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Self-regulation in Private Law in Japan and Germany

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Terminology, Development, and Institutional Framework of Self-regulation in Germany

Petra Buck-Heeb[*]

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I. Introduction

When I was asked to talk about the terminology, development and institutional framework of self-regulation in Germany, I was convinced that this would be a simple task. When I began writing down my thoughts, I realized that it turned out to be somehow complicated, which was astonishing. Two reasons can be identified for these difficulties. First, the given task means an introduction to the German system and at the same time drawing conclusions from the examination of many special sectors in which self-regulation takes place.

Secondly, self-regulation still lacks significant systematization in Germany. Together with Andreas Dieckmann, I published the German book "Selbstregulierung im Privatrecht" ("Self-regulation in Private Law") in

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2010. In this book we took first steps aiming to systematize self-regulatory elements in the various sectors where self-regulation can be found. But since then, we – and here I mean the collective "we" – have had hardly any general research on this subject in German literature. Instead, we can find a large amount of literature on self-regulation in specific sectors.

As the following chapters deal with general aspects of self-regulation, it seems helpful to mention some examples. Therefore, this lecture should start with some current examples of self-regulation. It had been my intention to give you some brief insight into the success of self-regulation in Germany. But what did I find? The contrary.

Three current examples: There was a voluntary self-commitment of the German Central Credit Committee *(Zentraler Kreditausschuss)*[1] under which every citizen in Germany was to get a payment account.[2] The Committee asked its members to implement this commitment. Few did it, most did not. What was the result? From 19 June 2016 onwards we have Section 31 of the "payment accounts act" *(Zahlungskontengesetz)*.[3] Accordingly, all consumers in Germany now have the right to a payment account with basic features irrespective of their credit status. In this context, banks and many authors speak of coercive contracting. Without going further into this point, we can conclude that there is now regulation instead of self-regulation.

In the German Corporate Governance Code, which was drafted by the "Government Commission German Corporate Governance Code", there has been a rule (chapter 5.4.1. of the Code) since 2010 that there is to be more diversity in the supervisory board of German listed stock corporations. Above all, more women should be members of the supervisory board.[4] Some tried to follow the rule, some didn't. In addition to this, in March 2011 there was a self-commitment of the industry to follow the rule of diversity management.[5] But the number of women in supervisory boards did not increase significantly. The legislator registered that the voluntary

1 Now called "Die Deutsche Kreditwirtschaft" ("The German Banking Industry Committee").

2 It was called a "current account for everybody" – "Girokonto für Jedermann".

3 Federal Law Gazette (Bundesgesetzblatt, BGBl.) of 11 April 2016, 720; this act implements the European Payment Accounts Directive (Directive 2014/92/EU of 23 July 2014, OJ L 257/214) into German law.

4 S. JUNG, Eine Frauenquote für die EU, Betriebs-Berater (BB) 2013, 387, 388; J. BASEDOW, Komplexität der Wirtschaft, Allokation des Wissens und privates Privatrecht, in: Calliess (ed.), Transnationales Recht (Tübingen 2014) 141, 150 ff.

5 See "Charta der Vielfalt", under *www.charta-der-vielfalt.de/fileadmin/user_upload/beispieldateien/Downloads/Faktenblatt_CdV_2016-4.pdf*

rules failed to succeed[6] and inserted Section 96 para. 2 into the German Stock Corporation Act. Pursuant to this, listed companies now must have at least 30% of the seats on the supervisory board, corresponding to at least six seats, staffed by women. The fulfilment of this minimum staffing requirement is ensured by a harsh sanction.

In the same way, the non-binding rule in the German Corporate Governance Code about the remuneration of members of the management board[7] proved to be without effect (chapter 4.2.2. ff. of the Code). Therefore, the German legislature changed Section 87 para. 1 of the German Stock Corporation Act.[8] As a binding legal rule, the supervisory board must ensure, first, that the aggregate remuneration bears a reasonable relationship to the duties and performance of the members of the management board as well as the conditions of the company and, second, that it does not exceed standard remuneration without any particular reason. So, the result was that we have obtained a regulation instead of self-regulation.

The resulting confusion is increased by a statement in academic literature referring to the Capital Market Law. There it was concluded: "Für privates Recht ist kein nennenswerter Raum mehr" (meaning: "There isn't any significant scope for privately made law").[9] The reason for this seemed to be especially the global financial crisis of 2008. This, so it is said, marked the beginning of a new era.[10] Thus, my idea to enrich this lecture with examples of successful self-regulation did not seem to work.

Ultimately, some examples of self-regulation could be found: in the field of the internet or in accounting principles. When I looked at these more closely, I realized that all of these are transnational rules, which means that they are not genuine or exclusive German self-regulation. They go beyond our borders. Therefore, they are also called "private law beyond the

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6 See "Entwurf eines Gesetzes für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst", BT-Drucks. 18/3784 of 20 January 2015, under A., 1 and 40.

7 H. FLEISCHER, Aufsichtsratsverantwortlichkeit für die Vorstandsvergütung und Unabhängigkeit der Vergütungsberater, Betriebs-Berater (BB) 2010, 67 ff.

8 "Gesetz zur Angemessenheit der Vorstandsvergütung (VorstAG)" of 31 July 2009, Federal Law Gazette (Bundesgesetzblatt) BGBl. No. I, 2479 ff.

9 R. VEIL, Autonomie privaten Rechts und dessen Einbindung in die staatliche Rechtsordnung, in: Bumke/Röthel (eds.), Privates Recht (2012) 269, 272.

10 See J. KÖNDGEN, Transnationale Regel- und Standardbildung auf Finanzmärkten – vor und nach der Krise, in: Calliess (ed.), Transnationales Recht (Tübingen 2014) 277 ff.; S. T. OMAROVA, Rethinking the Future of Self-Regulation in the Financial Industry, Brooklyn Journal of International Law (Brook. J. Int'l L.), Vol. 35:3 (2010) 697, 706; critically also W. WEISS, Selbstregulierung der Wirtschaft – noch sinnvoll nach der Finanzkrise?, Der Staat 2015, 555 ff.

state".[11] So, in a narrow sense, it's not "self-regulation in Germany".[12] In most cases the regulating body is not situated in Germany. We will come back to this point later.

This is the somehow disturbing starting point for our reflections on the terminology, development and institutional framework of self-regulation. And at the same time this result leads to another point which we cannot deepen here but which we will have to deal with at many points of our symposium: The question of the importance of self-regulation nowadays.

II. Terminology of Self-regulation

1. Various Definitions

So, I will turn to the topic "terminology of self-regulation". At first sight, at least defining this term seemed to be easy. But it also turned out to be difficult. The reason was that there has not been sufficient systematization of self-regulation in Germany up to now.

This is already apparent when we look at the numerous special terms that are used in Germany for the phenomenon of "self-regulation". Accordingly, one speaks of co-regulation, delegated regulation, controlled self-regulation, regulated self-regulation, state-initiated self-regulation, audited self-regulation,[13] embedded self-regulation,[14] autonomous self-regulation, genuine self-regulation etc.[15] What do these terms mean?

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11 R. Michaels, The true lex mercatoria: Private law beyond the state, Indiana Journal of Global Legal Studies (IJGLS) 14 (2007) 447 ff.

12 See P. Zumbansen, The constitutional itch: Transnational private regulatory governance and the woes of legitimacy, in: Helfand (ed.), Negotiating state and non-state law (Cambridge 2015) 96, 108 f.; critically referring to a public or private character P. Zumbansen, Neither "public" nor "private", "national" nor "international": Transnational corporate governance from a legal pluralist perspective, Journal of Law and Society, Vol. 38, No. 1, March 2011, 50 ff., under *digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1949&content=scholarly_works;* see also F. Möslein, Dispositive Regeln im transnationalen Privatrechtsverkehr, in: Calliess (ed.), Transnationales Recht (Tübingen 2014) 155, 156 ff.

13 W. Schulz/T. Held, Regulierte Selbstregulierung als Form modernen Regierens, Endbericht Mai 2002, Arbeitspapiere des Hans-Bredow-Instituts Nr. 10, A-4 f., who explain that the term is used especially in the USA, under *https://www.hans-bredow-institut.de/webfm_send/53.*

14 Omarova, *supra* note 10, 697, 701.

15 Cf. C. Wenzel/S. Gadringer/J. Trappel, Media Policy and Regulation in Times of Crisis, in: Simpson/Puppis/van den Bulck (eds.), European Media Policy for the Twenty-First Century (New York 2016) 106.

There is a definition in scholarship according to which the term "self-regulation" means that "the actors are urged to solve problems among themselves, before turning to the state regulator".[16] But this covers only a portion of the self-regulatory measures. The same is true for another definition, according to which self-regulation is "the possibility for economic operators, the social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)".[17] This definition found in EU papers is also unsatisfactory, as it is too narrow and only describes one part of the possible self-regulating acts.

Even brief research makes clear that in the various fields in which "self-regulation" can be found, the term is used quite differently. Thus, in academic literature one cannot find a standardized definition of the term "self-regulation". All existing definitions refer only to special sectors. That does not seem to be a good starting point for dealing with the terminology of "self-regulation". And it leads to the question: Is it impossible to define this term generally for all fields? Is the reality of self-regulation different from sector to sector and possibly even from circumstance to circumstance?[18]

In scholarship we can find a thesis that goes even further. It is assumed that the definition of self-regulation can in fact change in one area when there is an alteration of the topic that is to be self-regulated.[19] Has self-regulation a different meaning depending on the sector in which it is used? How can we discuss legal issues if we do not have at least a general definition of self-regulation for all sectors in Germany? This would make it impossible to speak about self-regulation in general, as we are doing here. And moreover: Is it nevertheless possible to compare our system with others when we do not have a system?

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16 Cf. H. J. KLEINSTEUBER, The Internet between Regulation and Governance, in: Möller/Amouroux (eds.), The Media Freedom Internet Cookbook (Vienna 2004) 61, under *www.osce.org/fom/13844?download=true.*

17 No. 22 of the Interinstitutional agreement on better law-making (2003/C321/01), OJ. C 321, 1, 3 of 31 December 2003; but no longer mentioned in the EU agenda "Better regulation for better results", COM (2015) 215 final of 19 May 2015 or in the European Commission's paper "Better Regulation: Delivering better results for a stronger Union", COM (2016) 615 final of 14 September 2016. This definition can also be found in the European Economic and Social Committee's "The Current State of Co-Regulation and Self-Regulation in the Single Market" (2005), under *www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf,* 11; Communication from the Commission to the Council and the European Parliament concerning a New Legal Framework for Payments in the Internal Market, 2 December 2003, COM (2003) 718 final, 15, fn. 26.

18 E. P. MONROE/S. G. VERHULST, Self-Regulation and the Internet (The Hague 2005) 3.

19 MONROE/VERHULST, *supra* note 18, 3.

2. *The Terms "Self" and "Regulation"*

The two parts of the term, "self" and "regulation", already show the difficulties we have to cope with. "Self" means first of all "made by non-governmental parties" or "made by private parties". Such a broad definition of "private" includes all non-state actors.[20] "Private parties" in this context means any natural and legal persons that are not the "state".[21] Others use a more narrow definition and use the term "private" only as regards "institutions" such as industry associations, interest groups and supervisory authorities.[22]

Also, when we add "not by the state", we encounter a problem because there are some forms of self-regulation where the state indeed does not make the rules but instead regulates and supervises the rule-making. Therefore, in academic literature it is concluded that there is a wide range of possible definitions for the "self".[23] So, it is seen as important to distinguish between individual self-regulation – where regulation of the entity takes place independent of others – and self-regulation by a group. In most cases self-regulation does not govern the actions of individual actors but "represents collective constraints that bind a group of actors".[24]

On the other hand, the term "regulation" is a problem in itself. There are so many understandings of "regulation" that we cannot deepen the discussion in the present context. The term "regulation" is broad and therefore "leaves room for different explanatory approaches".[25]

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20 T. POGUNTKE, in: Graz/Nölke (eds.), Transnational Private Governance and its Limits (London 2008) xvii; see also P. BUCK-HEEB/A. DIECKMANN, Selbstregulierung im Privatrecht (Tübingen 2010) 19 f.

21 T. M. J. MÖLLERS/B. FEKONJA, Private Rechtsetzung im Schatten des Gesetzes, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2012, 777, 779 referring to S. AUGSBERG, Rechtsetzung zwischen Staat und Gesellschaft. Möglichkeiten differenzierter Steuerung des Kapitalmarktes (Berlin 2003) 34.

22 SCHULZ/HELD, *supra* note 13, A-3 fn. 11.

23 M. E. PRICE/S. G. VERHULST, Self-Regulation and the Internet (The Hague 2005) 10.

24 PRICE/VERHULST, *supra* note 23, 10.

25 C. BUMKE, Regulierung am Beispiel der Kapitalmärkte, in: Hopt/Veil/Kämmerer (eds.), Kapitalmarktgesetzgebung im Europäischen Binnenmarkt (Tübingen 2008) 107, 108; E. SCHMIDT-ASSMANN, Verwaltungsrecht in der Informationsgesellschaft (Baden-Baden 2000) 405, 425; G. F. SCHUPPERT, Governance und Rechtsetzung (Baden-Baden 2011) 253 ff.; C. WAHLERS, Private Selbstregulierung am Beispiel des Kapitalmarktrechts (Göttingen 2011) 34 f.; T. ZÜLL, Regulierung im politischen Gemeinwesen (Tübingen 2014) 6 ff.; M. FECHNER/T. TIPTON, Securities Regulation in Germany and the U.S. (2016), Comparative Corporate Governance and Financial Regulation. Paper 5, 1, (under *http://scholarship.law.upenn.edu/fisch_2016/5);* BUCK-HEEB/DIECKMANN, *supra* note 20, 17 ff.

3. *Self-regulation as Privately Made Law?*

Let us try to access the terminology of "self-regulation" by another means. In the literature it is often described as privately made law.[26] German scholars define this as "law made on the basis of powers delegated by the state". Similarly, some talk about the "privatization of law".[27] And in most cases this means the privatization of public law, meant as an inclusion of private rules into the German legal system.[28] This has the disadvantage that it means in our context that the state has in the first place the right to regulate and can transfer this power to private parties – so it's a public view of rule-making.[29]

In Germany the term "privatization" is translated not only with the word "Privatisierung"; some also call it "Entstaatlichung",[30] which is broader than our topic.[31] This latter term means that regulation by the state is withdrawn. Concretely, it means that fields in which governmental regulation took place are now going to be regulated by private actors. Often, in German literature this is seen as a result of the globalization.[32] But it also can be discovered in other areas (and here that means national areas).

The question that is being discussed in Germany is whether self-regulation really means "law" as "Recht". Mostly, in Germany "Recht" means "Gesetz". And this can only be made by the state as a legislator. The

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26 R. MICHAELS/N. JANSEN (eds.), Private Law Beyond The State? Europeanization, Globalization, Privatization, The American Journal of Comparative Law (AJCL) 54 (2006) 850.

27 See J. KÖNDGEN, Privatisierung des Rechts – Private Governance zwischen Deregulierung und Rekonstitutionalisierung, Archiv für civilistische Praxis (AcP) 206 (2006) 477 ff.

28 H. SCHEPEL, The Constitution of Private Governance (Oxford and Portland, Oregon 2005) 32; C. BUMKE/A. RÖTHEL, Auf der Suche nach einem Recht des Privaten Rechts, in: Bumke/Röthel (eds.), Privates Recht (2012) 1, 3.

29 See BUCK-HEEB/DIECKMANN, *supra* note 20, 24 f.

30 See the conference transcript of the "Gesellschaft für Rechtsvergleichung" (German Society of Comparative Law), J. SCHWARZE (ed.), Globalisierung und Entstaatlichung des Rechts (Tübingen 2008), and R. ZIMMERMANN (ed.), Nichtstaatliches Privatrecht. Geltung und Genese (Tübingen 2008); compare also W. BERNHARDT, Sechs Jahre Deutscher Corporate Governance Kodex – Eine Erfolgsgeschichte?, Betriebs-Berater (BB) 2008, 1686 (referring to the German Corporate Governance Code); see also A. RÖTHEL, Entstaatlichung des Rechts. Ein Einführung, in: Deutsche Sektion der Internationalen Juristen-Kommission e.V. (ed.), Entstaatlichung des Rechts (Wien 2014) 17 ff.; J. A. KÄMMERER, Privatisierung (Tübingen 2001) 54 f.; BUCK-HEEB/DIECKMANN, *supra* note 20, 21.

31 See KÄMMERER, *supra* note 30, 16 ff.; see also BUCK-HEEB/DIECKMANN, *supra* note 20, 25.

32 See SCHWARZE, *supra* note 30.

state has a monopoly on the legitimate use of force ("staatliches Gewaltmonopol"). So, in principle only the state can enforce effective rules.[33] Even the German Federal Supreme Court ("Bundesgerichtshof") has observed that being authorized to make rules comprises also the authority to impose and enforce sanctions.[34] So, "Recht" is according to prevailing opinion only law made by the state.[35] And this means that "private law" ("privates Recht") cannot exist. Private parties can only adopt unbinding rules,[36] i.e. a private ordering.

4. Definition by Categories

The best way to handle the term "self-regulation" seems to be to distinguish between various categories of self-regulation. In the German discussion we can find different approaches to categorization. In almost all self-regulatory research we can identify a differentiation that comes from public law.[37] There is a distinction between voluntary, genuine self-regulation as opposed to state-induced self-regulation as co-regulation or regulated self-regulation. This point will be looked at in more depth later.

5. Differentiation from Other Terms

In the last chapter we talked about self-regulation, privatization and the German word "Entstaatlichung". First of all, we have to realize that self-regulation is not identical to the term "de-regulation".[38] We also have to differentiate the term "self-regulation" from "self-control", "self-administration", "self-government" and "soft law".

The term "self-control" is narrower than the term self-regulation. It means in the first place the supervision and enforcement of rules.[39] The

33 Also G. BACHMANN, Private Ordnung. Grundlagen ziviler Regelsetzung (Tübingen 2006) 1, who focuses above all on the reliable enforcement of state norms in order to qualify only these as "law".

34 BGH, 28 November 1994, II ZR 11/94, BGHZ 128, 93, 98.

35 SPRAU, in: Palandt (ed.), BGB (77th ed., Munich 2018) Einl. Rn. 24; T. M. J. MÖLLERS, Standards als sekundäre Rechtsquelle – Ein Beitrag zur Bindungswirkung von Standards, in: Möllers (ed.), Geltung und Faktizität von Standards (Baden-Baden 2009) 143, 149; see also T. M. J. MÖLLERS, Internationalisierung von Standards (Baden-Baden 2011); BACHMANN, *supra* note 33, 1, 21, 51.

36 BACHMANN, *supra* note 33, 22; see also S. KADELBACH/K. GÜNTHER (eds.), Recht ohne Staat? Zur Normativität nichtstaatlicher Rechtsetzung (Frankfurt/Main 2011).

37 See BUCK-HEEB/DIECKMANN, *supra* note 20, 15.

38 OMAROVA, *supra* note 10, 697, 698.

39 BUCK-HEEB/DIECKMANN, *supra* note 20, 23.

term "self-administration" means a form of administration and therefore is also too narrow to cover all aspects of self-regulation.[40]

There also exists the terms of "self-government" and "private governance".[41] Governance comprises in a wide sense all forms of collective regulation of social topics.[42] So there is a certain similarity with "regulated self-regulation".[43] But the latter term refers to the performance of public tasks, whereas "governance" is neutral.[44] And governmental rule-making also

40 BUCK-HEEB/DIECKMANN, *supra* note 20, 23; see also G. F. SCHUPPERT, Selbstverwaltung und Selbstregulierung aus rechtshistorischer und governancetheoretischer Perspektive (Self-administration and Self-regulation from a Legal Historical and Governance Theoretical Perspective), Max Planck Insitute for European Legal History Research Paper Series N. 2015-01, under *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559077,* from 26 March 2016; G. LEHMBRUCH, From State of Authority to Network State: The German State in Developmental Perspective, in: Muramatsu/Naschold (eds.), State and Administration in Japan and Germany: A Comparative Perspective on Continuity and Change (Berlin/New York 1997) 39, 54 ff.; WAHLERS, *supra* note 25, 38 f.; G. F. SCHUPPERT, Governance-Perspektiven für Demokratie und Selbstverwaltung, in: Cancik (ed.), Demokratie und Selbstverwaltung – Selbstverwaltung in der Demokratie (Göttingen 2015) 53, 62 f.

41 See i.e. F. CAFAGGI/A. RENDA, Public and Private Regulation, Mapping the Labyrinth, CEPS Working Document No. 370 October 2012, 1 ff. *(https://www.ceps.eu/system/files/WD370%20Renda%20Public%20and%20Private%20Regulation.pdf).*

42 R. MAYNTZ, Governance Theory als fortentwickelte Steuerungstheorie?, in: Schuppert (ed.), Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien (2nd ed., Baden-Baden 2006) 11, 15; W. HOFFMANN-RIEM, Governance im Gewährleistungsstaat, in: Schuppert (ed.), Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien, (2nd ed., Baden-Baden 2006) 195 ff.; see also SCHUPPERT, *supra* note 25, 101 f.; SCHEPEL, *supra* note 28, 28 ff. referring to the European Standardization Committee CEN and the DIN (German Institute for Standardization, "Deutsches Institut für Normung") for product standards, especially 19 ff., also on the development from government to governance; KÖNDGEN, *supra* note 27, 477, 511; a critical view S. GRUNDMANN/H.-W. MICKLITZ/M. RENNER, Privatrechtstheorie – eine Einführung, in: Grundmann/Micklitz/Renner (eds.), Privatrechtstheorie, Vol. I (Tübingen 2015) 1, 33 f.

43 M. SECKELMANN, Regulierte Selbstregulierung – Gewährleistungsstaat – kooperativer Staat – Governance: Aktuelle Bilder des Zusammenwirkens von öffentlichen und privaten Akteuren als Analysekategorien für historische Kooperationsformen, in: Collin/Bender/Ruppert/Seckelmann/Stolleis (eds.), Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20. Jahrhunderts (Frankfurt/Main 2014) 27 ff.

44 P. COLLIN/S. RUDISCHHAUSER, Regulierte Selbstregulierung. Historische Analysen hybrider Regelungsstrukturen, Trivium 21 (2016) recital 10, also referring to G. F. SCHUPPERT, Selbstverwaltung und Selbstregulierung aus rechtshistorischer und governancetheoretischer Perspektive (Self-administration and Self-regulation from a Legal Historical and Governance Theoretical Perspective), Max Planck Insitute

includes the assistance of private parties.[45] This can be different when the term "private governance" is used in the context of transnational law.[46] In that context it means the necessity of private rules "as a means of compensating for the inability of nation states to provide effective regulation".[47]

In part, the various forms of self-regulation are described as "soft law"[48] or as "soft regulation".[49] In Germany the term "soft law" is understood much broader than it is used in this paper,[50] and it is very imprecise and

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for European Legal History Research Paper Series N. 2015-01, 25 f., under: *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559077;* G. F. SCHUPPERT, Governance-Perspektiven für Demokratie und Selbstverwaltung, in: Cancik (ed.), Demokratie und Selbstverwaltung – Selbstverwaltung in der Demokratie (Göttingen 2015) 53, 64 f.

45 BUCK-HEEB/DIECKMANN, *supra* note 20, 23.

46 J. C. GRAZ/A. NÖLKE, Introduction: beyond the fragmented debate on transnational private governance, in: Graz/Nölke (eds.), Transnational Private Governance and its Limits (London 2008) 1 ff.

47 POGUNTKE, *supra* note 20, xvii.

48 European Economic and Social Committee, "The Current State of Co-Regulation and Self-Regulation in the Single Market" (2005), under *www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf,* 10; referring to the German Corporate Governance Code see M. LUTTER, Das Europäische Unternehmensrecht im 21. Jahrhundert, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2000, 1, 18; M. LUTTER, Vergleichende Corporate Governance – Die deutsche Sicht, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2001, 224, 225; A. VON WERDER, Der deutsche Corporate Governance Kodex – Grundlagen und Einzelbestimmungen, Der Betrieb (DB) 2002, 801; M. KÖRNER, Comply or disclose: Erklärung nach § 161 AktG und Außenhaftung des Vorstands, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2004, 1148, 1150; M. KORT, Corporate Governance-Fragen der Größe und Zusammensetzung des Aufsichtsrats bei AG, GmbH und SE, Die Aktiengesellschaft (AG) 2008, 137, 138; M. LINNERZ, Anfechtbarkeit eines auf Entlastung des Aufsichtsrats gerichteten Hauptversammlungsbeschlusses wegen fehlenden Berichts zu Interessenkonflikten, Betriebs-Berater (BB) 2008, 581, 582; critically P. ULMER, Der Deutsche Corporate Governance Kodex – ein neues Regelungsinstrument für börsennotierte Aktiengesellschaften, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 166 (2002) 150, 161; P. ULMER, Aktienrecht im Wandel, Archiv für die civilistische Praxis (AcP) 202 (2002) 143, 169.

49 T. TALAULICAR, Normierungseffekte der Co-Regulierung von Standards guter Corporate Governance/Normative effects of co-regulatory regimes of corporate governance, in: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft (ORDO), Vol. 62 (Stuttgart 2011) 269, 275 with further references concerning the German Corporate Governance Code.

50 Organization for Economic Co-operation and Development (OECD), Better Regulation in Europe: Germany (2010) 91, under: *http://www.oecd-ilibrary.org/governance/better-regulation-in-europe-germany-2010_9789264085886-en.*

controversial.[51] This is especially true in the context of self-regulation because it relates to the legislative nature ("Normcharakter") of self-regulation and the question of whether it can be seen as "law". Thus it doesn't help further.

6. *Special Aspects*

There are two aspects that we haven't considered enough up to now in our discussion of the terminology. One is more general, this being the influence of transnational rules. The other aspect is the European context, especially the correlation between German and European rule-making.

a) German and Transnational Rules

In Germany, self-regulation takes place not only with the generation of national German rules but also with the acceptance of transnational rules by private parties. Here, first of all, we also have the generally recognized problem that the term "transnational law" has become common, although we do not have "law" in a formal German sense.[52] In those sectors in which transnational law is made by private parties, the state cannot enact legislation.[53]

Accordingly, transnational law is left to cope with global issues, as for example the Internet.[54] As an additional example, one can point to the International Financial Reporting Standards (IFRS), which were drafted by the International Accounting Standards Board (IASB), based in London.[55] The decentralized nature of the topics means that it is impossible to obtain

51 Critically AUGSBERG, *supra* note 21, 36.

52 See SCHUPPERT, *supra* note 25, 361 ff., who talks of "transnational regulation".

53 Cf. G. P. CALLIES/A. MAURER, Transnationales Recht – eine Einleitung, in: Callies (ed.), Transnationales Recht. Stand und Perspektiven (Tübingen 2014) 1, 11 ff.; G.-P. CALLIESS/P. ZUMBANSEN, Rough Consensus and Running Code: A Theory of Transnational Private Law (London 2012); L. VIELLECHNER, Was heißt Transnationalität im Recht?, in: Calliess (ed.), Transnationales Recht, (Tübingen 2014) 57 ff.; M. RENNER, Transnationales Recht, in: Grundmann/Micklitz/Renner (eds.), Privatrechtstheorie, Vol. II (Tübingen 2015) 1871 ff.; P. ZUMBANSEN, The constitutional itch: Transnational private regulatory governance and the woes of legitimacy, in: Helfand (ed.), Negotiating state and non-state law (Cambridge 2015) 96 ff.

54 KLEINSTEUBER, *supra* note 16, 61 ff.; C. T. MARSDEN, Co- and Self-Regulation in European Media and Internet Sectors: the Results of Oxford University's Study *www.selfregulation.info,* in: Möller/Amouroux (eds.), The Media Freedom Internet Cookbook (Vienna 2004) 76 ff., under *www.osce.org/fom/13844?download=true.*

55 See for example F. KIRCHHOF, Außerstaatliche Normsetzung am Beispiel von IFRS-Perspektiven und rechtliche Probleme, in: Hopt/Veil/Kämmerer (eds.), Kapitalmarktgesetzgebung im Europäischen Binnenmarkt (Tübingen 2008) 167 ff.

a solution for effective regulation at the national level.[56] This development is a challenge for the traditional private law system in Germany[57] because it is the beginning of an interaction between different national legal traditions.

b) German Self-regulation and European Rules

Another aspect we have to face when talking about self-regulation in Germany is that we have to include the topic of "self-regulation in the European Union". At present, there is very little research dealing with self-regulation in private law in Germany. However, there is even less as regards the EU.[58] The impact of self-regulation or co-regulation in Europe has still not been examined. In 2005 the European Economic and Social Committee stated that these "alternative methods of regulation have recently developed at European level".[59]

Also, there are up to now only rudimentary approaches for a discussion of the influence of European rule-making on national rule-making by self-regulation.[60] To date no one has analyzed the existing definitions in the various fields.[61] So, at the moment we do not know much about how the Europeanization of rule-making has influenced self-regulation. We know that there are EU-Principles for Better Self- and Co-Regulation.[62] This is the basis for some German approaches, for example in the field of data protection.[63]

There exist some topics where the German government proposed the use of "regulated self-regulation" and the Council of the European Union rejected the idea. In the field of internet regulation, for example, Germany

56 See MARSDEN, *supra* note 54, 76, 86.

57 See CALLIESS/ZUMBANSEN, *supra* note 53, 76 ff.

58 See instead, for example, European Economic and Social Committee, "The Current State of Co-Regulation and Self-Regulation in the Single Market" (2005) under *www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf.*

59 European Economic and Social Committee, *supra* note 58, 5.

60 BUCK-HEEB/DIECKMANN, *supra* note 20, 310; see also R. EISING, Interest Groups and Social Movements, in: Graziano/Vink (eds.), Europeanization: New Research Agendas (2008), Chapter 13, 167 ff.

61 See for example F. BIGNAMI, The Non-Americanization of European Regulatory Styles: Data Privacy Regulation in France, Germany, Italy, and Britain, in: Center for European Studies Working Paper Series #174 (2010) 20 ff., under *https://ces.fas.harvard.edu/uploads/files/publications/CES_174.pdf.*

62 *https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/CoP%20-%20Principles%20for%20better%20self-%20and%20co-regulation.pdf.*

63 See Selbstregulierung Informationswirtschaft e.V., "Chancen und Voraussetzungen effektiver Selbst- und Ko-Regulierung zur Förderung des Verbraucherschutzes und des Datenschutzes in der digitalen Welt", Position Paper of May 2014, 5.

"proposed giving companies strong incentives to create and adhere to rules and technology that would safeguard users' privacy. The German Government considered this a good approach toward managing the necessary transition for matching outdated privacy legislation and modern communication technology. Under the proposed plan, companies would develop and implement fair and transparent data processing methods, ask customers for consent before gathering data and explain to them how data would be used."[64] A majority of the Council rejected the proposal: "The presidency instead said the Council would follow the regulatory approach and provide a framework companies would need to follow. The presidency also said the private sector could participate in [the] development of such regulations."[65]

The influence of the Europeanization on policy- or law-making is also only partially described.[66] Up to now only a few studies exist on the role of private rule-making as an element of European private law-making.[67]

The reality is that European legislation overruled German and transnational attempts at implementing so-called corporate social responsibility into the corporate governance regimes of companies through the formulation of standards[68] or codes. Since 2014 we have the European directive as regards disclosure of non-financial and diversity information by certain large undertakings and groups (Corporate Social Responsibility-Directive, CSR).[69] In this context, 2013 saw the installation of the "Community of

64 See eco (Association of the Internet Industry) under *https://international.eco.de/2013/news/privacy-in-the-eu-german-plan-for-regulated-self-regulation-rejected.html.*

65 See *https://international.eco.de/2013/news/privacy-in-the-eu-german-plan-for-regulated-self-regulation-rejected.html.*

66 BIGNAMI, *supra* note 61, 21 ff.

67 See for instance F. CAFAGGI (ed.), Reframing self-regulation in European private law (Dordrecht, London 2006); F. CAFAGGI, Private Regulation in European Private Law, EUI Working Paper RSCAS (Robert Schuman Centre For Advanced Studies) 2009/31, 1 ff. (under *cadmus.eui.eu/bitstream/handle/1814/12054/RSCAS_2009_31%5brev%5d.pdf?sequence=3&isAllowed=y.*

68 F. J. SÄCKER, Corporate Social Responsibility und das Lauterkeitsrecht: Braucht es ein "Europäisches Unternehmerleitbild"?, in: Hilty/Henning-Bodewig (eds.), Corporate Social Responsibility: Verbindliche Standards des Wettbewerbsrechts? (Berlin, Heidelberg 2014) 261, 269 f. ("corporate social responsibility as first step to future law"); in a transnational context see M. KALTENBORN/J. NORPOTH, Globale Standards für soziale Unternehmensverantwortung, Recht der internationalen Wirtschaft (RIW) 2014, 402 ff.

69 Directive 2014/95/EU of 22 October 2014, OJ L 330, 1.

Practice for Better self- and co-regulation".[70] In 2016, first attempts were made at implementing the directive into national (German) law.[71]

And finally, the question arises whether it is possible to implement an European directive by means of self-regulation instead of governmental rules, e.g. implementing the 2014 directive[72] giving a right of access to payment accounts through self-regulating rules. This idea is rejected in recital 8 of the directive, where European lawmakers conclude:

"Transparency and comparability of fees were considered at Union level in a self-regulatory initiative, initiated by the banking industry. However, no final agreement was reached on that initiative. As regards switching, the common principles established in 2008 by the European Banking Industry Committee provide a model mechanism for switching between payment accounts offered by banks located in the same Member State. However, given their non-binding nature, those common principles have been applied in an inconsistent manner throughout the Union and with ineffective results."[73]

III. Development of Self-regulation

1. General Aspects

Talking about the development of self-regulation means asking whether there is an increase in the number of self-regulatory rules. Or is self-regulation nowadays – especially after the financial crisis of 2008 – on its way back? Did the state increasingly intervene in fields where self-regulation was seen as the best way of regulating? Can we identify areas where self-regulation has proved to be ineffective in Germany? Or can we discover fields where we are witnessing a renaissance of self-regulation?

Even a brief introduction to the "history" of German self-regulation would be a broader task than we can undertake in this context. For this reason, we must limit ourselves to rough lines of development. First of all, we can note that there is still a lack of research in this field that has only begun to be filled in the last years.[74] A further point should also be men-

70 See *https://ec.europa.eu/digital-single-market/genealogy-cop.*

71 On the draft law of 2016 see BT-Drucks. 18/9982 of 17 October 2016 "zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten" (meaning: on strengthening the non-financial reporting of companies in their management and group management reports).

72 Directive 2014/92/EU of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, OJ L 257 of 28 August 2014, 214 ff.

73 OJ L 257, 28 August 2014, 214, 216.

74 Cf. Buck-Heeb/Dieckmann, *supra* note 20, 7; also Michaels/Jansen, *supra* note 26, 843, 890; N. Jansen/R. Michaels, Private Law and the State: Compara-

tioned here: The distinction between private and public law plays a major role in Germany. This has historical reasons. Thus we have some uncertainty about what private law means within the legal tradition of Germany.

In German literature, we can find two contradictory statements. First, it is said that self-regulation has a long tradition in Germany.[75] Second, it is said that it is a quite modern creation.[76] Both are true. The different statements have to do with the distinction that I have indicated above: the distinction between genuine self-regulation and state-induced or regulated self-regulation.

The first self-regulatory rules can be found already in the 11th century, at a time when a state in the modern sense had not yet existed. But – and this is an important point – one didn't call it "self-regulation". The development of "regulated self-regulation" began only in the 19th century, when the German national state arose.[77] Technical rules in particular have been elaborated for more than a hundred years. To date we can count over 20,000 rules.[78]

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tive Perceptions and Historical Observations, in: The Rabel Journal of Comparative and International Private Law (RabelsZ) 71 (2007) 345, 358 ff.; P. COLLIN, Einleitung: "Gesellschaftliche Selbstregulierung" und "Regulierte Selbstregulierung" – ertragreiche Analysekategorien für eine (rechts-)historische Perspektive?, in: Collin/Bender/Ruppert/Seckelmann/Stolleis (eds.), Selbstregulierung im 19. Jahrhundert – zwischen Autonomie und staatlichen Steuerungsansprüchen (Frankfurt/Main 2011); see also P. COLLIN/G. BENDER/S. RUPPERT/M. SECKELMANN/M. STOLLEIS, Regulierte Selbstregulierung im frühen Interventions- und Sozialstaat (Frankfurt/Main 2012); P. COLLIN/G. BENDER/S. RUPPERT/M. SECKELMANN/M. STOLLEIS, Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20. Jahrhunderts (Frankfurt/Main 2014); COLLIN/RUDISCHHAUSER, *supra* note 44; P. COLLIN (ed.), Justice without the State within the State. Judicial Self-Regulation in the Past and Present (Frankfurt/Main 2016).

75 See for example Organization for Economic Co-operation and Development (OECD), Reviews of Regulatory Reform: Germany (2004) 60, under: *http://www.oecd-ilibrary.org/governance/oecd-reviews-of-regulatory-reform-germany-2004_9789264107861-en.*

76 COLLIN/RUDISCHHAUSER, *supra* note 44, recital 6; see also the title of the study of W. SCHULZ and T. HELD, Regulated Self-Regulation as a Form of Modern Government (Hamburg 2004).

77 Compare T. KEISER, Selbstregulierung im entstehenden Nationalstaat: Autogoverno und Corpi intermedi in Italien, in: Collin/Bender/Ruppert/Seckelmann/Stolleis (eds.), Selbstregulierung im 19. Jahrhundert. Zwischen Autonomie und staatlichen Steuerungsansprüchen (Frankfurt/Main 2011).

78 F. MICHAEL, in: Ehlers/Fehling/Pünder (eds.), Besonderes Verwaltungsrecht, Vol. 1 (3rd ed., Heidelberg 2012), § 16 Rn. 23; see also the development of the "self-created rules of the economy" ("selbstgeschaffenes Recht der Wirtschaft"), P. C. LEYENS, Selbstbindungen an untergesetzliche Verhaltensregeln: Gesetz, Vertrag,

The OECD review of regulatory reform in Germany of 2004 emphasizes:

"Self-regulation is part of the German tradition. Many activities are already subject to regulatory frameworks which have been developed and are managed by representatives of the sector, albeit under the umbrella of a comprehensive and efficient competition law and authority."[79]

Self-regulation has been consciously perceived only since the second half of the 20th century, because from this period the image of the "strong" state no longer describes reality. Since that time, the state has increasingly used private actors to regulate certain fields or enforce rules in those fields. On the one hand, the state is leaving regulation to private parties because the state does not have the necessary expertise (i.e. technical rules) or because the common good ("Gemeinwohl") is not affected (i.e. sporting competitions). On the other hand, the state is assigning tasks to private actors that inherently fall upon the state or are ones for which the state, while perceiving a need for regulation by law, nevertheless renounces this needs and instead uses economic and social mechanisms to regulate a field. The state only takes action when the parties concerned cannot cope with the regulatory task themselves. This can be the case, for example, if some of the persons concerned are disadvantaged (i.e. where there is an abuse of power by the economically or socially stronger). This can also be the case if third parties who are not directly related to the field to be regulated have become affected ("Gewährleistungsverwaltung").[80]

2. Autonomous Self-regulation, Especially Transnational Rules

This form of self-regulation looks back over a long tradition in Germany. Even in the eleventh century it was well developed in early long-distance networks, whether it was in the Mediterranean region as *lex mercatoria* or in the Hanseatic League, which covered the North and Baltic Seas.[81] This form of self-regulation can be characterized by the total privacy of regula-

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Verband, Publizität und Aufsichtsrecht, Archiv für die civilistische Praxis (AcP) 215 (2015) 611, 616 f.

79 OECD, *supra* note 75, 60.

80 See W. HOFFMANN-RIEM, Das Recht des Gewährleistungsstaates, in: Schuppert (ed.), Der Gewährleistungsstaat – ein Leitbild auf dem Prüfstand (Baden-Baden 2005) 87 ff.; W. HOFFMANN-RIEM, Innovation und Recht – Recht und Innovation (Tübingen 2016) 374; A. VOSSKUHLE, Beteiligung Privater an öffentlichen Aufgaben und staatliche Verantwortung, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL) 62 (2003) 266 ff.

81 M. LATZER/N. JUST/F. SAURWEIN/P. SLOMINSKI, Selbst- und Ko-Regulierung im Mediamatiksektor. Alternative Regulierungsformen zwischen Staat und Markt (Wiesbaden 2002) 9; see also CALLIESS/MAURER, *supra* note 53, 1, 8 ff.

tion without involvement of the state. Here, the reason for private rule-making is not that the state has withdrawn from these fields but that state-regulation is not an option because of the transnationality of the field that is to be regulated.[82] Thus there is no alternative between state and private regulation. This can be found mostly in private law.[83]

We also have new areas of self-regulation, as for example the rules in sports. Sports rules, which are defined by sports federations, are intended to ensure abstract-general rules according to which competitions and the like can take place.[84]

3. Regulated Self-regulation/Co-regulation

A second development we can see is in the field of regulated self-regulation. In Germany, this form of self-regulation was for a long period not as popular as, for example, it was in Great Britain. Nevertheless, starting in the 19th century there were some initial developments that – from today's point of view – can be called "regulated self-regulation".

This has to do with two general developments in Germany. The first one is the possibility of organizing interests beyond status-based social structures ("ständische Gesellschaft"). Being corporately organized was no longer dictated and instead became voluntarily possible. Thus we find many new or renewed organizations, as for example industry associations, chambers and employer associations. At the same time, legislation intervened in more and more sectors of economic life, and it undertook increasingly socio-political functions. The increase in governmental regulation led to new challenges. In many fields the challenges could be only met by social self-organization.[85] Especially two areas are covered by the development of this form of self-regulation: economics and social policy.[86]

This form of self-regulation gained great importance in the 1970s. This has to do with the emerging criticism of existing regulation.[87] There was a demand for the state's withdrawal in rulemaking, with constant stress

82 See G.-P. CALLIESS (ed.), Transnationales Recht. Stand und Perspektiven (Tübingen 2014); L. VIELLECHNER, Transnationalisierung des Rechts (Weilerswist 2013); N. C. IPSEN, Private Normenordnungen als Transnationales Recht? (Berlin 2009); H. ADEN, Transnationales Recht als Thema fragmentierter Rechtswissenschaft(en), Rechtswissenschaft (RW) 2010, 212 ff.; M. RENNER, Zwingendes transnationales Recht (Baden-Baden 2011).

83 COLLIN/RUDISCHHAUSER, *supra* note 44, recital 7.

84 BUCK-HEEB/DIECKMANN, *supra* note 20, 67 ff.

85 COLLIN/RUDISCHHAUSER, *supra* note 44, recital 12 f.

86 COLLIN/RUDISCHHAUSER, *supra* note 44, recital 19.

87 BUCK-HEEB/DIECKMANN, *supra* note 20, 19.

placed on the danger of over-regulation, inflexible regulation etc. Thus the term "regulated self-regulation" is quite a new one in Germany. There was a public law debate about a reform of administrative law. The central question here was whether and how a social self-organization ("gesellschaftliche Selbstorganisation") should take place to fulfill public tasks. Therefore it was discussed how such a non-governmental pursuit of interests ("Interessenverfolgung") could be systematically understood. The term "regulated self-regulation" seemed to describe the notion best.[88] Under this term the various administrative sectors are analyzed.[89]

Although this discussion took place, in 2004 the OECD still identified a considerable backlog of self-regulation in Germany. Therefore it was concluded that Germany

> "should further promote and support systematic consideration of self-regulation and regulatory alternatives for new regulatory proposals. Considerations about the use of self-regulation and soft-law alternatives should be matched with the same scrutiny, transparency and accessibility that applies for traditional regulation".[90]

The reason for this deficiency was seen in the failure of having "not yet developed more specific guidelines or criteria for when self-regulation should be preferred to other tools".[91]

IV. Framework of Self-regulation

1. Diversity of Self-regulation

In Germany, self-regulation – whatever this term means – can be found in all social and economic areas. So we will not deepen this here. It can be

88 H.-H. Trute, Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung", Deutsches Verwaltungsblatt (DVBl) 1996, 950 ff.; M. Schmidt-Preuss, Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL) 56, 160 ff.; E. Schmidt-Assmann, Regulierte Selbstregulierung als Element verwaltungsrechtlicher Systembildung, in: Regulierte Selbstregulierung als Steuerungskonzept des Gewährleistungsstaates, Die Verwaltung, supplement 4 (2001) 253 ff.

89 For example D. Bosch, Die "Regulierte Selbstregulierung" im Jugendmedienschutz-Staatsvertrag (Frankfurt/Main 2007); S. Frenzel, Stromhandel und staatliche Ordnungspolitik (Berlin 2007); T. Stefaniak, Der Wettbewerb in der Energiewirtschaft zwischen staatlicher Regulierung und selbstregulativer Verantwortung (Baden-Baden 2008); A. C. Thoma, Regulierte Selbstregulierung im Ordnungsverwaltungsrecht (Berlin 2008).

90 OECD, *supra* note 50, 89.

91 OECD, *supra* note 50, 90.

found in commercial law, in sports, in technical areas, in the area of accounting etc.[92]

2. Categories of Self-regulation

Because of the difficulties in defining the term "self-regulation", we can at least try to build categories of self-regulation. In scholarly literature there have been certain attempts to form categories. It seems difficult to draw distinctions between voluntary and non-voluntary self-regulation. Here, the question is what we mean by "voluntary". Accordingly, some genuine self-regulated rules without a direct influence of the state nevertheless have to fall under the category "non-voluntary" when there is the threat that the state will regulate if there is not sufficient self-regulation.

The most widely used distinction is the one which comes from public law scholars and which was already mentioned above. It is either a four-model system or a three- (or alternatively two-) model system. The distinction is based on the consideration that self-regulation encompasses a wide range. On the one hand there is private ordering without resort to legal rules, and on the other hand there are various forms of state-enforced systems of delegated rules.

a) The Four-model System

In this context we can find a differentiation into four self-regulation possibilities dependent on the influence of the state.[93] Here, the degree of interference by the state varies. First of all we have voluntary self-regulation, which means that the state doesn't play an active and not even a passive role. Second, there is the possibility of coerced self-regulation ("erzwungene Selbstregulierung"), where a private party is urged to make rules. The goal is to discourage the government from legislating. So, here the government threatens to implement a formal regulatory procedure if the results of self-regulation have proven unsatisfactory. Some refer to this form as forced self-regulation.

Third, we have a stronger influence of the state in the form of approved self-regulation ("genehmigte Selbstregulierung"). Here the rules made by private parties have to be consented to by the state. And last but not least

92 See BUCK-HEEB/DIECKMANN, *supra* note 20.

93 G. F. SCHUPPERT, Governance im Spiegelbild der Wissenschaftsdisziplinen, in: Schuppert (ed.), Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien (2nd ed., Baden-Baden 2006) 371, 402; MONROE/VERHULST, *supra* note 18, 11 ff.; E. P. MONROE, In Search of the Self, in: Marsden (ed.), Regulating the Global Information Society (London 2000) 57, 64 ff.

we have mandated self-regulation ("angeordnete Selbstregulierung"), where the government instructs a private party or institution to make rules taking into account the framework set by the state.

b) The Two- or Three-model System

A more general differentiation, deriving from German administrative law ("Verwaltungsrecht"),[94] is the one between totally autonomous self-regulation and self-regulation taking place under the influence of the state. As to the latter, some differentiate between co-regulation and regulated self-regulation (a three-model system). Others see co-regulation as a form of regulated self-regulation (a two-model system).[95]

aa) Co-regulation

Co-regulation (or delegated regulation)[96] is used in a wide variety of circumstances. German scholars mostly define co-regulation in their special area of expertise. Therefore, there is no uniform meaning; instead the specific meaning of co-regulation has to be seen "in the national, sectoral and temporal context in which it is used".[97] Moreover, in addition to there being no single definition in Germany, there is no prospect of identifying a uniform definition in Europe or internationally.

Some differentiate between co-regulation and regulated self-regulation.[98] While regulated self-regulation is defined as an activity of private parties, which is supervised and partially instructed by the state, co-regulation means an equal cooperation of private parties and the state. Co-regulation means in this sense a dialogue between private parties and the state. And last but not least, the term "co-regulation" gives a sense of the joint responsibilities of market actors and the state.[99] In fact, co-regulation is seen as an

94 See W. HOFFMANN-RIEM/E. SCHMIDT-ASSMANN/A. VOSSKUHLE (eds.), Grundlagen des Verwaltungsrechts, Vol. 1 (2nd ed., Munich 2012); see also LEYENS, *supra* note 78, 611, 619; W. HOFFMANN-RIEM, Auffangordnungen, in: Hoffmann-Riem/Schmidt-Aßmann (eds.), Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen (Baden-Baden 1996) 300 ff.; BUCK-HEEB/DIECKMANN, *supra* note 20, 33 ff.

95 MARSDEN, *supra* note 54, 76, 86, referring to W. HOFFMANN-RIEM, Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries (New York 1996).

96 In Germany these two terms are used as synonyms.

97 MARSDEN, *supra* note 54, 76, 86.

98 See for example SCHUPPERT, *supra* note 25, 300 ff.

99 MARSDEN, *supra* note 54, 76, 86.

alternative to the "command and control regulation" which is widely used in Germany.

Co-regulation means that a group of actors make rules for their sector in cooperation with or on behalf of the state. But in another context, we can find in academic literature a dissenting opinion. Here, the thesis is that since "co-regulation presumes the direct involvement of public actors in the regulatory process, especially with regard to enforcement, such regulatory mechanism is primarily considered or understood to take a "top-down" approach and to complement legislation rather than be an alternative to legal ordinances."[100]

In the EU, co-regulation is defined in an interinstitutional agreement titled "Better Lawmaking", which was concluded on 16 December 2003 between the Parliament, the Council and the Commission. Here it is described as

"the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organizations, or associations). This mechanism may be used on the basis of criteria defined in the legislative act so as to enable the legislation to be adapted to the problems and sectors concerned, to reduce the legislative burden by concentrating on essential aspects and to draw on the experience of the parties concerned".[101]

Others define co-regulation as a process where the state and the private regulators co-operate in joint institutions.[102] Some see also public-private partnerships as a form of co-regulation.[103]

The OECD speaks of co-regulation in Germany when

"experts contribute to the development of technical standards (e.g. for measurement procedures, noise control, etc.). Such standards are defined, among others, by the standards committees of the German Institute for Standardization (Deutsches Institut für Normung e.V.) or professional associations, such as the Association of Engineers (Verein Deutscher Ingenieure, VDI), or medical expert organizations. Some of these institutions and organizations receive financial support from a federal Ministry."[104]

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100 T. TROPINA, Public-Private Collaboration: Cybercrime, Cybersecurity and National Security, in: Tropina/Callanan (eds.), Self- and Co-regulation in Cybercrime, Cybersecurity and National Security (Cham et. al 2015) 16.

101 See No. 18 of the Interinstitutional agreement on better law-making (2003/C321/01), OJ C 321 of 31 December 2003; also see European Economic and Social Committee "The Current State of Co-Regulation and Self-Regulation in the Single Market" (2005), under *www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf,* 11.

102 KLEINSTEUBER, *supra* note 16, 61 ff.

103 TROPINA, *supra* note 100, 17.

104 OECD, *supra* note 50, 103 f.

We can also find co-regulation, for example, in the field of the protection of young people from harmful media ("Jugendmedienschutz").[105]

Important for the discussion of the development of self-regulation is the following point: Depending on the concrete definition of co-regulation, the examples given in academic literature vary (see below under c)).

bb) Regulated Self-regulation

Regulated self-regulation in Germany is at times also called "controlled self-regulation" or self-regulation induced by the state. The term "regulated self-regulation" goes back to the judge of the Federal Constitutional Court Wolfgang Hoffmann-Riem in 1995.[106] He and other German scholars describe the concept of administrative regulated self-regulation with the German term "Gewährleistungsverwaltung". This refers to "measures that secure functionality of a certain field of business by activating and sharing action-guiding criteria".[107]

Here the government actively uses private sectors to achieve public policy objectives. Thus, regulated self-regulation is seen as a form of modern government. In this context self-regulation changes the role of the state.[108]

The German concept of regulated self-regulation is called "a form of delegation of rule-making to self-regulation bodies".[109] Hence, the state only plays a role when basic constitutional rights are to be upheld. Therefore some conclude that where self-regulation is structured by the state but the state is not involved, it should be called "regulated self-regulation".[110] In this context it is in the end a manner of outsourcing legislation.[111]

Private rule-making initiated by the government can be called "rule-making in the shadow of the law", taking into account the term which is

105 W. SCHULZ, Neue Ordnung durch neues Medienrecht? Modelle der Co-Regulierung im Medienbereich, in: Jarren/Donges (eds.), Ordnung durch Medienpolitik (Konstanz 2007) 217, 224.

106 W. HOFFMANN-RIEM, Multimedia-Politik vor neuen Herausforderungen, Rundfunk und Fernsehen (RuF) 1995, 125 ff.

107 BUMKE, *supra* note 25, 107, 108; SCHMIDT-ASSMANN, *supra* note 25, 405, 425; FECHNER/TIPTON, *supra* note 25, Paper 5, 1.

108 MICHAELS/JANSEN, *supra* note 26, 843.

109 SCHULZ/HELD, *supra* note 76.

110 See for example KLEINSTEUBER, *supra* note 16, 61 ff., referring to W. Hoffmann-Riem.

111 W. WIEGAND/J. WICHTERMANN, Der Einfluss des Privatrechts auf das öffentliche Bankrecht, in: Wiegand (ed.), Berner Bankrechtstag 1999, BBT Vol. 6 (Bern 1999) 119, 134 f.

used in the American sociology of law.[112] Some call it regulation under the "shadow of the state".[113] This last term shows that there is a control by a superior, i.e. that there is a directive function of the state. In other words: The state provides a "safety net" in case self-regulation fails.[114]

cc) Genuine Self-regulation

The second (or third) type of self-regulation is genuine self-regulation. This manner of self-regulation without any influence of the state is also called autonomous self-regulation, "pure" self-regulation,[115] voluntary self-regulation,[116] or even "social self-regulation" ("gesellschaftliche Selbstregulierung").[117] Some call it "private self-regulation" in contrast to "regulated" self-regulation.[118]

Autonomous self-regulation means self-regulation as rule-production by private parties in the absence of legal instruction. This means that the regu-

112 Cf. KÖNDGEN, *supra* note 27, 477, 495 ff.; SCHUPPERT, *supra* note 25, 227 ff.; see the reference to the American sociology of law, especially R. H. MNOOKIN/L. KORNHAUSER, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale Law Journal 950, 968 (1978/79) 496; see also MÖLLERS/FEKONJA, *supra* note 21, 777, 779 fn. 9; S. GRUNDMANN, Schatten des Rechts und soziale Einbettung, in: Grundmann/Micklitz/Renner (eds.), Privatrechtstheorie, Vol. II, (Tübingen 2011) 1998 ff.

113 KLEINSTEUBER, *supra* note 16, 61 and 69.

114 KLEINSTEUBER, *supra* note 16, 61 and 69; M. M. LEITAO MARQUES/L. BETTENCOURT NUNES, Deepening the freedom of services through pro-competitive regulation: the case of the EU Services Directive, in: Drexl/Bagnoli (eds.), State-Initiated Restraints of Competition (Cheltenhem 2015) 103, 107.

115 G. MÜLLER/F. UHLMANN, Elemente einer Rechtssetzungslehre (3rd ed., Zürich 2013) 38.

116 L. MADER, Regulierung, Deregulierung, Selbstregulierung: Anmerkungen aus legistischer Sicht, in: Zeitschrift für Schweizerisches Recht (ZSR) 2004 II, 3, 43 (together with B. Rütsche).

117 P. COLLIN, Einleitung: "Gesellschaftliche Selbstregulierung" und "Regulierte Selbstregulierung" – ertragreiche Analysekategorien für eine (rechts-)historische Perspektive?, in: Collin/Bender/Ruppert/Seckelmann/Stolleis (eds.), Selbstregulierung im 19. Jahrhundert – zwischen Autonomie und staatlichen Steuerungsansprüchen (Frankfurt/Main 2011); SCHMIDT-PREUSS, *supra* note 88, 160, 162 ff.; U. DI FABIO, Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL) 56 (1997), 235, 237 ff.; W. HOFFMANN-RIEM, Verfahrensprivatisierung als Modernisierung, Deutsches Verwaltungsblatt (DVBl.) 1996, 225, 228 ff.; W. HOFFMANN-RIEM, Innovation und Recht – Recht und Innovation (Tübingen 2016) 374 meaning not genuine but regulated self-regulation; see also KÖNDGEN, *supra* note 27, 477, 509.

118 COLLIN/RUDISCHHAUSER, *supra* note 44, recital 7.

lation is undertaken by private actors. It is established independently from the adoption of legal orders. Some call it a "bottom-up" approach.[119]

It is uncertain just what could be an example of genuine self-regulation. Thus, some identify German general contract terms ("Allgemeine Geschäftsbedingungen") as such a form of genuine self-regulation. General contract terms are a long-proven means of private ordering. Whether they can be called an instrument of self-regulation is not yet quite clear. Additionally, the self-regulation of the press in Germany is often taken as an example.[120] And surely transnational rules are an example of genuine self-regulation.

c) Conclusion

Could I now present you with a systematized description of self-regulatory acts in Germany? The answer seems to be yes, but, frankly said, the answer is no. As we have been able to see, there is no uniform definition of co-, regulated or genuine self-regulation.

The problem with the differentiations which I presented above is, that there exist in some fields different opinions as to whether a certain self-regulatory act falls in the one or the other category. As an example of this, we can take the German Corporate Governance Code. Some see it as an example of co-regulation.[121] Others see it as a form of regulated self-regulation.[122] Another opinion sees it as voluntary self-regulation; for though there is a comply-or-explain-rule in the German Stock Corporation Act, the Code is nevertheless non-binding[123] and therefore has no means of formally enforcing its rules, enforcement instead referring only to the comply-or-explain principle.[124] This uncertainty can also be seen in other papers to be presented at this conference.[125]

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119 Cf. TROPINA, *supra* note 100, 16 f.

120 SCHULZ/HELD, *supra* note 13, A-3 with further references.

121 Cf. TALAULICAR, *supra* note 49, 269 ff., especially 274 ff.; see also M. M. HAFEEZ, Corporate Governance and Institutional Investment (Boca Raton, Florida/USA 2015) 61; on whether the German Corporate Governance Code can be seen as an act of self-regulation see BUCK-HEEB/DIECKMANN, *supra* note 20, 99 f.

122 M. GRÜNBERGER, Geschlechtergerechtigkeit im Wettbewerb der Regulierungsmodelle, Rechtswissenschaft (RW) 2012, 1 ff.; S. LEUTHEUSSER-SCHNARRENBERGER, Recht mitgestalten. Bemerkungen zur liberalen Rechtspolitik anlässlich des 69. Deutschen Juristentages, Recht und Politik (RuP) 2012, 129 ff.

123 See the open formulation in the preamble of the German Corporate Governance Code (latest version dated 5 May 2015), where it is stated: "[…] the Code contributes to more flexibility and more self-regulation in the German corporate constitution".

124 LEYENS, *supra* note 78, 611 ff.

If we look closer, there is also a problem with the public law categories in the field of transnational law. Here, for example, it is discussed, whether the lex mercatoria is really autonomous or not.[126] Some even see the *lex mercatoria* as a "useful illusion"[127] or a "normative hypocrite" ("normative Hochstapelei"[128]). In the same way the existence of a lex sportiva is questioned by some scholars.[129]

Difficulties arise also in integrating so-called forced self-regulation into the system.[130] Although some see in this a separate category, the question remains whether there is seen an influence of the state or not. Genuine self-regulation must be rejected because governmental regulation is to be avoided. But it is also not a form of state-induced self-regulation.

At the same time, some even deny the self-regulatory character of certain models. For example, some assume that only heteronomous, state-induced self-regulation is "self-regulation", whereas genuine self-regulation belongs to the field of contractual freedom.[131]

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125 In the same way both MÖSLEIN and BINDER refer to the German Corporate Governance Code as an example, although in one paper the topic is genuine, and in the other it is state-induced self-regulation.

126 BUCK-HEEB/DIECKMANN, *supra* note 20, 156; see also P. ZUMBANSEN, Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power, Vol. 76, No. 2 (2013) 117 ff., see under *scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4364&context=lcp.*

127 SCHUPPERT, *supra* note 25, 379 ff.; ähnlich auch G. F. SCHUPPERT, Governance-Perspektiven für Demokratie und Selbstverwaltung, in: Cancik (ed.), Demokratie und Selbstverwaltung – Selbstverwaltung in der Demokratie (Göttingen 2015) 53 referring to A. ENGERT, Private Normsetzungsmacht: Die Standardisierung von Regelungen im Markt als Form der Fremdbestimmung, Rechtswissenschaft (RW) 2014, 301 ff.

128 G. F. SCHUPPERT, Governance-Perspektiven für Demokratie und Selbstverwaltung, in: Cancik (ed.), Demokratie und Selbstverwaltung – Selbstverwaltung in der Demokratie (Göttingen 2015) 53, 58 (in the end left open); but clearly in this direction K. SCHMIDT, Lex mercatoria: Allheilmittel? Rätsel? Chimäre?, in: Murakami/Marutschke/Riesenhuber (eds.), Globalisierung und Recht. Beiträge Japans und Deutschlands zu einer internationalen Rechtsordnung im 21. Jahrhundert (Berlin 2007) 153 ff.; compare also IPSEN, *supra* note 82.

129 See the notes in BUCK-HEEB/DIECKMANN, *supra* note 20, 84; see also K. D. WOLF, The non-existence of private self-regulation in the transnational sphere and its implications for the responsibility to procure legitimacy: the case of the lex sportiva, in: Global Constitutionalism, Vol. 3, Issue 3 (2014) 275 ff.

130 See BASEDOW, *supra* note 4, 141, 144.

131 C. CALLIESS, Inhalt, Dogmatik und Grenzen der Selbstregulierung im Medienrecht, Archiv für Presserecht (AfP) 2002, 465, 466; see also J. KÜHLING, Sektorspezifische Regulierung in den Netzwirtschaften (Munich 2004) 27.

This result leads to the fundamental question of whether we have to abandon the categories that have been used for years, the categories that are also the background of the lectures at our symposium. We have to question whether the categorization which was offered by administrative law scholars was an unsuccessful attempt.

3. New Categories?

This leads to the next question: If we abandon this categorization, how will it be possible to systematize self-regulatory acts?[132] Can we find a private approach? Or would it be better to leave aside the discussion on a "private" or "public" approach because it is a "political" question not influencing the content? The advantage of this would be that the discussion could be widened to the international level, where the difference between "public" and "private" rules mostly doesn't exist in the same way. If we give up the "public"-"private"-approach, we will have to look for another way to categorize the different forms of self-regulation.

Therefore, we need to decide whether it is preferable to make a distinction between the different stages in which self-regulation takes place. Here we could distinguish between the stages of the creation, application and enforcement of self-regulated rules. Especially the way in which self-regulated rules are enforced is crucial to their success, i.e. as to the rules being accepted and respected. Also, the creation of rules has to cope with a lot of challenges. For example, individual parties can try to design the rules in such a way that they are one-sidedly beneficial to them.[133] Self-regulation can also be used as a means of restricting competition against a market participant seeking market entry.

It is also possible to distinguish between external and internal effects of self-regulatory rules. Thus an external effect occurs when the rules are used (also by courts) for the concretization of private law. Such an effect can be seen with special technical rules or with sports rules, e.g., the FIS rules for skiing. On the other hand it is solely an internal effect when the rules apply only to the members and don't have an external effect.

Another possibility is to categorize self-regulatory acts by distinguishing between the various self-regulatory bodies and organizations (see below 4.) Self-regulation also can be categorized according to the tool that is used (see below 5.). All of the details cannot be dealt with here, so we will focus on these last two points.

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132 For the typificaton of law see BASEDOW, *supra* note 4, 141, 146.

133 R. BAHAR/L. THÉVENOZ, Conflicts of Interest: Disclosure, Incentives, and the Market, in: Bahar/Thévenoz (eds.), Conflicts of Interest. Corporate Governance Financial Markets, (Alphen aan den Rijn 2007) 1, 17 ff.

4. Self-regulatory Bodies as a Categorization

There exist many different rule-makers or standard-setters in the various areas of self-regulation.[134] Thus various types of standard-setters can be identified.[135] We can recognize self-regulatory rules made by companies in relation to contract partners (i.e. with general contract terms), we have rules created by a registered association ("eingetragener Verein") for its members (i.e. in sports), and there are rules made by an institute for standardization (i.e. DIN) or by a committee (IFRS). In this context, some see the rule-making bodies as "lawmaking clubs".[136]

An older self-regulatory body is the FSK (Freiwillige Selbstkontrolle der Filmwirtschaft GmbH, The German Film Industry's Organization for Voluntary Self-regulation/Film Classification Board), which enforces the legally regulated protection of youth and minors by designating age restrictions for films, videos and digital image carriers which will be publicly screened to children and young people, or made available to them.[137]

There are also chambers making rules in the sense of a self-regulation: chambers of handicraft and guilds, chambers of lawyers (federal and for individual court districts), chambers of doctors, chambers of pharmacists etc.[138] In these cases regulatory powers have been delegated to self-regulatory bodies. The OECD notes that the effectiveness of this type of regulation is not always clear and can engender restraints on competition.[139] In a transnational context we can name the International Chamber of Commerce (ICC). Here we find no delegation because of the transnational character of this chamber.

An example of self-regulation by private associations *(Vereine)* would be the Accounting Standards Committee of Germany (ASCG, "Deutsches Rechnungslegungs-Standards Committee e.V.", DRSC), which was established as a national standardization organization. Pursuant to Section 342 of the German Commercial Code (HGB), it has been recognized as a private accounting committee by the Federal Ministry of Justice.

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134 SCHUPPERT, *supra* note 25, 217 ff.

135 See SCHUPPERT, *supra* note 25, 221 ff.; T. M. J. MÖLLERS (ed.), Standardisierung durch Markt und Recht (Baden-Baden 2008); T. M. J. MÖLLERS, Standards als sekundäre Rechtsquelle – Ein Beitrag zur Bindungswirkung von Standards, in: Möllers (ed.), Geltung und Faktizität von Standards (Baden-Baden 2009) 143 ff; see also T. M. J. MÖLLERS, Internationalisierung von Standards (Baden-Baden 2011); in the field of transnational self-regulation see KÖNDGEN, *supra* note 10, 277, 289 ff.; LEYENS, *supra* note 78, 611, 620 f.

136 SCHUPPERT, *supra* note 25, 404.

137 *https://www.spio-fsk.de/?seitid=1299&tid=1299*.

138 OECD, *supra* note 75, 75.

139 OECD, *supra* note 75, 75.

Self-regulation can also involve private organizations, like for example the German Federal Bar (Bundesrechtsanwaltskammer), founded in 1878. It is the umbrella organization for the professional self-regulation of German lawyers. The regional bar associations monitor lawyers' exercise of professional rights and compliance with professional duties in their capacity as self-regulatory institutions. In the same way we have, for example, the Chamber of Public Accountants *(Wirtschaftsprüferkammer)* as well as many other chambers. They are corporations under public law, but this is not private law.

5. Self-regulatory Tools as a Categorization

In the OECD-report from 2010 on Germany, a range of alternative approaches to state regulation is enumerated. Mention is made of voluntary agreements, standardization, conformity assessment and self-regulation in sectors such as corporate governance, financial markets and professional services such as accounting.[140] One can add self-binding rules[141] in the form of commitments, declarations, charters, standards, codes of conduct and contractual agreements. In 2005, 60% of all professional associations in Europe stated that they were involved in self-regulation, and half of the remaining 40% expected to be involved in the future.[142] We can differentiate between the various contractual elements of the self-regulatory acts as long as private law and not public law is the focus. An important point is the binding effect.[143] As time is limited, I can focus on only a few points at present.

a) Codes

Codes of practice or good conduct are common tools of self-regulation. These can be a special form of a self-commitment. The Fairness Code, for example, is a self-commitment of the German Derivatives Association (*Deutscher Derivate Verband,* DDV). It is a "voluntary undertaking by issuers to observe standards with respect to the structuring, issuing, marketing and trading of structured products".[144] Often the codes are merely gen-

140 OECD, *supra* note 50, 81 and 104.

141 LEYENS, *supra* note 78, 611 ff.

142 European Economic and Social Committee (EESC) "The Current State of Co-Regulation and Self-Regulation in the Single Market" (2005) 5, under *www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf;* see also EESC The Current State of Self-Regulation and Co-Regulation", 31.3.2008; M. MATAIJA, Private Regulation and the Internal Market (Oxford 2016) 14 ff.

143 LEYENS, *supra* note 78, 611, 636 ff.

144 See the homepage of the DDV, *www.derivateverband.de/DEU/Politik/Selbstregulierung*.

eral declarations of principles.[145] Some equate the term "code" with the term "gentlemen's agreement".[146] This does not seem convincing since the latter are not regularly fixed in writing. There are different sanctions for breaches of the code in question.

In Germany, the experience with codes is varied. The Takeover Code of 1995, for example, did not prove successful. The Code was said to have some functional shortcomings. It mainly failed because it was not accepted by a sufficient number of listed companies.[147] Consequently, since 1 January 2002 Germany has a Takeover Law (WpÜG).

Some see the German Corporate Governance Code as being more successful than the Takeover Code, although the recommendations and suggestions of the Code are voluntary. But through the declaration of conformity pursuant to Section 161 of the German Stock Corporation Act, the Code has a legal basis.[148] According to this "the board of directors and the supervisory board of listed companies have to declare annually that they have complied with the recommendations of the Code Commission, or have to declare which recommendations will not be considered". The declaration statement is mandatory and non-compliance has to be explained. In German literature it is criticized that the principle of comply-or-explain has increasingly eroded and a juridification ("Verrechtlichung") of the code is taking place.[149] But, although the German Corporate Governance Code is accepted by the majority of the German business community and although there is a sort of supervision through the comply-or-explain-mechanism,[150] it often doesn't lead to the desired effects – as I already mentioned in my introduction.[151]

145 PRICE/VERHULST, *supra* note 23, 7.

146 WAHLERS, *supra* note 25, 94.

147 BUCK-HEEB/DIECKMANN, *supra* note 20, 99; AUGSBERG, *supra* note 21, 280.

148 See P. C. LEYENS, Comply or Explain im Europäischen Privatrecht: Erfahrungen im Europäischen Gesellschaftsrecht und Entwicklungschancen des Regelungsansatzes, Zeitschrift für europäisches Privatrecht (ZEuP) 2016, 388 ff.

149 Arbeitskreis Externe und Interne Überwachung der Unternehmung (AKEIÜ) der Schmalenbach-Gesellschaft für Betriebswirtschaft e.V. (a working group for external and internal supervision of companies), Der Betrieb (DB) 2016, 395 ff.; see also M. R. THEISEN, Aufstieg und Fall der Idee vom Deutschen Corporate Governance Kodex, Der Betrieb (DB) 2014, 2057 ff.; R. POFALLA, Gute Unternehmensführung in Deutschland, im Spannungsfeld zwischen Selbstregulierung und gesetzgeberischem Auftrag, Die Wirtschaftsprüfung (WPg) 2013, Sonderheft, 2 f.

150 LEYENS, *supra* note 150, 388 ff.

151 See under I.

b) Other Self-commitments

Self-commitments of companies indeed may be binding for the individual company. But in most cases the rules are very general so that the addressees normally don't acquire a legal right. In this context, the problem is not, as above, acceptance by parties or enforcement; rather, the problem is the way how self-regulatory rules are created. In consequence, the rules hardly lead to any real commitment as long as they are formulated in a very general fashion.

c) Standards and Technical Rules

Technical rules are, for example, implemented by the German Institute for Standardization (*Deutsches Institut für Normung e.V.,* DIN), by the Association of German Engineers (*Verein Deutscher Ingenieure,* VDI) and by the German Technical and Scientific Association for Gas and Water (*Deutscher Verein des Gas- und Wasserfaches e.V.,* DVGW). Even for the members there is no obligation to comply with the technical standards. In private law these rules serve to make some legal terms ("unbestimmte Rechtsbegriffe") and general clauses more specific and thus assume the function of concretizing the law.[152] The standardizations[153] themselves are not law, but the rules are incorporated into the law. They constitute binding references for the field on technical issues. In this context, also courts use them in reaching their decisions.

V. Concluding Remarks

The present talk discussed only the terminology, the development and the framework of self-regulation. We have not been able to address other cross-cutting issues, as for example the pros and cons of self-regulation; the legitimation of self-regulatory rules;[154] the enforcement of self-regulatory rules and their binding force; the conditions which are relevant for successful self-regulation; and, especially, the effectiveness of self-regulation. We also didn't deal with the requirements for a successful and/or adequately legitimated self-regulatory body or with the formation of a regulatory choice theory.[155]

152 Buck-Heeb/Dieckmann, *supra* note 20, 159 ff.

153 See also W. Hoffmann-Riem, *supra* note 117, 420 ff.

154 See Bachmann, *supra* note 33, 159 ff.; Bumke/Röthel, *supra* note 28, 1, 13 ff.; G. Bachmann, Legitimation privaten Rechts, in: Bumke/Röthel (eds.), Privates Recht (Tübingen 2012) 207 ff.; S. Magen, Zur Legitimation privaten Rechts, in: Bumke/Röthel (eds.), Privates Recht (Tübingen 2012) 229 ff.

155 Schulz/Held, *supra* note 13, A-5.

Similarly, we also didn't talk about special private law-effects, e.g. the possibility of binding third parties to self-regulatory rules. And we didn't answer the question whether, after the financial crisis, we need at least in certain sectors a shift in the "conception of the principal goals, scope, and function of self-regulation".[156] It remains open whether we can talk about an increase of self-regulation in the transnational context and a decrease of so-called genuine self-regulation (without transnational rules).

The goal of this lecture was to give a short introduction into general aspects of self-regulation. With this effort many questions have arisen and we can summarize that in Germany we are still at the early stages of systemizing self-regulation.[157] This paper has attempted to show the problems we have to cope with.

Let me end with a provocative thesis: The lack of sufficient systematization has to do with the insufficient categories we have used up to now. Therefore we should think about abandoning the distinctions developed by public law scholars. We should concentrate on a private law approach. Then a sufficient systematization might be possible and experiences in one area may help to govern other areas. Perhaps we can learn in this context from the Japanese approach toward self-regulation.

156 See OMAROVA, *supra* note 10, 697; see also TALAULICAR, *supra* note 49, 269, 270.

157 First steps in BUCK-HEEB/DIECKMANN, *supra* note 20; see also BACHMANN, *supra* note 33; T. M. J. MÖLLERS, *supra* note 135; T. M. J. MÖLLERS, Standards als sekundäre Rechtsquelle – Ein Beitrag zur Bindungswirkung von Standards, in: Möllers (ed.), Geltung und Faktizität von Standards (Baden-Baden 2009) 143 ff.; see also T. M. J. MÖLLERS, Internationalisierung von Standards (Baden-Baden 2011); MÖLLERS/FEKONJA, *supra* note 21, 777 ff.; LEYENS, *supra* note 78, 611 ff.