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Self-regulatory competition  
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# Structure of the presentation

- The growing role of private regulators in the EU
- A taxonomy of private regulation
- Plurality of regulators and different models of relationship between regulators and regulated
- Self-regulatory cooperation and competition
- The framework of sr competition: regulation and competition law
- Policy implications at EU level

# Aims and limits of the paper

- The presence of private regulators with different functions is a reality of many regulated markets. This paper does not deal with the question of desirability of such a phenomenon. It starts from the existing reality i.e the presence of private regulators in some regulated sectors to ask what is the best institutional design at EU level given the current situation
- I share the view that sector specificity affects severely the preconditions for regulatory competition and the operational modes of regulatory competition. ( Van den Bergh, 2000, Kerber and Budzinski 2003) However the analysis does not address a specific regulatory field. Many examples draw on financial markets, professional services and technical standardisation

## Current examples of multiple private regulators at EU and MS level

- Stock exchanges
- Professional organisations
- Advertising private Authorities
- Standardisation bodies

# A taxonomy of private regulation

- Pure private regulation ( Independent from public regulators)
- Delegated SR ( see for example art. 48.2 and 50 directive EC on markets of financial instruments 2004/39)
- Co-regulation ( see for example art. 50 directive on markets of financial instruments, see also dir. EC 2005/29 on unfair trade practices act).

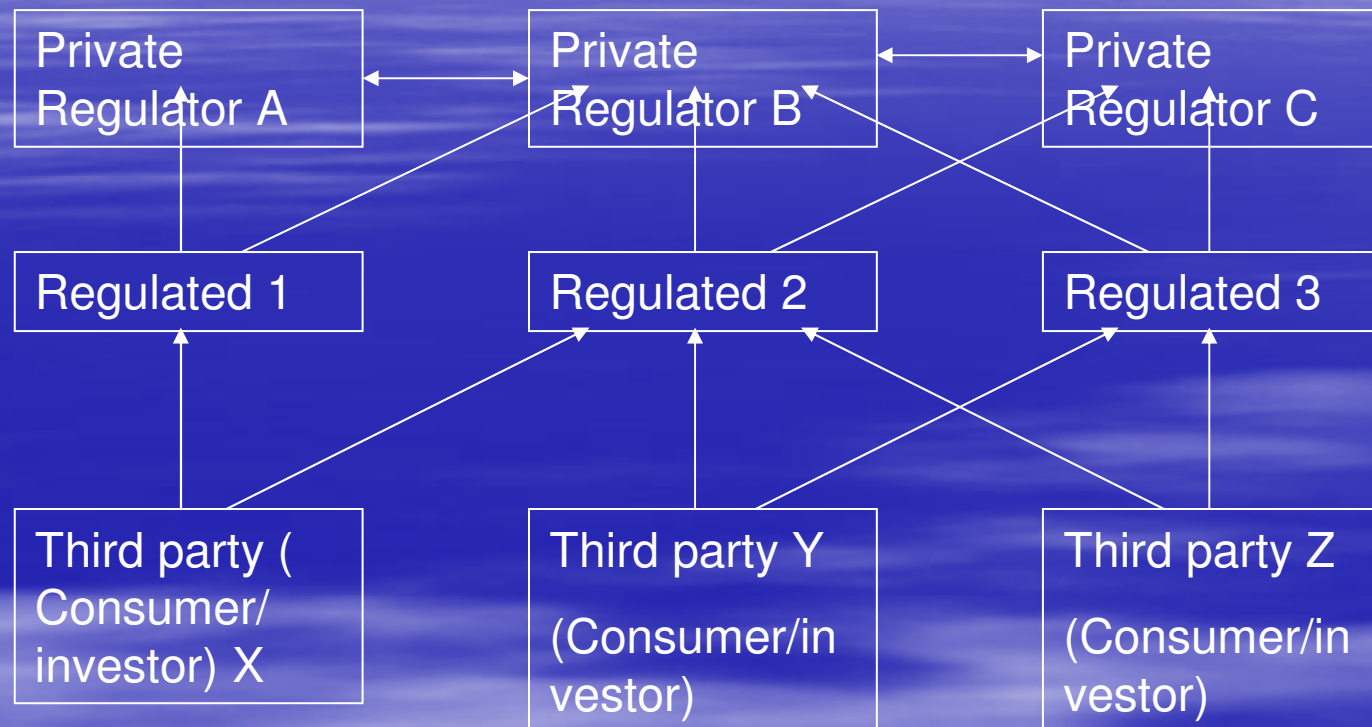
# The preconditions for SR competition

- Plurality of regulators
- Competition law enforcement to ensure that regulators compete according to the rules: i.e. elimination of barriers to entry access and exit of regulatees are kept at sufficient low costs and that participation to multiple regulators is allowed ( see stock exchange example)
- Regulatory law devices to ensure that framework conditions to compete exist. SR competition as an ongoing process. The aim is not to achieve a uniform regulatory structure through ex post market harmonisation but to stimulate ongoing competition among regulators to improve the efficiency of the regulated markets

# Some clarifications about SR

- SR competition can concern different subject matters
- SR can occur even when regulation is uniform and yet it is differently implemented and enforced by single private regulators.
- An SR scheme can therefore operate if EU legislation is uniform but a decentralized regulatory system is set up
- SR can, on the contrary, serve the purpose of improving regulatory standards and concern standard setting beyond implementation and enforcement

# The regulatory space



# Illustration of the regulatory space

- The regulatory space is organised with numerous private regulators, for example stock exchanges that have to cooperate but also to compete
- To have competition implies that regulated firms can switch from one to another regulator.
- Firms may be listed with different regulatory requirements in various SE. This requires to increase coordination to reduce costs associated to differentiation
- Investors may decide to invest in particular financial markets according to the regulatory requirements. If the same firm is listed in several markets they may opt for one or another market in relation to the most desirable regulatory relationship. By expressing their preferences they may signal to the regulated firm the preferred regulator and its regulatory standards

## The choice of the private regulators by regulated and its effects on third parties

- The different modes of relationship between private regulators and regulatees
- In this framework I only consider regulators composed by regulatees without direct involvement of third parties
- A) Contractual relationship ( when regulation occurs only through contractual agreements among parties)
- B) Organizational relationship ( when there is an organization with the form of association, company, foundation, consortium etc).

# The effects of choices on the regulatory mechanism

- The premise of a working regulatory competition system is that preferences can be expressed. But whose preferences?
- **1) The choice of regulator(s) by the regulatee.**  
To have regulatory competition the regulatee has to be able to choose one or more regulators. Often mutual recognition among private regulators is a necessary precondition to have regulatory competition. When firms or professionals are bound to be regulated by their national private regulator there is little space for regulatory competition.
- **2) The choice of the regulated (firm by the investor, the consumer or the customer).** In an integrated market the choice of the firm is relatively free. The consumer can therefore express its preferences for a regulatory relationship by choosing one product/service associated to a firm. The link between the choice and the regulator may not be immediately discernible but it is certainly crucial for SR competition to operate

## The choice of the private regulators by regulated and its effects on third parties

- **The effects of the choice of the regulators by the regulated on third parties ( investors, consumers, customers)**
- The choice of the regulator by the regulated affects the interests of third party. A regulator imposing stricter standards will protect the interests of third parties to a broader extent than a regulator imposing laxer standards.
- Are those standards only minimum standards or are they mandatory standards whose compliance will exclude liability?
- The distinction between different types of private regulators becomes relevant
- Standards set up by purely private regulators can only be considered minimum standards
- Standards set up by private regulators delegated by legislator or public regulator can be either minimum or standards whose compliance may exclude liability. The general rule is that judges can find regulators liable even if they comply with standards defined by legislator because regulatory compliance is evidence but not a defence.

## The choice of the private regulators by regulated and its effects on third parties

- Distinguishing the effects of the choice between regulated/third party contractual and non contractual relationship
- A) Contractual relationship (i.e investor and listed company). When there is a contractual relationship the choice of the regulated implies a choice of the regulator. Investor chooses to invest according to which SE the company is listed in
- B) Non contractual relationship. When there is not a contractual relationship the choice of the regulated affects third party without any possibility to be influenced by them. For example bystander in relation to products safety. The bystander does not choose the product and therefore can not affect the choice of the regulatory regime by the firm as the consumer can

## The choice of the private regulators by regulated and its effects on third parties

- When third parties have a contractual choice among different regulated ( i.e firms listed in different SE) they will be able to choose a regulated firm applying strict standards as long as there is not strong asymmetry of information
- When third parties do not have a contractual relationship they will have no choice. The choice will be made by the regulated who will operate as agents. To the extent that they are protected by national civil liability the regulated will have to comply with those standards, otherwise they will only be indirectly protected by the choice of the regulated
- In the latter case the risks of underprotection are extremely high and the necessity to complement SR competition with civil liability is very strong.

# Preferences systems and regulatory choices

- The premise of a working regulatory competition system is that preferences can be expressed. But whose preferences? Regulated and or third parties?
- In the framework just underlined while regulated can express their choices third parties can only choose very limitedly and often they can not
- If the preferences are only those of the regulated then this is not a problem. If the object of the regulation is the relationship between regulated and third parties then it becomes a problem and the governance structure of the private regulator becomes crucial

# The role of governance in SR competition

- To promote effective SR competition two questions related to governance are relevant
- A) Openness of the to the final beneficiaries of the regulatory process
- B) The alternative between for profit, non profit and mutual

## Different governance forms and their influences on the effectiveness of SR competition

- 1) A governance structure in which only regulated have voice. In this case two potential avenues are available:
  - a) To give voices to different stakeholders, in particular those who should benefit from regulation: i.e consumers, investors, customers (example Agreement between Commission and standardisation bodies, 2003)
  - B) To complement Sr competition with public regulation designing minimum standards to protect investors in financial markets, customers in utility markets and consumers in product markets).

## The link between the competitive framework and the legal form of private regulators

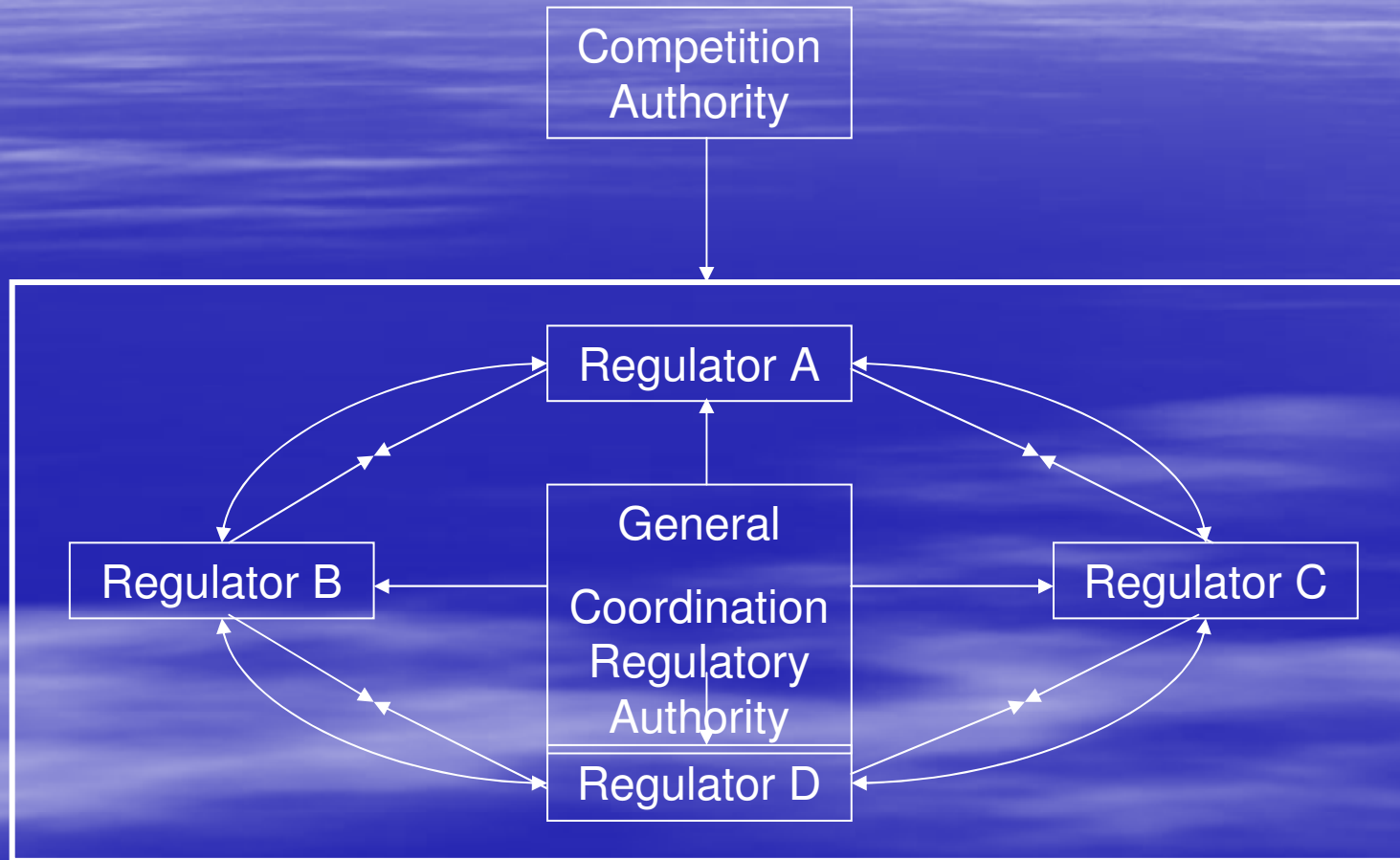
- The substantial relevance of the legal form of private regulator to ensure sr competition
- The distinction between non-profit, mutual and for profit form of private regulators in relation to incentives to compete, modes of competition
- Incentives to compete are higher for for-profit than the for others. To the extent that the non-profit or mutual form is adopted more regulation is needed to ensure the level of protection that SR competition can not ensure
- When for profit regulators operate they have pecuniary and non pecuniary incentives to compete.

# Competition in a self-regulated framework

- Should framework agreements among private regulators only be defined by public regulators? What does happen when they do not exist?
- How can competition law distinguish between agreements among private regulators aimed at defining a common framework for interoperability and anticompetitive agreements ?
- Competition law is a necessary but not sufficient conditions to allow SR competition. A system of regulated SR competition is needed

# Regulated SR competition and cooperation

## A hypothetical scheme for EU



# Coordination among private regulators and the limits of competition

- The role of coordination among private regulators is crucial:
- A) to define a common framework and interoperability for integrated markets
- B) to identify common regulatory standards. These standards concern not only the regulated but also the regulators. For example disclosure information by the regulators to the public about regulatory compliance and enforcement may serve the purpose of increasing competition among regulators.
- Such a coordination role can be carried out by public or private coordinating authorities
- When the coordinator is a private association the limits of competition law should be defined according to the specific regulatory function. Specific trade-offs may occur between the promotion of public interests and the limitation of competition among private regulators

# Concluding remarks

- The presence of private regulators is an important phenomenon at Eu and international level
- They entertain different relationships among them and with public regulators
- In certain markets such as the financial market there is a relatively high level of competition among private regulators, in other markets this level is low or nonexistent as in the area of professional services and technical standards. Starting points are very different and competition law devices should differ as well. When there are several private regulators mergers are the means to control the level of concentration. When there is only one abuse of dominant position is the instrument
- A uniform strategy at Eu level concerning self-regulatory competition is not appropriate given sector specificity and departing points; comparative analysis shows that in many cases an appropriate combination of competition and cooperation among private regulators may enhance efficiency and effectiveness of regulation

# Concluding remarks

- Competition is needed to provide private regulators incentives to regulate efficiently. It fosters a process of mutual learning if it is correctly engineered.
- Competition law may ensure that the competitive process is operating and enhances the welfare of the final beneficiaries of the regulatory process.
- Pure self-regulatory competition solely controlled by competition law may be insufficient to provide the optimal level of coordination and to define adequate governance arrangements
- Regulation is needed to define framework rules concerning all the private regulators and their coordination
- Coordination through framework rules is needed to promote network externalities and to avoid negative regulatory externalities ( i.e each regulator defines standards aimed at externalise costs towards different regulatory jurisdictions).

# Concluding remarks

- Regulation is needed to define governance arrangements that allow preferences of final beneficiaries to be expressed.
- Governance arrangements of private regulators opening to stakeholders' voice increase the effectiveness of the competitive system