rethinking Self-Regulatory modes and strategies in Europe

4) Workshop Report with Draft Chapters: Regulatory strategies

See http://www.eu-newgov.org/datalists/deliverables_detail.asp?Project_ID=25b