

## **Regulatory Pluralism within the EU Context: The Case of Private Regulation and the Challenge of Constitutionalism**

Private actors are playing an increasingly important role in the performance of public regulatory functions, both at national and supranational level. Especially the dynamics marked by globalisation and the fast-moving technological innovation have created highly complex regulatory environments, which pose growing challenges to public authorities. In such highly dynamic regulatory spheres a certain shift can be observed in the perceptions and expectations of which role public regulators can actually play in delivering public policy objectives. It appears that state-made norms, set by legislative authorities through conventional constitutional norm-setting channels, arguably ceased to serve as “the main institutional vehicle for policing corporations in aid of public interests.”<sup>1</sup> In the wake of globalisation and digitalisation processes, the constraints to and limits of public regulatory capacities became more and more apparent, indicating that “governmental actors lack sufficient authority to regulate against many of the negative social externalities of international economic activity.”<sup>2</sup> Because of this creeping loss of public regulatory authority the search for alternative regulatory routes has intensified over time. What can be observed is a proliferation of alternative regulatory avenues, in which private actors are playing an increasingly important role.

Such a proliferation of private regulatory arrangements can also be encountered within the particular context of the European Union, where private actors are increasingly relied upon for the achievement of regulatory objectives. Instances of reallocating regulatory authority from public to private actors can be found in multiple policy domains within the EU’s regulatory context, such as in the field of e-commerce, audio-visual media services, product safety, eco-design, data protection and consumer protection. However, the institutional mode through which regulatory powers are reallocated differs significantly from one regime to another. The entrustment of private actors with the exercise of regulatory functions may be the result of either informal public sponsorship or an explicit legislative mandate. Thus, from a conceptual viewpoint, the term “private regulation” must be considered as a rather elusive umbrella concept which, in principle, encompasses a wide range of private regulatory and enforcement mechanisms. A quite illustrative example of delegated rule-making authority by private entities at Union level are so-called “European codes of conduct”. These codes must be understood as mechanisms whereby private associations or market operators are explicitly encouraged by the EU legislator to draw up their own standards, intended to implement or specify certain legislative or public policy objectives with regard to specific market sectors or fields of application.

While a stronger involvement of private stakeholders within regulatory processes is commonly promoted as a more efficient way of tackling challenges emerging in complex regulatory environments, the spread of private regulatory strategies has also been the object of major criticism. The growing importance of private regulatory regimes can be regarded as an indicator

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<sup>1</sup> J. Bakan (2015): “The Invisible Hand of Law: Private Regulation and the Rule of Law.”, in: *Cornell International Law Journal*, Vol. 48, No. 2, (pp. 279-300) 290.

<sup>2</sup> L. K. McAllister (2014): “Harnessing Private Regulation.”, in: *Michigan Journal of Environmental & Administrative Law*, Vo. 3, Issue 2, (pp. 219-420) p. 293.

of the increasing “economisation” of post-democratic rule-making, which contributes to the “hollowing out of the state”<sup>3</sup> by replacing binding public obligations on economic operators by weak and often voluntary alternatives. This goes hand in hand with a genuine risk posed by such private regulatory mechanisms of not sufficiently delivering the policy objectives at stake. A key concern raised in this respect is that the private regulators in charge are primarily pursuing their own (economic) interests. The recent financial crisis has underscored the drastic consequences private regulation may entail when public interests are not sufficiently protected.<sup>4</sup>

A more general issue concerns the critique, as voiced by constitutional law scholars, that the reallocation of genuine regulatory authority to private entities are considered as bearing the risk of undermining the constitutional setup and balance of democratic norm-setting procedures. In this respect concerns have primarily been raised with regard to the potential normative implications of private regulatory acts on a wider public, the lack of an electoral mandate and the detachment from traditional constitutional rule-making channels.<sup>5</sup> While the exercise of regulatory powers by public authorities, both at national and supranational level, is usually confined and governed by a comprehensive set of constitutional standards and constraints, private regulatory regimes appear to be detached from these premises of conventional constitutionalism.<sup>6</sup> With that said, the main threat of allocating regulatory powers to private actors resides in the possible erosion of the protective standards and safeguards provided under the regime of constitutional law. Hence, the general question that must be raised is how such alternative routes of regulation fit within the constitutional framework provided for the exercise of normative authority in democratic societies.

This paper does not intend to present a comprehensive analysis of the above question. Rather it seeks to reflect on this conflicting relationship between contemporary regulatory pluralism and “constitutional orthodoxy” by critically discussing the phenomenon of private regulation within the EU context from a constitutional point of view. This contribution seeks to shed light on the question as to what extent the use of private regulatory arrangements at Union level might affect the constitutional setup of EU regulatory governance.

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<sup>3</sup> D. Levi-Faur (2012): “From ‘big government’ to ‘big governance’.”, in: D. Levi-Faur (ed.), *The Oxford Handbook on Governance*, Oxford University Press, Oxford, (pp. 3-18) p. 4.

<sup>4</sup> Cf. V. Hatzopoulos (2013): “From Hard to Soft: Governance in the EU Internal Market.”, in: C. Barnard et al. (ed.), *The Cambridge Yearbook of European Legal Studies*, Vol. 15, 2012-2013, pp. 101-138.

<sup>5</sup> C. Scott et al. (2011): “The Conceptual and Constitutional Challenge of Transnational Private Regulation.”, in: *Journal of Law and Society*, Vol. 38, No. 1, pp. 1-19.

<sup>6</sup> Cf. C. Scott (2010): “Regulatory Governance and the Challenge of Constitutionalism.”, in: *EUI Working Papers*; Robert Schuman Centre for Advanced Studies, Private Regulation Series 02, pp. 1-20.