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**Self-regulation in Private Law
in Japan and Germany**

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Genuine Self-regulation in Germany

Drawing the Line

*Florian Möslein**

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In times of globalization and privatization, private law is subject to fundamental changes since legal relations between private individuals are increasingly cross-border in nature and occur on the basis of changed patterns of statehood. For this reason, there is a growing recognition that private law scholarship should not only focus on the existing rules of substantive law, but also support regulators in the selection and design of appropriate legal instruments.¹ More precisely, legal scholarship must examine the material content of specific legal provisions, as well as analyze the full range of regulatory instruments and strategies, along with comparing them with regard to their regulatory intensity and impact. Legal scholarship must provide for regulatory instruments that are appropriate for solving real-life problems.² The discipline of private law is supposed to contribute to the “art of regulation” (again).³

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1 For general information on peculiar characteristics of current legal scholarship, see C. ENGEL/W. SCHÖN (eds.), *Das Proprium der Rechtswissenschaft* (Tübingen 2007); M. JESTAEDT/O. LEPSIUS (eds.), *Rechtswissenschaftstheorie* (Tübingen 2008).

2 H. FLEISCHER, *Die Zukunft der gesellschafts- und kapitalmarktrechtlichen Forschung*, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2007, 500,

Research on private law rule-making, then, is increasingly becoming established as a legal subdiscipline in its own right.⁴ Accordingly, an extensive series of recently published German monographs aims to measure the effectiveness of specific regulatory instruments, techniques and strategies in different areas of private and commercial law.⁵ With a focus on different modes of regulation, the specific research questions are cross-sectoral in

502 et seq.; cf. *id.*, Gesetz und Vertrag als alternative Problemlösungsmodelle im Gesellschaftsrecht, *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR)* 168 (2004) 673.

- 3 With reference to the traditional notion (much too narrow today) of “Gesetzgebungskunst” (art of legislation), and from a historical perspective, see S. EMMENEGGER, *Gesetzgebungskunst: Gute Gesetzgebung als Gegenstand einer legislativen Methodenbewegung in der Rechtswissenschaft um 1900 – Zur Geschichte der Gesetzgebungslehre* (Tübingen 2006), in particular, 154–183 (on the determination of suitable legislative means).
- 4 F. MÖSLEIN (ed.), *Regelsetzung im Privatrecht* (Tübingen 2018, forthcoming). In a similar vein, with respect to contract law, see G. BACHMANN, *Optionsmodelle im Privatrecht*, *Juristenzeitung (JZ)* 2008, 11, 19 et seq.; H. EIDENMÜLLER, *Der homo oeconomicus und das Schuldrecht – Herausforderungen durch Behavioral Law and Economics*, *Juristenzeitung (JZ)* 2005, 216; H. UNBERATH/J. CZIUPKA, *Dispositives Recht welchen Inhalts? – Antworten der ökonomischen Analyse des Rechts*, *Archiv für die civilistische Praxis (AcP)* 209 (2009) 37, 39. With respect to company law, see J.-H. BINDER, “Prozeduralisierung” und Corporate Governance – Innerbetriebliche Entscheidungsvorbereitung und Prozessüberwachung als Gegenstände gesellschaftsrechtlicher Regulierung – Entwicklungslinien und Perspektiven, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2007, 745 et seq.; H. EIDENMÜLLER, *Forschungsperspektiven im Unternehmensrecht*, *Juristenzeitung (JZ)* 2007, 487, 490 et seq.; FLEISCHER, *supra* note 2, 686–704.
- 5 For instance, see S. BECHTOLD, *Die Grenzen zwingenden Vertragsrechts – Ein rechtsökonomischer Beitrag zu einer Rechtsetzungslehre des Privatrechts* (Tübingen 2010); J.-H. BINDER, *Regulierungsinstrumente und Regulierungsstrategien im Kapitalgesellschaftsrecht* (Tübingen 2012); J. CZIUPKA, *Dispositives Vertragsrecht – Funktionsweise und Qualitätsmerkmale gesetzlicher Regelungsmuster* (Tübingen 2010); M. FORNASIER, *Freier Markt und zwingendes Vertragsrecht* (Berlin 2013); T. HABERER, *Zwingendes Kapitalgesellschaftsrecht – Rechtfertigung und Grenzen* (Wien 2009); A. HELLGARDT, *Regulierung und Privatrecht* (Tübingen 2016); L. KÄHLER, *Begriff und Rechtfertigung abdingbaren Rechts* (Tübingen 2012); F. MÖSLEIN, *Dispositives Recht – Zwecke, Strukturen und Methoden* (Tübingen 2010); R. PODSZUN, *Wirtschaftsordnung durch Zivilgerichte* (Tübingen 2014); M. RENNERT, *Zwingendes transnationales Recht – Zur Struktur der Wirtschaftsverfassung jenseits des Staates* (Baden-Baden 2010). From a similarly comparative perspective, see N. KORNET, *Contract Interpretation and Gap Filling: Comparative and Theoretical Perspectives* (Antwerpen 2006); V. LASSERRE-KIESOW, *La Technique Legislative* (Paris 2002); see also J. BLACK, *Rules and Regulators* (Oxford 1997) 246–250 (“Towards a Theory of Rule Making”).

nature, which is (at a minimum) relevant for all private law. Moreover, by taking complex forms of non-state regulation into account as well, this research approach extends far beyond classical legal theory, as well as beyond the traditional *Gesetzgebungslehre* (theory of legislation), to become a subdiscipline of public law.⁶

Against this background, the present volume on self-regulation in private law could not be more timely or topical. For the first time, this specific rule-making phenomenon is approached from a cross-sectoral and comparative perspective, taking both Germany and Japan into account. At the same time, it builds on a long and illustrious tradition of Japanese-German exchanges in legal scholarship, as well as honorably marking the 20th anniversary of the founding of the Journal of Japanese Law. On a personal note, my own contribution builds on the particularly fruitful experience of two previous German-Japanese conferences attended as a younger scholar more than a decade ago. I feel especially honored and pleased to contribute to the present volume, given that three times proverbially makes a tradition. In fact, both of these earlier contributions happened to concern questions of private law rule-making as well.⁷

I. INTRODUCTION: IS GENUINE SELF-REGULATION A TWOFOLD OXYMORON?

The specific topic that I have currently been assigned is genuine self-regulation in Germany. Due to globalization and privatization, self-regulation has become so important and omnipresent that our times have already been qualified as an “era of self-regulation”.⁸ Concurrently, self-regulation is an established mode of rule-making and has ancient origins, for example, with respect to the liberal professions.⁹ Its long tradition and

6 G. F. SCHUPPERT, *Governance und Rechtsetzung – Grundfragen einer modernen Regelungswissenschaft* (Baden-Baden 2011).

7 F. MÖSLEIN, *Rechtsangleichung durch Richterrecht – Eine Darstellung am Beispiel der Geschäftsleiterpflichten*, in: Riesenhuber/Takayama (eds.), *Rechtsangleichung: Grundlagen, Methoden und Inhalte* (Berlin 2006) 279; *id.*, *Inhaltskontrolle und Inhaltsregeln im Schuldvertragsrecht*, in: Riesenhuber/Nishitani (eds.), *Wandlungen oder Erosion der Privatautonomie – Deutsch-Japanische Perspektiven des Vertragsrechts* (Berlin 2007) 233.

8 C. ESTLUND, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, *Columbia Law Review* 105 (2005) 319.

9 For an extensive (including historical) account, see J. TAUPITZ, *Die Standesordnungen der freien Berufe* (Berlin 1991); for a more general historical perspective, see P. COLLIN et al. (eds.), *Selbstregulierung im 19. Jahrhundert – zwischen Autonomie und staatlichen Steuerungsansprüchen* (Frankfurt/Main 2011).

widespread use, when taken together, make self-regulation an incredibly broad field for legal scholarship and one that has already made many valuable contributions in the realms of private and (even more so) public law.¹⁰

Yet, the contours of the term as such, and the definition of genuine self-regulation in particular, are far from being razor-sharp; indeed, they remain largely blurred. I will therefore focus on crucial issues of delimitation by first reflecting on the term itself (in this introduction) and then by trying to develop distinctive criteria (see Section II), which I will subsequently apply to different examples (see Section III). In the end, these examples will be used to illustrate why it is important to draw such a distinctive line in the first place.

1. Self-regulation: An Oxymoron?

At first sight, the term self-regulation seems self-explanatory. Self-regulatory rules are “by definition developed by those directly involved in the industry or professions”.¹¹ Some of the advantages commonly attributed to self-regulation are that this regulatory form is relatively flexible, quick and cheap to achieve, that it accurately reflects the issues and needs of specific sectors, and that it creates a sense of a common bond, which in turn increases the likelihood of compliance. On the other hand, there are the various dangers of self-interest coming before public interest, anti-competitive effects and entry barriers, risks of non-enforcement, and also concerns about the lack of democratic legitimacy.¹²

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- 10 For instance, see S. AUGSBERG, *Rechtsetzung zwischen Staat und Gesellschaft: Möglichkeiten differenzierte Steuerung des Kapitalmarktes* (Berlin 2003); W. BERG et al. (eds.), *Regulierte Selbstregulierung als Steuerungskonzept des Gewährleistungsstaats – Ergebnisse des Symposiums aus Anlass des 60. Geburtstages von Wolfgang Hoffmann-Riem* (Berlin 2001); T. HOEREN, *Selbstregulierung im Banken- und Versicherungsrecht* (Karlsruhe 1995); G. MAKOWSKI, *Kartellrechtliche Grenzen der Selbstregulierung* (Baden-Baden 2007); K.-D. SABROWSKY, *Selbstregulierung im Wirtschafts- und Unternehmensrecht* (Bonn 1978); H. STOCKHAUS, *Regulierte Selbstregulierung im europäischen Chemikalienrecht* (Tübingen 2015); Z. TALIDOU, *Regulierte Selbstregulierung im Bereich des Datenschutzes* (Frankfurt/Main 2005); A. C. THOMA, *Regulierte Selbstregulierung im Ordnungsverwaltungsrecht* (Berlin 2008); K. TONNER, *Regulierung und Selbstregulierung im Verbraucherrecht* (Hamburg 1994). From a specifically private law perspective, see P. BUCK-HEEB/A. DIECKMANN, *Selbstregulierung im Privatrecht* (Tübingen 2010).
- 11 C. HARLOW/R. RAWLINGS, *Law and Administration* (Cambridge 2009), p. 325, referring to BETTER REGULATION TASK FORCE, *Self-regulation Interim Report* (London 1999).
- 12 For more extensive information on both the advantages and disadvantages of self-regulation, see, for instance, A. OGUS, *Rethinking Self-regulation*, *Oxford Journal of Legal Studies* 15 (1999) 97; R. VAN DEN BERGH, *Towards Efficient Self-*

In contemplating the term self-regulation itself, however, an inherent tension gradually becomes obvious:

“The term self-regulation is an oxymoron. If all persons affected agree to a set of rules, the problem calling for regulatory intervention disappears. Self-regulation means something different. At least some actors have subdued to group pressure, or the entire group has given in to outside pressure, usually to a threat of the exercise of sovereign powers.”¹³

Indeed, if the word fragment “regulation” is understood as any alteration of socially harmful behavior, and the word fragment “self-” is understood as a requirement of consent of all affected parties, the combination of both word fragments is a contradiction in itself. Any change against the will of the involved parties would effectively exclude such consensual agreement. We can only make sense of that combination if such consent is not entirely autonomous but somehow influenced by outside powers, either by the other party or from outside. To analyze this heteronomous influence requires us to unpack the concept of consent.

2. *Genuine Self-regulation: Not Even in the Desert?*

Against this background, the attribute “genuine” does not make our understanding any easier. According to a leading English-language dictionary, “genuine” means “actual, real, or true — not false or fake”.¹⁴ The structure of the present volume illustrates, however, that the true contrast is not between genuine and false or fake self-regulation, but between genuine self-regulation and self-regulation “induced by the state”.¹⁵ In fact, in order to overcome the deficiencies of self-regulation, which have just been mentioned, the approaches to self-regulation vary widely and involve different degrees of state involvement. Not every form of self-regulation is genuine self-regulation; instead, self-regulation itself can be regulated to varying degrees. Conversely, German administrative lawyers accordingly employ yet another form of wording, namely, regulated self-regulation, or “*Regulierte Selbstregulierung*”, to cite the title of a *Festschrift* (commemorative publication) about the well-known legal scholar and former judge of the German Federal Constitu-

Regulation in Markets for Professional Services, in: Ehlermann/Atanasiu (eds.), *European Competition Law Annual 2004: The Relationship Between Competition Law and the (Liberal) Professions* (Oxford 2006) 155, 157 et seq.

13 C. ENGEL, *The Role of Law in the Governance of the Internet*, *International Review of Law, Computers & Technology* 20 (2006) 201, 202.

14 See the respective entry in the Merriam-Webster Dictionary, available at: <https://www.merriam-webster.com/dictionary/genuine>.

15 Cf. the contributions made in this volume by S. KOZUKA (p. 109) and J.-H. BINDER (p. 127).

tional Court, Wolfgang Hoffmann-Riem.¹⁶ Since its publication, that term has become very common and is used in many different respects.¹⁷

This contrast between “genuine self-regulation” and “regulated self-regulation” or “self-regulation induced by the state” seems to imply that the former occurs in the absence of any outside influence, in some sort of legal and regulatory vacuum, where private parties self-regulate without being subject to any outside influence by the state regulator: in other words, entirely autonomous self-regulation. In fact, some authors distinguish accordingly between heteronomous and autonomous self-regulation, defining the latter as “regulation that takes place without any state interference” (“Regulierung, die ohne staatliche Einflussnahme erfolgt”).¹⁸

But, can we imagine this kind of entirely autonomous self-regulation? In a different setting, this question was discussed over 90 years ago by Gerhart Husserl, one of the sons of the famous philosopher Edmund Husserl. The junior Husserl analyzed contracting as the most fundamental form of self-regulation, while indulging in the following thought experiment.¹⁹ Imagine that, by coincidence, two people of different origins, different nationalities and different languages meet in the desert. One of them is thirsty but has only dried fruits, while the other one is hungry but has nothing to eat except a coconut. While it might seem beneficial for them to exchange the dried fruits and the coconut, they will probably not conclude such an exchange contract. The reason for the absence of contracting here is that they are both afraid that, immediately after the exchange, the opposing party will steal back what he has just given away. This example shows that even the simplest form of self-regulation, an exchange contract, will only reliably function with at least some form of state intervention, even if it simply involves the safeguarding of the execution of contracts.²⁰ As a consequence, as self-

16 BERG et al. (eds.), *supra* note 10.

17 In addition to the monographs by STOCKHAUS, see TALIDOU and THOMA, *supra* note 10; see also T. ATTENDORN, *Regulierte Selbstregulierung: Gibt es das in der telekommunikationsrechtlichen Zugangsregulierung?*, *Die öffentliche Verwaltung* 2008, 715; K.-H. LADEUR, *Regulierte Selbstregulierung im Jugendmedienschutzrecht*, *Zeitschrift für Urheber- und Medienrecht* 2002, 859; T. WEICHERT, *Regulierte Selbstregulierung – Plädoyer für eine etwas andere Datenaufsicht*, *Recht der Datenverarbeitung* 2005, 1.

18 P. BUCK-HEEB/A. DIECKMANN, *supra* note 10, 45.

19 G. HUSSERL, *Rechtskraft und Rechtsgeltung: eine rechtsdogmatische Untersuchung* (Berlin 1925) 39; cf. G. MANSSEN, *Privatrechtsgestaltung durch Hoheitsakt* (Tübingen 1994) 141. See also F. V. HIPPEL, *Das Problem der rechtsgeschäftlichen Privatautonomie* (Tübingen 1936, 91–105 (“im Naturstande”).

20 For more details, see F. MÖSLEIN, *Privatrechtliche Regelsetzung, Governance und Verhaltensökonomik*, *Austrian Law Journal* 1 (2014) 135, 138 et seq.

regulation will never entirely occur without the state, it will never be purely autonomous or “genuine”.

While some public law scholars question whether autonomous self-regulation, that is, the exercise of private autonomy, qualifies as self-regulation at all²¹ (and while some private law scholars contrariwise question whether heteronomous self-regulation forms part of self-regulation in the proper meaning of the term),²² our argument here is different: Self-regulation is never purely autonomous because private autonomy cannot be exercised in the absolute absence of the state. This idea that any form of self-regulation requires at least some state-made legal infrastructure can also be traced to the jurisprudence of the German Constitutional Court. In the famous *Bürgerschaftsurteil*, a decision on the provision of a security, the court observed that safeguarding private autonomy requires enforceability and therefore constitutes a duty on the part of the legislature to provide regulatory tools and mechanisms that are legally binding and that establish enforceable legal positions in the event of disputes.²³ The contrary view, which argues that the legal order could restrict itself to simply tolerating private arrangements,²⁴ has consequently been rejected by Claus-Wilhelm Canaris as completely pointless and inconsistent with the constitutional right to the freedom of action (Art. 2, para. 1, German Basic Law).²⁵ While the state is necessarily involved to a greater extent, what may vary is the degree and the manner of state interference. Comparative contract law indeed shows significant differences, namely, in the comparison between common and civil law jurisdictions.²⁶

21 C. CALLIESS, *Inhalt, Dogmatik und Grenzen der Selbstregulierung im Medienrecht*, *Zeitschrift für Medien- und Kommunikationsrecht* (AfP) 2002, 465, 466; J. KÜHLING, *Sektorspezifische Regulierung in den Netzwirtschaften* (Munich 2004) 27.

22 P. BUCK-HEEB/A. DIECKMANN, *supra* note 10, 45.

23 BVerfGE 89, 214, 231 (“Nach ihrem Regelungsgegenstand ist die Privatautonomie notwendigerweise auf staatliche Durchsetzung angewiesen. Ihre Gewährleistung denkt die justitielle Realisierung gleichsam mit und begründet daher die Pflicht des Gesetzgebers, rechtsgeschäftliche Gestaltungsmittel zur Verfügung zu stellen, die als rechtsverbindlich zu behandeln sind und auch im Streitfall durchsetzbare Rechtspositionen begründen”).

24 G. STRUCK, *Vertragsfreiheit – ein Grundrecht, Demokratie und Recht* (DuR)1988, 39.

25 C.-W. CANARIS, *Verfassungs- und europarechtliche Aspekte der Vertragsfreiheit in der Privatrechtsgesellschaft*, in: Badura/Scholz (eds.), *Festschrift for Peter Lerche* (Munich 1993) 873, 889 (note 59: “völlig sinnlos und mit Art. 2 I GG zweifelsfrei unvereinbar”).

26 M. PARGENDLER, *The Role of the State in Contract Law: The Common-Civil Law Divide*, New York University School of Law Working Paper No. 17-01, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2848886.

II. DEFINING THE LINE

If self-regulation therefore never occurs entirely “without the state”,²⁷ the distinction between genuine self-regulation and self-regulation induced by the state becomes difficult and diffuse. Yet the variety of different forms of self-regulation is obvious; likewise, the variances of state involvement.²⁸ Even more, it is crucial to form and differentiate two kinds of subcategory with regard to the application of the respective rules: The interpretation of rules follows different patterns, depending on whether they are induced by the state or not. As will be shown more extensively at a later stage,²⁹ such a distinction is not only reasonable for the sake of legal systematization but is also necessary in order to apply and interpret self-regulated rules.

But, how can one make this distinction? How can one draw the line between genuine self-regulation and self-regulation induced by the state? What is the decisive criterion? What we already know is that the mere involvement of the state does not play a role because the state is always involved in some form or another when it comes to private rule-making. What we therefore arguably need to consider is not the involvement but the initiative: On whose initiative does self-regulation take place? Is it the initiative of private parties or is it the initiative of state authorities?

Let me propose the identification of three different dimensions of this initiative criterion: namely, the procedure of rule-making, the substance of rules and their enforceability. I will briefly explain each of these three dimensions (see Subsections 1-3 below) before extensively illustrating them with various examples (see Section III). The challenge is to find the respective “tipping points”,³⁰ i.e., the point where self-regulation rapidly and dramatically changes its character, such that it falls under the alternative

27 For a similar form of wording, see G. TEUBNER, *Global Law without a State* (Dartmouth 1997); cf. N. JANSEN/R. MICHAELS (eds.), *Beyond the State: Rethinking Private Law* (Tübingen 2008).

28 For a recent account of this variety (and its different dimensions), see G. F. SCHUPPERT, *The World of Rules. Eine etwas andere Vermessung der Welt* (Frankfurt/Main, forthcoming), working paper available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747385.

29 See, *infra*, Section III, Subsection 3.

30 The idea of such tipping points has been extensively explored in other social sciences, namely, economics and sociology; see T. SCHELLING, *A Process of Residential Segregation: Neighborhood Tipping*, in: Pascal (ed.), *Racial Discrimination in Economic Life* (Lexington 1972) 157; M. GRANOVETTER, *Threshold Models of Collective Behavior*, *American Journal of Sociology* 83 (1978) 1420. Cf. the best-seller from M. GLADWELL, *The Tipping Point: How Little Things Can Make a Big Difference* (London 2014): “The tipping point is that magic moment when an idea, trend, or social behaviour crosses a threshold, tips, and spreads like wildfire.”

respective subcategory. We need to define more precise criteria that produce the categorical difference between genuine self-regulation and self-regulation induced by the state.

1. *Mechanisms, but No Mandate*

Beginning with procedural aspects, in any event, the state creates the necessary infrastructure for rule-making: To cite the German Constitutional Court again, the state provides regulatory tools and mechanisms, which are legally binding and establish legal positions that are enforceable in the event of disputes.³¹ Several fundamental questions need to be answered in order to define the respective legal positions. Which statements are legally binding? What formalities does self-regulation require? Who is competent to regulate? All these questions concern the legal infrastructure of self-regulation. In fact, private law in general is widely regarded as representing this infrastructure.³² Its provision by the state does not therefore necessarily speak against genuine self-regulation but is a necessary precondition for self-regulation of any kind.

But, where is the tipping point? What level and what intensity of respective specifications transform genuine self-regulation into self-regulation induced by the state? A preliminary proposition is that this line is crossed once the state not only provides mechanisms but also mandates self-regulation.³³ In fact, any such delegated rule-making lacks the necessary de-

31 See reference, *supra* note 23. For more detail on private law implications, see H. HANAU, *Der Grundsatz der Verhältnismäßigkeit als Schranke privater Gestaltungsmacht* (Tübingen 2004) 27–29, which claims that enforceability of private arrangements requires a respective order by the state (Erforderlichkeit eines “staatliche[n] Geltungsbefehl[s] für private Abreden”).

32 Above all, see C. WINDBICHLER, *Neue Vertriebsformen und ihr Einfluss auf das Kaufrecht*, *Archiv für die civilistische Praxis* (AcP) 198 (1998) 261, 271; cf. G. BACHMANN, *Privatrecht als Organisationsrecht – Grundlinien einer Theorie privater Regelsetzung*, *Jahrbuch Junger Zivilrechtswissenschaftler* 2003, 1, 20 et seq.; J. DREXL, *Zwingendes Recht als Strukturprinzip des Europäischen Verbrauchervertragsrechts?*, in: Coester et al. (eds.), *Festschrift für Hans Jürgen Sonnenberger* (Munich 2004) 771, 783; S. GRUNDMANN, *Regulating Breach of Contract*, *European Review of Contract Law* 3 (2007) 121, 122; *id.*/F. MÖSLEIN, *Vertragsrecht als Infrastruktur für Innovation*, *Zeitschrift für die gesamte Privatrechtswissenschaft* (ZfPW) 2015, 435; K. RIESENHUBER/F. MÖSLEIN, *Contract Governance – Skizze einer Forschungsperspektive*, in: Riesenhuber (ed.), *Perspektiven des Europäischen Schuldvertragsrechts* (Berlin 2008) 1, 22. With respect to company law, see H. FLEISCHER, *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* (ZHR) 168 (2004) 673, 675–678 and 707 (“Infrastrukturverantwortung des Gesetzgebers”).

33 For a fundamentally different approach, cf. P. BUCK-HEEB/A. DIECKMANN, *supra* note 10, 45, referring to state responsibility (“staatliche Verantwortlichkeit”), i.e., to

gree of private autonomy for it to qualify as genuine self-regulation since it evolves at the behest of the state, not of private parties. Of course, the “increasingly dynamic and synergistic interaction between public and private [...] rule-making systems”³⁴ tends to make it difficult to distinguish between mandates and mechanisms. The examples given subsequently (see Section III) will serve as test cases as to whether this distinction is nonetheless workable in practice.

2. *Limitations, but No Instructions*

In addition to procedural differentiation, a second dimension concerns the substance of self-regulated rules. In this respect, the state can and does define limitations. For instance, the general clause of § 138 of the German *Bürgerliches Gesetzbuch* (BGB), i.e., the Civil Code, prohibits extremely unjust or immoral agreements. A more specific example is § 276, paragraph 3, of the German BGB, which disallows the advance exclusion of liability for willful acts.³⁵ Such provisions excluding certain (more or less specifically defined) substantive content in private arrangements are commonplace in private law. In particular, they serve to protect the common interest or interests of third parties.³⁶ As a consequence, such limitations are indeed indispensable for the efficient functioning of self-regulation, given that self-regulation involves the specific risk of self-interest being put before public interest.³⁷

Once again, if substantive limitations are ubiquitous, where is the tipping point? In this substantive respect, the preliminary proposition is that, as long as the state only limits the content of self-regulation, the latter is still within the realm of genuine self-regulation. The line is crossed, however, once the state affirmatively determines what content self-regulation should comprise. In turn, there are various instances where it is difficult to distin-

the question about whether the state itself has a duty to regulate. What remains unclear, however, concerns the specific requirements with respect to the sources and intensity of such a duty. In fact, there are only a few instances where legislation is (constitutionally) mandatory; see J. ISENSEE, *Der Bundesstaat. Bestand und Entwicklung*, in: Badura/Dreier (eds.), *Festschrift 50 Jahre Bundesverfassungsgericht* (Tübingen 2001) 719, 739 et seq. (“Soweit der Bund die Gesetzgebung in bestimmten Materien hat, hat er die Befugnis, aber nicht die Verpflichtung, Gesetze zu erlassen”).

34 J. LISTER, *Corporate Social Responsibility and the State* (Vancouver/Toronto 2011) 29 (illustrating the “Co-Regulatory Policy Mix” with respect to environmental law).

35 Various incidental restrictions of that liability remain possible, however; see L. KÄHLER, *Mittelbare und unmittelbare Einschränkungen der Vorsatzhaftung*, *Juristenzeitung* (JZ) 2007, 18.

36 For more extensive information, see MÖSLEIN, *supra* note 5, 164–175.

37 Cf. the above references in note 12.

guish between limitations and instructions. Default rules are a prime example: While private parties may, by definition, deviate from them, such rules also serve as focal points, such that deviating from them could prove to be difficult, either for practical reasons or due to legal provisos.³⁸ But, “taken as such, default rules do not intrude on autonomy, even if they influence people without persuading them”.³⁹ In spite of the applicability of default rules, which may or may not have an influence on its substantive content, self-regulation may still qualify as genuine.

3. *Enforcement, but Not Public*

The third and final dimension concerns the enforcement of self-regulated rules. Husserl’s desert example, as well as the reasoning of the Constitutional Court, demonstrates that safeguarding private autonomy, as in self-regulation, requires some degree of enforceability. Of course, self-regulation can also be of a non-binding nature.⁴⁰ To note that codes of conduct, for instance, are not legally binding, “is not to say that they do not influence international economic relations, nor does it mean that they produce no legal effects whatsoever”.⁴¹ The enforcement mechanisms largely differ; they can also involve non-legal, i.e., social or economic sanctions.⁴² Moreover, seemingly “voluntary” corporate codes may well be enforced by private law means.⁴³ When distinguishing between the two categories of self-regulation, the specific type of enforcement is relevant. In this respect, the preliminary proposition is that private enforcement (in a very large sense) characterizes genuine self-regulation, whereas self-regulation induced by the state is typically also enforced by the state, i.e., publicly enforced.

38 Such legal and factual barriers are extensively dealt with by MÖSLEIN, *supra* note 5, 186–334.

39 C. SUNSTEIN, *Autonomy by Default*, *The American Journal of Bioethics* 16 (2016) 1. In a similar vein, see F. MÖSLEIN, “Governance by Default” – Innovation und Koordination durch dispositives Recht, in: Grundmann et al. (eds.), *Festschrift für Klaus J. Hopt*, (Berlin 2010) 2861.

40 See P. BUCK-HEEB/A. DIECKMANN, *supra* note 10, 42 (distinguishing between binding and non-binding self-regulation).

41 S. ZAMORA, *Economic Relations and Development*, in: Joyner (ed.), *The United Nations and International Law* (Cambridge 1997) 232, 261.

42 Cf., for instance, A. OGUS/E. CARBONARA, *Self-regulation*, in: Parisi (ed.), *Production of Legal Rules*, (2nd ed., Cheltenham 2011) 228–229 et seq.

43 A. BECKERS, *Enforcing Corporate Social Responsibility Codes* (Oxford/Portland 2015).

III. WALKING THE LINE: THREE EXAMPLES

While these three dimensions provide an image of the divide between genuine self-regulation and self-regulation induced by the state, they need to be applied to and tested with different examples. According to the cross-sectoral nature of rule-making theory, we examine rules in three entirely different contexts of private law: contract law, where we will examine standard terms (see Subsection 1 below); corporate law, where the focus is on corporate governance codes (see Subsection 2 below); and various standards from a European law perspective (see Subsection 3 below).

1. *Standard Terms in Contract Law*

Standard terms are often known as the “fine print” and form a part of many contracts, even though the opposing party is often not even aware of those terms. US legal scholars pointedly refer to them as “boilerplate”.⁴⁴ To read a set of standard terms is indeed not very stimulating, instead requiring a level of time and effort that most consumers are not ready to invest.⁴⁵

In Germany, the regulation of standard contract terms has a long tradition and history.⁴⁶ This history started as early as 1906, when the Reichsgericht first scrutinized the substance of standard contract terms, which, at the time, was based on BGB § 138 and was undertaken only where the terms were employed by monopolists.⁴⁷ In the 1920s, the Reichsgericht broadened the scope of this jurisprudence to situations of superior economic power, while the Bundesgerichtshof later applied it to a wide range of situations involving materially unbalanced terms, basing it on either § 242 or § 315 BGB.⁴⁸ In 1958, Ludwig Raiser described that case law as a particularly glorious chapter (*Ruhmesblatt*) in German jurisprudence.⁴⁹ The legislature then intervened in 1976 with a law on standard contract terms.⁵⁰ A major adjustment of that law was triggered by European harmonization, since the Directive on Unfair

44 O. BEN-SHAHAR (ed.), *Boilerplate: The Foundation of Market Contracts* (Cambridge 2007).

45 For an empirical study, see Y. BAKOS/F. MAROTTA-WURGLER/D. R. TROSSEN, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, *Journal of Legal Studies* 43 (2014) 1.

46 For a more extensive survey, see J. BASEDOW, in: Säcker et al. (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (7th ed., Munich 2016) Preliminary Note, § 305 et seq., para. 8.

47 Judgment of the Reichsgericht of 6 January 1906, RGZ 62, 264 (266).

48 See, on the one hand, the Judgment of the Reichsgericht of 26 October 1921, RGZ 103, 82, 83; and, on the other hand, for instance, the Judgment of the Bundesgerichtshof of 29 October 1962, BGHZ 38, 183, 186.

49 L. RAISER, *Vertragsfreiheit heute*, *Juristenzeitung* (JZ) 1958, 1, 7.

Terms of 1993 urged the German legislature to adjust the focus in order to primarily take consumer contracts into account.⁵¹ With the reform of the Law of Obligations of 2002, the provisions were finally incorporated into the German BGB itself (now in BGB § 305 et seq.).⁵²

While this history of the regulation of standard terms is well known, it may seem surprising to conceptualize standard terms themselves as (self-) regulation. Formally, at least, they simply form a part of contractual arrangements. But, it is worth recalling the comment made above in relation to self-regulation as an oxymoron, specifically: That we need to unpack the concept of consensus.⁵³ Standard terms are indeed a prime example of the ambivalence of that concept: Since the other party is typically not well aware of those terms, the claim that those terms are consensus-driven is not very persuasive. As a consequence, standard contract terms have, for a long time, been discussed as a form of regulation, namely by the ordoliberal Hans Großmann-Doerth. The title of his Freiburg inaugural lecture in 1933 referred to the self-produced law of the business community (*Das selbstgeschaffene Recht der Wirtschaft*), where he discussed standard terms as a form of law.⁵⁴ After all, standard terms often go far beyond bilateral contracts and “regulate” a wide range of situations, for instance, when they are elaborated by trade associations and applied sector-wide in the banking and insurance industry.⁵⁵ Let us therefore apply the three-dimensional grid to standard terms.

50 Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz) of 9 December 1976, Bundesgesetzblatt I, p. 3317. On the legislative history, again see BASEDOW, *supra* note 46, paras. 10–13.

51 Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts, OJ L 95 of 21 April 1993, p. 29. For a brief overview and further references, see F. MÖSLEIN, Kontrolle vorformulierter Vertragsklauseln, in: Schmidt-Kessel (ed.), Ein einheitliches europäisches Kaufrecht? (Munich 2012) 255, 259 et seq.

52 For more extensive information on this legislative step, see M. WOLF/T. PFEIFFER, Der richtige Standort des AGB-Rechts innerhalb des BGB, Zeitschrift für Rechtspolitik 2001, 303; R. KOCH, Auswirkungen der Schuldrechtsreform auf die Gestaltung Allgemeiner Geschäftsbedingungen, Wertpapier-Mitteilungen (WM) 2002, 2173 and 2217; U. SCHUMACHER, Materielle Neuregelungen im Recht der Allgemeinen Geschäftsbedingungen, Monatsschrift für Deutsches Recht 2002, 973.

53 *Supra* note 13.

54 H. GROSSMANN-DOERTH, Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht (Freiburg 1933), reprinted and discussed in U. BLAUROCK/N. GOLDSCHMIDT/A. HOLLERBACH (eds.), Das selbstgeschaffene Recht der Wirtschaft – Zum Gedenken an Hans Großmann-Doerth (Tübingen 2005). In a similar vein, see H. GROSSMANN-DOERTH, Das autonome Recht des Welthandels, Juristische Woche (JW) 1929, 3447.

55 On parallels and differences in detail, cf. MÖSLEIN, *supra* note 5, 459 et seq.

a) *Mechanisms of Bilateral Consensus*

With respect to the procedure of rule-making, the mechanism here is the same as for contractual agreements in general, that is: bilateral consent. With respect to consumers, however, German law contains a specific rule in § 305 paragraph 2, of the BGB. It lays down the so-called *Einbeziehungs-kontrolle* (meaning a review of the incorporation of standard terms), which requires the user of the terms, when entering into a contract, (1) to explicitly refer the other party to the standard terms and (2) to give the other party, in an acceptable manner, the opportunity to take notice of these terms. Last but not least, the provision also requires the agreement of the other party to the application of the standard terms.⁵⁶

This last requirement clearly shows that bilateral consent is required. As a consequence, standard terms clearly fall into the realm of genuine self-regulation, even if such an agreement does not need to be explicit; indeed, it can even be “silent” if based on conclusive conduct.⁵⁷ We have to be satisfied, then, with a very formal sort of consent because the counterpart will often not be consciously aware of the substance of those standard terms. To illustrate how blurred the line between autonomous self-determination and heteronomous external determination can be, some speak pointedly of zones of diluted autonomy (*Zonen verdünnter Freiheit*).⁵⁸ At least the legal rules in question give the counterpart a chance to gain access to these standard terms and to take notice of them.

In any event, the use of standard terms is not mandated by the state. Take, for example, a commercial website: While there are information duties mandating the disclosure of various facts, for instance, with respect to prices,⁵⁹ there is no duty to use standard terms. However, if you use stand-

56 The provision was originally very much debated, cf. H. E. BRANDNER, *Wege und Zielvorstellungen auf dem Gebiet der Allgemeinen Geschäftsbedingungen*, *Juristenzeitung (JZ)* 1973, 613–614 et seq.; H. KÖTZ, *Welche gesetzgeberischen Maßnahmen empfehlen sich zum Schutze des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträgen?*, in: *Verhandlungen für den 50. Deutschen Juristentag (Munich 1974) A 59–A 61*; E. ULMER, *Welche gesetzgeberischen Maßnahmen empfehlen sich zum Schutze des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträgen?*, in: *Verhandlungen für den 50. Deutschen Juristentag (Munich 1974) H 28–H 30*. Moreover, such a review is not provided for in the European Directive; cf. MÖSLEIN, *supra* note 51, 274, with further references.

57 In this sense, see the legislative materials, *Bundestags-Drucksache 7/3919*, 18.

58 L. RAISER, *Vertragsfunktion und Vertragsfreiheit*, in: v. Caemmerer et al. (eds.), *Festschrift Hundert Jahre Deutsches Rechtsleben (Berlin 1960)* 101, 126.

59 Art. 246a, § 1 para. 1, no. 4 *Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB)*.

ard terms, you need to disclose them: not only by virtue of § 305 paragraph 2, of the BGB, but also according to the more specific rules on distance selling.⁶⁰ Despite these information duties, the use of standard terms, as such, is voluntary and, in that respect, this clearly falls into the realm of genuine self-regulation.

b) Substantive Limitations of Different Intensities

With respect to the substance of standard contract terms, German and European law prescribe limitations in sets of rules which, to different degrees, take differentiated approaches. At the European level, the Directive on Unfair Contract Terms confines itself to the abstract general clause in Article 3 paragraph 1, which provides that standard contract terms “shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”. Both preconditions, that is, the term of “significant imbalance”, as well as the requirement of good faith, are obviously in need of concretization. Even though the directive at least includes in its annex a non-exhaustive list of terms which may be regarded as unfair, the courts have had difficulties in defining the substantive limitations of standard contract terms and even deciding upon the competence, at the European or national level, to concretize that general clause.⁶¹

In comparison, the rules in German law take a much more differentiated approach. Whereas BGB § 309 contains a “black list” of clauses, which are prohibited per se without any possibility of evaluation, BGB § 308 provides for another list of prohibited clauses; this second list is “gray”, however, since the wording of its prohibitions allows for case-specific evaluations.⁶² Last but not least, BGB § 307 prescribes a more general test of reasonableness for general clauses. Roughly following the wording of the directive, it states that “provisions in standard business terms are ineffective if, contrary

60 Art. 246a, § 1 para. 1, no. 7 EGBGB; for more details, in particular on specific problems of mobile orderings, cf. R. JANAL, Die AGB-Einbeziehung im “M-Commerce”, *Neue Juristische Wochenschrift (NJW)* 2016, 3201.

61 For more details, see, for instance, A. RÖTHEL/F. MÖSLEIN, Concretisation of General Clauses, in: Riesenhuber (ed.), *European Legal Methodology (Cambridge/Antwerp/Portland 2017)* 261, 271–275.

62 Cf. with the directive: M. STÜRNER, *Der Grundsatz der Verhältnismäßigkeit im Schuldvertragsrecht* (Tübingen 2010) 113–117. More recent reform proposals at the European level, namely, the draft Proposal for a Regulation on a Common European Sales Law (Arts. 83–85) and the 2008 draft for the Directive on Consumer Rights (Arts. 32–35), contained much more differentiated sets of rules, similar to German law; see, respectively, MÖSLEIN, *supra* note 51, 265 et seq.; A. MITTWOCH, *Vollharmonisierung und Europäisches Privatrecht* (Berlin 2013) 246.

to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user"; the second paragraph of the same provision then specifies that such unreasonable advantage will be assumed if a clause (1) is not compatible with essential principles of the statutory provision from which it deviates, or if it (2) limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardized.

Beyond doubt, this much differentiated set of provisions limits the freedom of contract, be it by absolute limits or by much more nuanced relative limits.⁶³ Some of these limitations are very case-sensitive, to be finally decided upon by the courts rather than by the legislators who take a rather general approach. Notwithstanding their partly abstract and partly more precise character, however, these legal provisions only define the limitations of standard terms' substance. In any event, they do not affirmatively instruct the rule-making parties to include any particular kind of substance. In other words, the content of standard clauses is not prescribed by any third party. In particular, it is not mandated by the state.

Yet, there are some more specific counterexamples in German law too, namely, with respect to public services. For instance, the standard terms for postal services and transport and railway services are prescribed by statutory instruments, such that any specific deviation from these prescriptions typically requires administrative authorization.⁶⁴ As opposed to standard contract terms in general, these exceptional terms are beyond the tipping point, meaning they qualify as self-regulation induced by the state. In general, however, we can qualify standard terms as genuine self-regulation, including with respect to their substance.

c) Individual and Collective Enforcement

With respect to enforcement, the mechanisms are, in principle, the same as for contractual agreements in general, i.e., standard terms can be enforced by private litigation. The same individual enforcement framework also applies to the question about whether standard terms are valid or not. In other words, the question about whether such terms comply with the aforementioned procedural and substantive rules will regularly be decided in court proceedings between the two private parties, i.e., the consumer and the supplier who have concluded the contract.⁶⁵

63 In a general sense with regard to these different forms of limitations, see MÖSLEIN, *supra* note 5, 187–216.

64 Cf. the provisions in the Postdienstleistungsverordnung (namely, § 1 para. 2), the Personenbeförderungsgesetz (namely § 58 para. 1 no. 3), and the Eisenbahn-Verkehrsordnung (namely, § 5 para. 1); for more details, see MÖSLEIN, *supra* note 5, 206 et seq.

In addition, the law provides for collective mechanisms of enforcement: unfair contract terms can also be challenged in court by consumer or business organizations. For this purpose, the German legislature enacted a specific law, the so-called *Unterlassungsklagegesetz*.⁶⁶ In § 3 of this law, it defines the organizations that are competent to bring actions.⁶⁷ It is important to note that this provision enumerates private organizations, not public authorities. Against the backdrop of our three-dimensional grid, this is a clear indicator that we can qualify standard terms as genuine self-regulation, including with respect to enforcement.

European law, however, takes a somewhat different approach (as do other national laws within the EU). Article 7, paragraph 2, of the Unfair Terms Directive provides that the means of enforcement are to include provisions on collective enforcement. According to this provision, however, the decision as to whether contractual terms are unfair does not necessarily need to be litigated before the courts, but could also be taken by “competent administrative bodies”.⁶⁸ Whenever national legislators opt for this kind of enforcement, it is at least partly driven by public authorities.⁶⁹ In such cases, the qualification of standard terms as genuine self-regulation is much less obvious. Under German law, however, standard terms are indeed genuine self-regulation in all three of the respects as outlined above.

65 For more details, see F. WILMAN, *Private Enforcement of EU Law before National Courts* (Cheltenham/Northampton 2015) 161–171; on the enforcement of consumer rights in individual proceedings in general, see M. FRIES, *Verbraucherrechtsdurchsetzung* (Tübingen 2016) 108–169.

66 For an overview see, for instance, E. SCHAUMBURG, *Die neue Verbandsklage, Der Betrieb* (DB)2002, 732; W.-D. WALKER, *Die Verbandsklage nach dem Unterlassungsklagengesetz (UKlaG)*, in: Dauner-Lieb et al. (eds.), *Das Neue Schuldrecht* (Heidelberg 2002) 206.

67 The definition raises various much-debated issues, cf., for instance, the Judgment of the Bundesgerichtshof of 25 September 2002, BGHZ 152, 121; see also W. LÖWE, *Flickschusterei bei den gesetzlichen Änderungen der AGB-Verbandsklagebefugnis*, *Zeitschrift für Wirtschaftsrecht* (ZIP) 2003, 12.

68 T. WILHELMSSON, *Public Interest Litigation on Unfair Terms*, in: Micklitz/Reich (eds.), *Public Interest Litigation before European Courts* (Baden-Baden 1996) 385, 389–392.

69 See, for instance, on the transposition in the UK empowering the Office of Fair Trading to pursue collective proceedings in relation to unfair terms: J. DEVENNEY / T. PFEIFFER, *Control of Standard Terms and Collective Proceedings*, in: Danneemann/Vogenauer (eds.), *The Common European Sales Law in Context* (Oxford 2013) 687, 698 et seq.; C. WILLET, *From Reindeers to Confident Consumers: UK Consumer Bodies and the Unfair Term Directive*, in: Micklitz/Reich (eds.), *Public Interest Litigation before European Courts* (Baden-Baden 1996) 403.

2. *Codes in Corporate Law*

In the realm of corporate law, one could possibly discuss a whole range of different instruments of self-regulation, such as corporate charters, bylaws or shareholder agreements.⁷⁰ As opposed to exchange contracts, they are all of a multilateral nature. Some even require (or used to require, from a legal-historical perspective)⁷¹ an approval by public authorities, with their substance is partially prescribed, at least when corporate law is mandatory, as is the case for a German stock corporation (*Aktiengesellschaft*) pursuant to the much debated provision in § 23 paragraph 5, of the German *Aktiengesetz*.⁷²

My focus, however, will be on corporate governance codes, a particularly modern regulatory instrument with very recent origins. The history of these codes does not even straddle two decades, prompted as they were by various scandals in the UK, particularly related to the manufacturer Polly Peck and the media proprietor Robert Maxwell.⁷³ These scandals led to the appointment of the Committee on the Financial Aspects of Corporate Governance, led by Sir Adrian Cadbury.⁷⁴ This committee produced the Cadbury Report,

70 See also D. KERSHAW, *Corporate Law and Self-Regulation*, in: Gordon/Ringe (eds.), *Oxford Handbook on Corporate Law and Governance* (Oxford 2017), with a focus on the (UK) takeover code.

71 On the so-called octroi system, requiring such public approval, see, for instance, K. LEHMANN, *Die geschichtliche Entwicklung des Aktienrechts bis zum Code de Commerce* (Berlin 1895) 82–88; more generally, see F. MÖSLEIN, *Grenzen unternehmerischer Leitungsmacht im marktoffenen Verband* (Berlin 2007) 11–16.

72 For recent contributions on this debate, see in particular W. BAYER, *Empfehlen sich besondere Regelungen für börsennotierte und für geschlossene Gesellschaften*, Gutachten E, in: *Verhandlungen des 67. Deutschen Juristentag*, Vol. I (Munich 2008), in particular, 27 et seq.; see also M. HABERSACK, *Staatliche und halbstaatliche Eingriffe in die Unternehmensführung*, Gutachten E, in: *Verhandlungen des 69. Deutschen Juristentag*, Vol. I (Munich 2012) 26 et seq. From an Austrian perspective, see S. KALSS/M. SCHAUER, *Die Reform des Österreichischen Kapitalgesellschaftsrechts*, Gutachten für den 16. Österreichischen Juristentag (Vienna 2006) 54 et seq. From a comparative perspective, this mandatory approach is exceptional; cf. H. FLEISCHER, *Der Einfluß der Societas Europaea auf die Dogmatik des deutschen Gesellschaftsrechts*, *Archiv für die civilistische Praxis (AcP)* 204 (2004) 502, 517; K. J. HOPT, *Gestaltungsfreiheit im Gesellschaftsrecht in Europa – Generalbericht*, in: Lutter/Wiedemann (eds.), *Gestaltungsfreiheit im Gesellschaftsrecht* (Berlin 1998) 123; G. SPINDLER, *De-regulierung des Aktienrechts?*, *Die Aktiengesellschaft (AG)* 1998, 53.

73 For more details, see T. CLARKE, *Cycles of Crisis and Regulation*, *Corporate Governance – An International Review* 12 (2004) 153, 156; cf. P. STILES/B. TAYLOR, *Maxwell – The Failure of Corporate Governance*, *Corporate Governance – An International Review* 1 (1993) 34.

74 See B. CHEFFINS, *The History of Corporate Governance*, in: Wright et al. (eds.), *The Oxford Handbook of Corporate Governance* (Oxford 2013) 46, 57.

which called for contemporary best practice to be embraced by listed companies. This recommendation led not only to the UK Combined Code,⁷⁵ but also, on a supranational basis, to the OECD Principles of Corporate Governance. Originally developed in 1999, these principles were updated in 2004 and 2015 and are now also endorsed by the G20.⁷⁶ In Germany, the Corporate Governance Code was introduced in 2002 and has subsequently been updated several times, with its current version stemming from 2015.⁷⁷

This historical summary already shows that, within a short time span, corporate governance codes are at the core of widespread practice. A study commissioned by the European Commission counted 35 different codes in Europe alone.⁷⁸ What is even more interesting for our present purposes is the regulatory variety of these codes, with different procedures of elaboration, different substantive approaches and different modes of enforcement. Several studies distinguish the different regulatory modes of such codes, ranging from pure (i.e., genuine) self-regulation to pure regulation, including various degrees of statutory and non-statutory support in between.⁷⁹

75 For a survey on related developments, see P. DAVIES, Board Structure in the United Kingdom and Germany: Convergence or Continuing Divergence, *International and Comparative Corporate Law Journal (ICCLJ)* 2 (2000) 435 et seq.; cf. *id.*, Enron and Corporate Law Reforms in the UK and the European Community, in: Hopt et al. (eds.), *Corporate Governance in Context* (Oxford 2005) 163.

76 OECD (ed.), *G20/OECD Principles of Corporate Governance* (Paris 2015); cf. S. WONG, The 'New' G20/OECD Principles of Corporate Governance, *Hawkamah Journal* 2 (2015) 20. For more details, but on earlier versions, see P. HOMMELHOFF, Die OECD-Principles on Corporate Governance – ihre Chancen und Risiken aus dem Blickwinkel der deutschen corporate governance-Bewegung, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2001, 238; U. SCHNEIDER, Die Revision der OECD Principles of Corporate Governance 2004, *Die Aktiengesellschaft (AG)* 2004, 429.

77 Available at <http://www.dcgk.de/de/kodex.html>; for detailed accounts, see T. H. KREMER/G. BACHMANN/M. LUTTER/A. V. WERDER (eds.), *Deutscher Corporate Governance Kodex – Kommentar* (6th ed., Munich 2016); H.-U. WILSING (ed.), *DCGK – Deutscher Corporate Governance Kodex* (Munich 2012); L. FUHRMANN/M. LINNERTZ/A. POHLMANN (eds.), *Deutscher Corporate Governance Kodex* (Frankfurt/Main 2015).

78 WEIL/GOTSHAL/MANGES LLP (eds.), *Comparative Study of Corporate Governance Codes Relevant to the European Union and Its Member States – Final Report* (Brussels 2002), available for download at http://ec.europa.eu/internal_market/company/docs/corpgov/corp-gov-codes-rpt-part1_en.pdf; an index with links to all codes is available at <http://www.ecgi.org/codes> (both last visited on 16 February 2017).

79 A. GALLE, 'Comply or Explain' in Belgium, Germany, Italy, the Netherlands and the UK: Insufficient explanations and an empirical analysis, *Corporate Ownership & Control* 12 (2014) 862; A. PIETRANCOSTA, Enforcement of Corporate Govern-

This regulatory variety makes these codes an excellent research subject with a view to analyzing the boundaries of genuine self-regulation. We revert again to the three-dimensional grid in order to examine the example of the German Corporate Governance Code.

a) Mechanisms of Rule-making and Compliance

With regard to the procedure of rule-making, the German Corporate Governance Code is elaborated – on a continuing basis – by a commission which was established by the German Federal Minister of Justice in September 2001, the so-called Regierungskommission Deutscher Corporate Governance Kodex.⁸⁰ It consists of board representatives of German listed companies, institutional and retail investors, academics, auditors and a trade union federation.⁸¹ In fact, all members are private actors. Moreover, the commission itself can recommend new members, but they are ultimately appointed by the Federal Ministry of Justice and for Consumer Protection.⁸²

In short, the rule-making procedure is initiated by the state, rather than by private actors. In this respect, the code is clearly outside the realm of pure self-regulation (perhaps even outside the realm of self-regulation in general).⁸³ Of course, the commission develops the standards not only through internal discussion, but in dialogue with economists, politicians and the general public. This does not change the fact, however, that the procedure of rule-making is initially induced by the state. Moreover, the

ance Codes – A Legal Perspective, in: Grundmann et al. (eds.), *Festschrift für Klaus J. Hopt*, (Berlin 2010) 1109; H. H. VOOGSGEERD, *Corporate Governance Codes: markt- of rechtsarrangement?* (Deventer 2006); E. WYMEERSCH, *The Enforcement of Corporate Governance Codes*, *Journal of Corporate Law Studies* 6 (2006) 113.

80 See, for instance, W. BAYER, *Grundsatzfragen der Regulierung der aktienrechtlichen Corporate Governance*, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2013, 1, 4; W. SEIDEL, *Der Deutsche Corporate Governance Kodex – eine private oder doch eine staatliche Regelung?*, *Zeitschrift für Wirtschaftsrecht (ZIP)* 2004, 285, 287 et seq.; cf. M. WOLF, *Corporate Governance – Der Import angelsächsischer ‘Self-Regulation’ im Widerstreit zum deutschen Parlamentsvorbehalt*, *Zeitschrift für Rechtspolitik* 2002, 59.

81 For the list of its current members, see <http://www.dcgk.de/de/kommission/mitglieder.html>.

82 Cf. its rules of procedure: *Geschäftsordnung der Regierungskommission Deutscher Corporate Governance Kodex*, Sub. 1.2, available at http://www.dcgk.de/files/dcgk/usercontent/de/download/geschaeftsordnung/2014-04-14_Geschaeftsordnung_RegKom.pdf.

83 In fact, some qualify the code as state-made law, others as “private rule-making in the shadow of law”. See, on the one hand, *supra* note 80; on the other hand, T. MÖLLERS/B. FEKONIA, *Private Rechtsetzung im Schatten des Gesetzes*, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2012, 777, 803 et seq.

provisions of the code become valid on publication in the official section of the Federal Gazette: they are published as if they were laws.⁸⁴

b) Limitations and the Shadow of the Legislature

With respect to their substance, different sets of rules can be distinguished within the Corporate Governance Code.⁸⁵ Some provisions simply describe the law, since they replicate provisions of German corporate law that refer to the management and supervision of listed companies. One may wonder whether this is a pointless exercise, but the idea here is that replicating these provisions in the Corporate Governance Code makes them easier to access, particularly by foreign investors.⁸⁶ Other provisions do not replicate the law; rather, they aim to represent internationally and nationally acknowledged governance standards.⁸⁷ They substantiate corporate law standards, which are often rather abstract and general, while providing more specific guidance. Based on the regulatory intensity of the rules, one can again distinguish between recommendations and mere suggestions, but it is only with respect to enforcement that this second distinction gains in significance (see, *infra*, Subsection C).

In general, we can, at any rate, observe that some provisions of the code simply replicate codified law and therefore strictly follow formal instructions of the state, whereas others are produced with a wider margin of discretion, reflecting private market practices. Yet, if we take a broader look at the politics of the Corporate Governance Code,⁸⁸ there are numerous examples of a more subtle, informal influence of the legislature. At various times, the legislature either made clear that legal provisions would be enacted if rules were not incorporated into the code, or indeed enacted legal provisions after it had become clear that the respective code recommendations were not sufficiently followed. As a consequence, even in the second, seemingly genuine, self-regulated set of rules, the “shadow of the legisla-

84 See *Geschäftsordnung*, *supra* note 82, sub. 3.4.

85 See, for instance, P. ULMER, *Der Deutsche Corporate Governance Kodex – ein neues Regulierungsinstrument für börsennotierte Aktiengesellschaften*, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)* 166 (2002) 150, 153.

86 On the importance of corporate governance reports for investors, cf. S. WEBER / P. VELTE, *Die Bedeutung von Corporate Governance Reports aus Investorensicht*, *Deutsches Steuerrecht* 2011, 1141.

87 See, for instance, C. SEIBT, *Deutscher Corporate Governance Kodex: Antworten auf Zweifelsfragen der Praxis*, *Die Aktiengesellschaft (AG)* 2003, 465, 470.

88 More generally and from a transnational perspective on this topic, see H. OVERBEEK/B. V. APeldoorn/A. Nölke (eds.), *The Transnational Politics of Corporate Governance Regulation* (London/New York 2007).

ture”⁸⁹ plays an important role, albeit in a subtle and informal manner. Cooling-off periods between management and supervisory boards, disclosure of remuneration and the gender quota are prominent examples of that shadow’s reach.⁹⁰ Due to the informal character of this legislative impact, it is difficult to assess the German Corporate Governance Code in this substantive respect. In any event, we can note that, with regard to its substance, the code is definitely not purely genuine self-regulation but seems to exceed the tipping point.

c) Enforcement by Reputation, Voidability and (Perhaps) Liability

With respect to enforcement, the most prominent mechanism originates from the comply-or-explain rule, which is laid down in § 161 of the German Stock Corporations Act (*Aktiengesetz*, AktG).⁹¹ The provision obliges listed companies to make a declaration of conformity: Deviations from the code’s recommendations, but not from its suggestions, have to be explained and disclosed in the annual declaration of conformity.⁹² While recommendations and suggestions are neither mandatory nor even enforceable in a strictly legal sense, the comply-or-explain principle aims at establishing some kind of social enforcement mechanism, which works by reputation. The idea here is that companies which comply with the code enjoy a better reputation with investors and that this reputation will ultimately translate into higher stock market performance and into better economic success.⁹³

In addition to this reputational mechanism, however, two different legal forms of enforcement have been established or are at least discussed. On

89 See also M. MOORE, *Corporate Governance in the Shadow of the State* (Oxford 2013), cf. reference in note 83 above.

90 On the varied regulation of these issues in Germany, cf. M. ROTH, *Ehemalige Geschäftsleiter im Aufsichts- und Verwaltungsrat*, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* (ZHR) 1178 (2014) 638; S. AUGSBERG, *Vom Kodex zur Kodifizierung – Anmerkungen zum Gesetz über die Offenlegung der Vorstandsvergütungen*, *Zeitschrift für Gesetzgebung* 2005, 315; M.-PH. WELLER/N. BENZ, *Frauenförderung als Leitungsaufgabe*, *Die Aktiengesellschaft (AG)* 2015, 467, 469.

91 See M. LUTTER, *Die Erklärung zum Corporate Governance Kodex gemäß § 161 AktG*, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* (ZHR) 166 (2002) 523, 525 et seq.; cf. M. SCHÜPPEN, *To Comply or Not to Comply – That’s the Question!*, *Zeitschrift für Wirtschaftsrecht* (ZIP) 2002, 1269; and, more generally, P. LEYENS, *Comply or Explain im Europäischen Privatrecht: Erfahrungen im Europäischen Gesellschaftsrecht und Entwicklungschancen des Regelungsansatzes*, *Zeitschrift für Europäisches Privatrecht* (ZEuP) 2016, 388.

92 Cf. LUTTER, *supra* note 91, 530 et seq.

93 The effectiveness of this mechanism depends, however, on a broad range of circumstances; see, for instance, O. EHRHARD/E. NOWAK, *Die Durchsetzung von Corpo-*

the one hand, decisions by a general meeting which were based on incorrect declarations of conformity have been considered to be voidable by the German Federal Court of Justice.⁹⁴ Whether the management can be held liable for such inaccurate declarations is, on the other hand, a more hotly debated issue and has not yet been decided by the highest civil court.⁹⁵ In any event, both mechanisms are again forms of private, not public, enforcement. Incorrect declarations may also give rise to some criminal or administrative sanctions, but only under very specific circumstances.⁹⁶ In general, we can sum up by stating that the enforcement of the Corporate Governance Code is predominantly private, and even only partially of a legal nature. In this context of enforcement, the code is therefore closest to genuine self-regulation. If all three dimensions are taken together, however, the Corporate Governance Code cannot persuasively be qualified as genuine self-regulation, but it is at least a borderline case.

3. *(Harmonized) Standards in European Law*

In the third and final place, let us briefly turn to standards and analyze them from the perspective of European law. There are indeed innumerable examples of standards in many different fields, ranging from technical to profes-

rate-Governance-Regeln, Die Aktiengesellschaft (AG) 2002, 336. On the interplay between rules and companies' reputation, see L. KLÖHN/K. SCHMOLKE, Unternehmensreputation (Corporate Reputation), *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2015, 689.

- 94 See, in particular, the Judgment of the Bundesgerichtshof of 21 September 2009, BGHZ 182, 272; for more details, see P. MÜLBERT/A. WILHELM, Grundfragen des deutschen Corporate Governance Kodex und der Entsprechenserklärung nach § 161 AktG, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)* 176 (2012) 286, 291 et seq.
- 95 Even though the court ascertained an infringement of the law, the question was expressively left open in the Judgment of the Bundesgerichtshof of 16 February 2009, BGHZ 180, 9, para. 19 ("ohne dass der Senat generell zu den Folgen eines Verstoßes gegen § 161 AktG Stellung nehmen müsste"); see also G. BACHMANN, Die Erklärung zur Unternehmensführung (Corporate Governance Statement), *Zeitschrift für Wirtschaftsrecht (ZIP)* 2010, 1517, 1526; *id.*, Der Deutsche Corporate Governance Kodex – Rechtswirkungen und Haftungsrisiken, Wertpapier-Mitteilungen 2002, 2137–2138 et seq.; MÜLBERT/WILHELM, *supra* note 94, 299 et seq. T. TRÖGER, Aktionärsklage bei nicht-publizierter Kodexabweichung, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)* 175 (2011) 746, 767 et seq.
- 96 For more details, see P. LEYENS/F. SCHMIDT, Corporate Governance durch Aktien-, Bankaufsichts- und Versicherungsaufsichtsrecht, *Die Aktiengesellschaft (AG)* 2013, 533; H.-C. KESSLER, Strafrechtliche Aspekte von Corporate Governance (Berlin 2012).

sional standards, for instance, for lawyers.⁹⁷ This “world of standards” is remarkably diverse, including from a regulatory perspective: There are all different sorts of standard setters, limited in substance to various degrees and by different modes of enforcement.⁹⁸ In this section, however, we will not focus on the elaboration and application of these standards themselves, but rather change the perspective in order to see how they are scrutinized. We will focus on their standard of review as prescribed by European law. This perspective will provide insights not only into how to draw the line between genuine self-regulation and self-regulation induced by the state, but, more significantly, on why it is important and indeed crucial to draw that line. In fact, recent jurisprudence of the European Court of Justice (ECJ) gives important guidance in this respect.

a) Associations of Undertakings vs. Mechanisms of Delegation

With respect to their procedural setting, these judgments concern self-regulation of two different sorts. On the one hand, they relate to standards of national professional bodies, either acting autonomously or with the approval of a national public authority, for example regulations by the bar on the exercise of the legal profession,⁹⁹ or compulsory tariffs for fees of bar members as approved by the national ministry of justice.¹⁰⁰ On the other hand, the ECJ deals with “harmonized” standards, and more precisely with standards that are again set by private bodies, but based on some kind of European mandate.¹⁰¹

In fact, this latter approach is very common under the so-called New Approach strategy, adopted back in 1985.¹⁰² Under this strategy, private

97 For more details, see, for instance, B. VAN LEEUWEN, *European Standardisation of Services and Its Impact on European Law* (London 2017); H. SCHEPEL, *The Constitution of Private Governance* (Oxford/Portland 2005) 101 et seq.; see also P. DELIMATISIS, *The Law, Economics and Politics of International Standardisation* (Cambridge 2015).

98 For an extensive overview, see N. BRUNSSON/B. JACOBSON, *A World of Standards* (Oxford 2002); see also T. MÖLLERS, *Geltung und Faktizität von Standards* (Baden-Baden 2009).

99 ECJ case C-309/99 *Wouters*, ECR 2002, I-01577 (ECLI:EU:C:2002:98).

100 ECJ case C-35/99 *Arduino*, ECR 2002-I-01529 (ECLI:EU:C:2002:97).

101 ECJ case C-613/14 *James Elliott*, not yet published (ECLI:EU:C:2016:821); cf. ECJ case C-171/11 *Fra.Bo*, ECLI:EU:C:2012:453 (a case where the national legislature considered the products certified by the private body to be compliant with national law).

102 For more details, see, for instance, J. PELKMANS, *The New Approach to Technical Harmonization and Standardization*, *Journal of Common Market Studies* 25 (1987) 249; C. JOERGES, *The New Approach to Technical Harmonization and the Interests of Consumers*, in: Bieber et al. (eds.), 1992: *One European Market?* (Baden-Baden 1988) 157;

bodies termed European Standard Bodies exercise rule-making powers: On the basis of a mandate from the European Commission, they draw up and adopt harmonized technical standards, which set out guidelines on how to comply with key requirements laid down by European directives. The Commission subsequently publishes the reference to the respective harmonized standard in the Official Journal. As a consequence, this standard acquires a presumption of conformity, such that compliance with the standard triggers a presumption of compliance with the directive itself.¹⁰³

b) Limitations in EU Primary Law: Fundamental Freedoms vs. Rules on Competition

In terms of substance, such standards, even if not harmonized, raise two questions about European law, namely, (1) whether the competition rules of the Treaty on the Functioning of the European Union apply or, alternatively (2) whether its rules on the fundamental freedoms apply. This set of questions is crucially relevant to our topic because the former set of rules is aimed at private actors, whereas the latter set of rules is aimed at Member States. As a consequence, these questions correspond to the dividing line between different forms of self-regulation, while the classification of the ECJ effectively responds to the distinction between genuine self-regulation and self-regulation induced by the state. For instance, rules of private professional bodies are scrutinized under competition rules, but only as long as their validity does not depend on the approval of a public body.¹⁰⁴ Conversely, fundamental freedoms apply to private standards, provided they are backed by the legislature, for instance, by references in EU directives.¹⁰⁵

c) Enforcement and Uniform Interpretation

The recent *Elliott* judgment of the ECJ¹⁰⁶ raised a third question, which concerns the enforceability, or at least the application and interpretation, of

K. SCHREIBER, The New Approach to Technical Harmonization and Standards, in: Hurwitz/Lequesne (eds.), *The State of the European Community* (Harlow 1991) 97.

¹⁰³ Cf. SCHEPEL, *supra* note 97, 235.

¹⁰⁴ For more details, see H. SCHWEITZER, Standardisierung als Mittel zur Förderung und Beschränkung des Handels und des Wettbewerbs, *Europäische Zeitschrift für Wirtschaftsrecht* (ZIP) 2012, 765; cf. H. LÖRCHER, Anwaltliches Berufsrecht und europäisches Wettbewerbsrecht, *Neue Juristische Wochenschrift* (NJW) 2002, 1092.

¹⁰⁵ For more extensive information, see A. CRESPO VAN DE KOOJI, The Private Effect of the Free Movement of Goods, *Legal Issues of Economic Integration* 40 (2013) 363; cf. R. VAN GESTEL/H.-W. MICKLITZ, European Integration through Standardization, *Common Market Law Review* 50 (2013) 145.

¹⁰⁶ *Supra* note 101.

private standards. The question was about whether such standards require uniform interpretation across Europe and whether the ECJ is competent under Article 267 of the Treaty on the Functioning of the European Union to decide on that interpretation. In turn, the answer depends on whether the standard qualifies as a provision of European law, and more precisely whether it ranks among acts “which, while indeed adopted by bodies which cannot be described as ‘institutions, bodies, offices or agencies of the Union’, are by their nature measures implementing or applying an act of EU law”.¹⁰⁷ Again, the ECJ made clear that this may well be the case, even though the standard is private, but only if it is induced by a European institution: “While the development of such a harmonised standard is indeed entrusted to an organisation governed by private law, it is nevertheless a necessary implementation measure which is strictly governed by the essential requirements defined by that directive, initiated, managed and monitored by the Commission, and its legal effects are subject to prior publication by the Commission of its references in the ‘C’ series of the Official Journal of the European Union.”¹⁰⁸ In other words, the ECJ precisely draws the line between genuine self-regulation and self-regulation induced by the state (i.e., the EU), while providing specific criteria that, with respect to procedure, substance and enforceability, come very close to the set that we have described and discussed throughout this paper.

IV. CONCLUSION

To conclude very briefly, this contribution has dealt with the difficulties of drawing the line between genuine self-regulation and self-regulation induced by the state. It has proposed a three-dimensional grid of criteria, referring to the procedure, the substance and the enforcement of self-regulation, and it has applied these criteria to standard terms, as well as to the German Corporate Governance Code. Whereas the former turns out to be genuine self-regulation under this grid, the latter proves to be more ambivalent in character. A brief look at the standards in European law has revealed the legal importance of drawing this line, which is crucial for both the application of competition rules or fundamental freedoms, and also for the uniform interpretation of its provisions by the ECJ.

107 ECJ case C-613/14 *James Elliott*, para. 34.

108 See again ECJ case C-613/14 *James Elliott*, para. 43.