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Self-regulation in Private Law in Japan and Germany

Edited by
Harald Baum / Moritz Bälz / Marc Dernauer

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Self-regulation Induced by the State in Japan

Souichirou Kozuka[*]

I. Introduction: the Varieties of State Engagement in Self-regulation

This paper aims at giving an overview of what self-regulation induced by the state *(die staatlich gesteuerte Selbstregulierung)* looks like in Japan. It does not aspire to produce an exhaustive list of such self-regulation. Nor is it a theoretical analysis in the strict sense: it is more of a descriptive nature. Legal issues are noted where relevant, but in-depth analysis is left for further study. Given that the study of the self-regulation has only recently started to attract the attention of legal academics,[1] a cursory sketch of existing self-regulations may be useful as such.

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* Prof. Dr. Souichirou Kozuka, Professor of Law, Faculty of Law, Gakushūin University, Tōkyō.

1 P. Buck-Heeb/A. Dieckmann, Selbstregulierung im Privatrecht (Tübingen 2010) is a comprehensive study of self-regulation that is a standard reference work. The concepts of "genuine self-regulation" and "self-regulation induced by the state" derive from this book (at pp. 33–41). The author of this present paper once advanced an analytical framework in a paper titled "Soft Law, Private Authority and Social Norms: When and how the non-state law replaces the private law of the State?"

It is anticipated that self-regulation induced by the state is not uniform in all respects. First, there is of course variety in the subjects of regulation. It will be meaningful to identify those subject matters for which self-regulation induced by the state is commonly found and those for which such self-regulation is exceptional. Though, as mentioned, this paper does not exhaustively cover the subject-matters of self-regulation, the examination might still offer initial insight into this point.

Variety is also found with regards to how the state is engaged in self-regulation. As opposed to genuine self-regulation *(echte Selbstregulierung),* self-regulation induced by the state, by definition, assumes the engagement of the state. However, "engagement" is a broad concept that encompasses a large variety in extent and formality. At one extreme, the state foresees self-regulation with an explicit provision in a statute or a rule of another type. In this case, self-regulation is incorporated in the statutory framework.[2] As less formal engagement, the state endorses self-regulation that entails the interpretation or implementation of the relevant statutory provision. If such self-regulation has been envisaged already in the process of introducing the formal regulation, it forms part of the package aiming to achieve a compromise among the stakeholders. In still another case, the state encourages self-regulation alongside the statutory framework. The state's aim is to make use of self-regulation in serving a policy goal as a scheme complementary to the regulation through statutes. Finally, the state may coordinate self-regulation in the absence of, or instead of, statutory regulation. Depending on the subject, it may be found more convenient to achieve some public policy goals through self-regulation and not through statutory regulation. Or it is not the subject but the context of the regulation, regarding timing for instance, that calls for informal regulation through self-regulation.

Besides the varieties in the modality of the state's engagement, variety is also found in the state's motivation or intention in inducing self-regulation. In this respect, the relationship with the goal of statutory regulation becomes the issue, leaving us to ask whether the intention behind the self-regulation induced by the state is to achieve the same goal as that of the statute, to enhance the latter, or to introduce another policy goal.

The following sections are structured according to the variety of state-induced self-regulation in the second respect identified above, namely the manner of the state's engagement in self-regulation. An examination of the other two aspects, the subject of self-regulation and the motivation of the

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(mimeo) that was presented at the 25th World Congress of IVR, a work referring to the sociological theory of Talcott Parsons.

2 BUCK-HEEB/DIECKMANN, *supra* note 1, at p. 37, also distinguishes between self-regulation prescribed by statute and that without such statutory delegation.

state, is conducted simultaneously through the review of the various instances of self-regulation and will be summarised in the last chapter.

II. Self-regulation Foreseen by the State in a Statute

1. Referral to Accounting Standards

One of the best known statutory rules that foresees self-regulation is that on the principles of corporate accounting. Introduced in 1974 as Article 32 (2) of the then Commercial Code, the rule is now embodied in Articles 431 (for joint stock companies) and 614 (for other types of companies) of the Companies Act as well as in Article 19 (1) of the Commercial Code (for individual merchants). The legislation provides that accounting "should comply" *(shitagau mono to suru)* with accounting practices generally recognised as fair and adequate. Furthermore, an equivalent provision has existed for non-profit corporations since 2006.[3]

The original purpose of the provision back in 1974 was to reconcile the Commercial Code's regulations on corporate accounting with actual accounting practices. Until recently, the Commercial Code, pursuant to the German law tradition, included several provisions on the evaluation of assets in the section on corporate accounting. The Ministry of Justice, as the agency in charge of corporate law, took the view that these provisions were the sole legal rules governing corporate accounting and denied the relevance of accounting standards in any legal sense. Accounting standards, on the other hand, had served as reference point for audits by certified public accountants under the then Securities and Exchanges Act (now Financial Products and Exchanges Act) since 1949. The latter Act was modelled after the American regulation of the capital market and gave rise to the overlap of audit by statutory auditors and audit by public certified accountants for listed companies. In this sense, the issue was how to accommodate the Anglo-American system transplanted after the Second World War with the traditional civil law system.

Finding a solution for the conflict became urgent when the reform of the audit system was put on the legislative agenda.[4] Being faced by a series of window dressing scandals in the 1960s, it was proposed that audit by public certified accountants, which had been in practice for two decades under the Securities and Exchanges Act, be introduced into corporate law (codified in the Commercial Code at that time). In order for this proposal to be realised,

3 Art. 119, Act on General Incorporated Associations and General Incorporated Foundations (Law No. 48 of 2006).

4 For details on the corporate law reform of 1974, see M. D. H. Smith, The 1974 Revision of the Commercial Code and Related Legislation, Law in Japan 7 (1974) 113.

corporate law needed to accommodate accounting standards. However, accepting accounting standards as such was considered inappropriate as a legal rule because of the non-normative nature of accounting standards. As a result, the term of accounting "practices" was chosen instead of accounting "standards"; additionally, the term was qualified by the requirement that the practices be "generally accepted as fair and appropriate." With all these qualifications, the provision basically adopts a self-regulation of corporate accounting through application of industry accounting standards.

While the text of the provision has remained the same since then, a significant reform of the law on corporate accounting was made when the Companies Act was enacted in 2005. Since the early 2000s, the internationalisation of accounting had advanced and the International Accounting Standards Board (IASB) was formed. To be represented on the board, an expert must be nominated by a non-governmental standard-setting body. The Corporate Accounting Council of the Ministry of Finance, which had developed the Corporate Accounting Principles and other accounting standards in Japan, did not qualify under this requirement. In order to address this issue, in 2001 a non-profit body titled the Accounting Standards Board of Japan was established, which has since that time published accounting standards. In response to such a privatisation of the development of accounting standards, the Companies Act no longer includes specific regulations on corporate accounting. Demand for compliance with the "accounting practices generally accepted as fair and appropriate" has now become the sole provision regulating corporate accounting in the Companies Act. The move to self-regulation has thus become complete.

2. Self-commitment by Retailors of Financial Products

When the government incorporates self-regulation by means of a statute, it is not always delegating to private actors the self-regulatory creation of rules. Rather, sometimes a statute invites private parties to make a self-commitment.

Such a mechanism is found in the Act on Sales of Financial Products, enacted in 2000.[5] Inspired by developments in UK regulation that resulted in the Financial Services and Market Act of 2000, the Act aims to provide a comprehensive consumer protection framework for the trade of financial products. The Act on Sales of Financial Products provides for the general

5 Law No. 101 of 2000. See C. SCHULTE, Das Gesetz über den Verkauf von Finanzprodukten, ZJapanR/J.Japan.L. 19 (2005) 123. For the broader context of consumer law developments surrounding this law, see T. MATSUMOTO, Privatization of Consumer Law: Current Developments and Features of Consumer Law at the Turn of the Century, Hitotsubashi Journal of Law and Politics 30 (2002) 1.

duty of financial products retailors to ensure the adequacy of their manner of marketing financial products.[6] It requires each financial products retailor to promulgate its marketing policy and publish it (with some exceptions).[7] The marketing policy must include the policy on suitability for the customer as well as the policy on the manner and hours of marketing. The latter requirement implicitly demands the restraint of unsolicited marketing.[8] A failure to promulgate or publish the marketing policy is subject to administrative penalty (of 500.000 JPY or less). The marketing policy required under this Act may be seen as a manner of self-regulation (though not through an organisation but by individual retailors).

Importantly, the requirement of the marketing policy is not the only regulation under the Act on Sales of Financial Products, and it is not even the primary regulation. The operative provision of the Act imposes on retailors of financial products the duty to provide explanations on "important points" to the customer in advance of concluding sales. "Important points", defined in an elaborate manner, are basically any risks that could result in the customer incurring losses (i.e. obtain a return smaller than the invested amount) and factors that could cause a risk to materialise.[9] The retailor is also prohibited from offering an assertive judgment about what is in fact uncertain as well as from making a statement that erroneously leads the customer to be convinced of the certainty of something that is in fact uncertain.[10] A retailor in breach of these obligations is liable for compensation of the damages.[11]

Even in the absence of these rules on statutory tort, the courts have developed case law on the "duty to explain in advance of conclusion of a contract," which is a case law doctrine similar to, but not exactly the same as, *culpa in contrahendo*.[12] The doctrine awards damages as remedies to parties that are unduly exposed to transactional risks as a result of their not receiving sufficient information in advance.[13] According to the Supreme Court, it is a kind of tort liability.[14]

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6 Art. 7 of the Act on Sales of Financial Products.

7 Art. 8 of the Act on Sales of Financial Products.

8 N. OKADA / Y. TAKAHASHI, *Chikujō kaisetsu kin'yu shōhin hanbai-hō* [Commentary on Financial Instruments Sales Law], (Tōkyō 2001) 137.

9 Art. 3 of the Act on Sales of Financial Products.

10 Art. 4 of the Act on Sales of Financial Products.

11 Art. 5 of the Act on Sales of Financial Products.

12 K. YAMAMOTO, Vertragsrecht, in: Baum / Bälz (eds.), Handbuch Japanisches Handels- und Wirtschaftsrecht (Cologne 2011) 461, Rn. 32–53. Briefly in English, see M. C. CHINO et al, Contract and Tort, in: McAlinn (ed.), Japanese Business Law (Austin et al. 2007) 173, at 177–178; H. ODA, Japanese Law (3rd ed., Oxford 2009) 154.

13 See, for example, Supreme Court, 28 October 1996, Kin'yu Hōmu Jijō No. 1469, p. 49 (variable life insurance).

The case law and the statutory obligations under the Act on Sales of Financial Products provide customers with a minimum level of protection. Yet in view of its existence, the self-regulation flowing from the promulgation of a marketing policy constitutes an additional layer of protection for customers. The extent of that additional layer is left to each retailor: the mechanism of self-commitment anticipates that market discipline will operate effectively so as to favour those who commit to greater protection. The legislature may have considered that mandatory obligations imposed through statutory regulation tends to be less rigorous on account of lobbying by industry members. Consequently, the legislature may have believed that self-regulation would lead to better protection of customers in the long run.

III. Self-regulation Endorsed by the State as Regards the Interpretation of a Statute

1. The Determination of Gross Negligence in Allocating Risk Associated with the Use of Forged or Stolen Bank Cards

Some self-regulation lacks an explicit basis in a statute but was foreseen by the legislature when a related statute was enacted. The agreement among banks on the meaning of "gross negligence" under the Act on Forged and Stolen Bank Cards (hereinafter "Bank Cards Act")[15] is an example of that kind of self-regulation.

The Bank Cards Act was enacted in 2005 in the wake of public concern arising from many reports about stolen bank cards and stolen personal identification numbers (PINs). Before the Bank Cards Act, the Civil Code applied when a bank card was stolen or forged and the wrongdoer successfully withdrew cash from an automatic teller machine (ATMs). Art. 478 of the Civil Code releases the bank from the duty to repay the account holder if the bank was not negligent in disbursing money to an unauthorised holder of the stolen card.[16] Needless to say, the release of the bank meant that the risk of such a criminal incident was placed on the cardholder whose deposits had been withdrawn from the bank. The Supreme Court held that negligence is established in the case of a withdrawal from an ATM when the

14 Supreme Court 22 April 2011, Minshū 65, No. 3, p. 1405.

15 Law No. 94 of 2005.

16 Art. 478 of the Civil Code: "Any performance made vis-a-vis a holder of quasi-possession of the claim shall remain effective to the extent the person who performed such obligation acted without knowledge, and was free from any negligence." For the meaning of this article, see Oda, *supra* note 12, 148–149; Yamamoto, *supra* note 12, marg. no. 161.

system lacks a sufficient level of security.[17] While this case law warns the banks to employ a sufficient level of security for an automated system, consumers were frustrated by the fact that the risk from a criminal act could fall upon them even if they were in no way at fault.

The Bank Cards Act has modified the rules in the Civil Code and has shifted part of the risk to banks. To be more precise, the Act distinguishes a case where a forged card is used at an ATM from a case where the bank card is stolen and used at an ATM. In the case of a forged card, the Bank Cards Act excludes application of the Civil Code.[18] Instead, it provides that the bank is released from the duty to repay the account holder only if the bank is not negligent *and* the account holder is not grossly negligent or if the forged card is used intentionally with the consent of the account holder.[19] In the case of a stolen card, the Civil Code still applies, but the Bank Cards Act provides that a victimised account holder is entitled to have wrongly withdrawn bank deposits refunded under certain conditions (i.e. procedural requirements such as advising the bank of the theft in a timely manner). Refund is made in full when the account holder has acted without negligence and at three quarters of the lost amount when the account holder has been negligent, but not grossly negligent.

It is obvious that, in both cases, the outcome depends on whether there is a finding that the account holder acted with gross negligence. The Bank Cards Act itself does not provide any guidance on this issue. However, in October 2005, two months after the enactment of the Act and four months in advance of its entry into force, the Japan Bankers' Association published an agreement as to when a account holder has acted negligently and when he or she has acted in a grossly negligent manner.[20] According to the agreement, the account holder is found to be grossly negligent in the following cases:

– when the account holder discloses his or her PIN to another person;
– when the account holder writes down his or her PIN on the bank card;
– when the account holder hands his or her bank card to another person; or
– in a situation equivalent to any of these.

The agreement further provides that the account holder is found to be negligent (but not grossly negligent) in the following cases:

17 Supreme Court 8 Apr. 2003, Minshū Vol. 57, No. 4, p. 337.
18 Art. 3 of the Bank Cards Act.
19 Art. 4 of the Bank Cards Act.
20 The Japan Bankers' Association, *Gizō, tōnan cash card ni kansuru yokin-sha hogo no mōshiawase* [Agreement on the Protection of Account holders with regards to Forged and Stolen Bank Cards], dated 6 October 2005, *https://www.zenginkyo.or.jp/fileadmin/res/news/news171006_2.pdf* (in Japanese).

– when the account holder, despite repeated suggestions by the bank, fails to change a PIN that can easily be guessed (such as one comprising his or her birthday) and carries together with the bank card a document from which the PIN can be guessed (such as a driver's license);
– when the account holder puts down his or her PIN on a note and carries it together with the bank card;
– when the account holder, despite repeated suggestions by the bank, fails to change a PIN that can easily be guessed (such as his or her birthday) or when the account holder uses the same PIN for another purpose (such as for a facility locker) and creates a situation under which the bank card can easily be stolen (such as displaying it in a conspicuous manner); or
– in a situation equivalent to any of these.

It might appear that the banks spontaneously discussed how the new Bank Cards Act will be applied to individual cases and that the government had no role to play in the production of this agreement. In fact, however, the legislative history shows that the agreement had from the beginning been incorporated in the package responding to the call for new legislation. Although the Bank Cards Act was drafted as a Diet member's Bill on the political initiative of the Liberal Democratic Party, the Financial Services Agency, which is in charge of supervising banks, coordinated a council-like Study Group to consider legislative options. The Interim Report of the Study Group published in March 2005 suggests that risks from the unauthorised use of a bank card should be borne by the bank, except when the account holder is grossly negligent.[21] The same Report mentions that if such a solution is enacted into law, the finding of (gross) negligence would be based on the facts of individual case, which could result in a divergence of outcomes depending on how accommodating the relevant bank might be. The Report further suggests that some "guidelines" be required to prevent such divergence from taking place. The agreement on negligence and gross negligence by the Japan Bankers' Association is apparently a response to this suggestion in the Study Group's Interim Report. It is, in this sense, self-regulation endorsed by the state.

Functionally, the agreement works as a self-commitment by the banks not to raise the negligence or gross negligence of the account holder as a defence in a dispute unless one of the listed situations is found to exist. The agreement is not, of course, binding on the court, but the court has no chance to find the account holder (grossly) negligent if the bank does not

21 The Interim Report of the Study Group on the Forged Bank Card Problem, dated 31 March 2005, *http://www.fsa.go.jp/news/newsj/16/ginkou/f-20050331-3.pdf* (in Japanese).

raise the issue in the first place. Furthermore, the court may find the agreement to be self-regulation binding on the banks and give it a normative effect. One court in fact did so and referred to the agreement in holding that a account holder who had continued to use her birthday as her PIN was not grossly negligent if the bank merely distributed flyers advising customers (account holders) not to use their birthday as a PIN but did not directly advise the account holder to change her PIN; the court found the actions taken by the bank to be insufficient to establish "(repeated) suggestions by the bank" under the agreement.[22]

2. The Exemption of Internet Providers from Liability

The self-regulatory power to interpret statutes sometimes involves an institutional mechanism and not a simple agreement among industry members. An example is found with regard to the liability of internet providers.

As is well known, internet providers can face conflicting demands and run the risk of being sued for uploaded contents regardless of the action they take. On the one hand, someone whose rights have allegedly been infringed may claim that the internet provider must remove (or restrict access to) the infringing content and should be liable for damages if it fails to do so. However, once the internet provider does remove the claimed content, the individual that uploaded it may complain and seek to hold the provider liable for unduly removing the content. Such a difficulty often arises with regards to allegations of copyright and trademark infringement as well as to claims of defamation.

Against this background, the United States amended the Copyright Act so as to introduce the system of "notice and takedown" for alleged copyright infringement cases. Under the relevant provisions of the Digital Millennium Copyright Act (DMCA), the provider is, on the one hand, not liable if it removes or restricts access to content upon notice of a claim by the owner of the copyright under certain conditions.[23] On the other hand, the provider owes no liability for removing content for which infringement is claimed if it (i) promptly notifies the uploader of the content (the "subscriber" to the provider's service), (ii) promptly notifies the copyright holder in the event the subscriber submits a counter notification objecting to the removal of the content, and (iii) replaces the removed content unless the owner of the copyright raises suit against the uploader.[24] The Japanese providers lobbied for a

22 Ōsaka District Court, 17 April 2008, Hanrei Jihō 2006 (2008) 87.
23 17 USC § 512 (c).
24 17 USC § 512 (g).

similar system be introduced in Japan, and the government responded by enacting the Act to Limit Liability of Internet Providers in 2001.[25]

However, the Japanese Act was not exactly the same as the DMCA in the US. Unlike the DMCA, the Act to Limit Liability of Internet Providers failed to provide a "safe harbour" for internet providers. As regards liability for failing to remove content, it provides that an internet provider will not be liable to a person whose rights were allegedly infringed unless it knew or had good reason to become aware that the content infringed that person's right.[26] Thus, the application (or, more precisely, non-application) of the exemption depends on the ascertainment of a "good reason," a determination which will likely depend on the facts of each individual case. Similarly, as regards liability for deleting content, the Act provides that an internet provider will not be liable if it had a good reason to believe that the content infringed another person's rights or if the person who uploaded the content does not object within seven days of the notice of request to remove the content.[27] Despite the apparent similarity to the "notice and take down" system, this provision is silent about what the outcome shall be if the uploader of the content *does* object within seven days. As a result, the exemption is similarly dependent on the finding of a "good reason." Unsurprisingly, internet providers were not entirely satisfied with the Act.

Accordingly, the Ministry of Internal Affairs and Communications (MIC) commenced the second round of consultations to promulgate Guidelines for the Act's implementation. The Guidelines adopted as a result provide for procedures by which a party suffering an alleged infringement can request the internet provider to remove the infringing content. There are three Guidelines, namely those on Defamation and Privacy, on Copyright Infringement and on Trademark Infringement.[28] The procedures under the latter two provide that the Reliability Certification Entity (REC) is to examine the request and certify the infringement if the alleged copyright or trademark is confirmed. As of 2017, there are twelve RECs for copyright and one REC for trademark. There is no equivalent mechanism under the Guidelines on Defamation.

Certification by the REC releases the internet provider from the risk of erroneously judging the disputed right. As long as the internet provider

25 Law No. 137 of 2001. See S. KOZUKA, The Role of Japan in World-Wide Copyright Protection, in: Gotzen (ed.), The Future of Intellectual Property in the Global Market of the Information Society (Brussels 2003) 23, at 32.

26 Art. 3 (1) of the Act to Limit the Liability of Internet Providers.

27 Art. 3 (2) of the Act to Limit the Liability of Internet Providers.

28 The Guidelines are available on the website of the Telecom Services Association. The Japanese versions are at *http://www.telesa.or.jp/consortium/provider* and the English versions are at *http://www.telesa.or.jp/consortium/provider/pconsortiumproviderindex_e-html.*

relies on the certification by the REC and removes the content, it can expect that the court, in the event the uploader of the removed content brings suit, will find a "good reason" to believe that the removed content infringes the copyright or trademark. Alternatively, if the REC declines to certify an infringement and the internet provider relies on this finding, the latter may expect that the court will find the absence of any "good reason" to become aware of the infringement. Furthermore, if in an individual case the court finds the opposite, the internet provider may still seek recourse from the REC for causing it to take an erroneous action, suing the latter as a result.

Where the statute includes a general clause such as "good reason", its interpretation is left to the court, which means that the relevant party (in this case the internet provider) incurs the risk of unpredictability. Still, the certification procedure under the Guidelines serves as a form of self-regulation which is agreed upon by internet providers and holders of copyright and trademark and which shifts potential liability to the latter. In this manner, internet providers in Japan have achieved the (functional) equivalent of what their counterparts in the US enjoy per statutory exemption under the "notice and take down" procedure of the Copyrights Act.

IV. Self-regulation Encouraged by the State to Complement Statutory Regulation

When the statutory regulation is framed only by a general term, the self-regulation can go beyond a simple interpretation of the statute and constitute an elaborated regulation on the basis of the statutory framework. The government may benefit from such self-regulation if it has a reason to avoid elaborating the statute itself. This is state-induced self-regulation to complement statutory regulation.

This type of self-regulation has developed significantly subsequent to smartphones having rapidly become popular among the public. When people are happy with smartphones, it is usually the apps that they find useful. Most of these apps collect and utilise personal information while providing services. In some cases, an independent module for this purpose is incorporated in the app and makes use of the collected information in a manner never imagined by the user of the app. These facts raise concerns among users about their privacy.

Under Japanese law, the right to privacy is a fundamental human right protected by the Constitution. Although there is no explicit reference, it is considered as part of the right to pursue personal happiness in Art. 13 of the Constitution. When one raises a privacy claim against another person, rather than against the state, the Constitution does not apply directly, and tort law liability under the Civil Code comes into play. It is established case law

that infringing someone's privacy wrongfully gives rise to tort liability, and the victim is entitled to damages.[29]

The protection of personal data ("data protection" in the European sense) is provided in the Act on Personal Data Protection.[30] The "personal data" protected by the Act is the data that identifies an individual (or enables identification by an easy matching with another set of data) and data including personal identifiers.[31] The information collected through the use of a smartphone may or may not be the personal data thus defined. While, for example, the device's ID is probably personal data (because it is easy to match with the holder's name, address etc.), the browsing history of websites is usually not personal data in itself. The Act on Personal Data Protection is enforced by the Personal Information Protection Commission, which publishes Guidelines for this purpose. However, given the special nature of the telecommunications service, the MIC has published Guidelines on Personal Data Protection in the Sector of Telecommunications Services. These Guidelines are implementation Guidelines and not self-regulation.

Furthermore, the telecommunications service involves the secrecy of communications, which is another fundamental human right protected by the Constitution. It is explicitly mentioned in Art. 21 (2) of the Constitution, together with the prohibition of censorship, and is provided in the Law on Telecommunications Business as one of its basic rules.[32] Some of the services offered by smartphones are telecommunications services (such as conversation over the telephone or e-mail texts) but others are not (such as positioning on the map app). A user usually subscribes to a service of the telecommunications service provider to start using a smartphone, but many of the apps are offered by companies that are not telecommunications service providers and that are not directly regulated by the MIC.

Given the general nature of the law on privacy (Constitution and general tort law) and the fragmentary regulations on personal data protection and

29 See generally, D. ROSEN, Private Lives and Public Eyes: Privacy in the United States and Japan, Florida Journal of International Law 6 (1990) 141; M. WEST, Secrets, Sex, and Spectacle (Chicago 2006) 63–68; M. HORIBE, Privacy Culture and Data Protection Laws in Japan, presentation at the 39th International Conference of Data Protection and Privacy Commissioners (Hong Kong 28 September 2017), available at *https://www.privacyconference2017.org/eng/files/ppt/masao_horibe.pdf*.

30 Law No. 57 of 2003. On the enactment of its original version, see C. LAWSON, Japan's New Privacy Act in Context, UNSW Law Journal 29 (2) (2006) 88. On the most recent amendments to it, see U. KIRCHHOFF/T. SCHIEBE, The Reform of the Japanese Act on Protection of Personal Information. From the Practitioner's Perspective, ZJapanR/J.Japan.L. 44 (2017) 199.

31 Art. 2 (1) of the Act on Personal Data Protection.

32 Art. 4 of the Law on Telecommunications Business (Law No. 86 of 1984).

telecommunications services, it is not easy to introduce formal rules to address the concerns of smartphone users about the collection and use of personal information. Therefore, the MIC has chosen to develop self-regulation to elaborate on and complement the statutory framework. Following the tradition of using a Council *(shingikai)* before introducing a regulation, the "Study Group on ICT Services in view of users' perspectives" was formed and published its first Report in 2012. The Report was titled "Smartphone Privacy Initiatives" and introduced the "Guidelines for handling smartphone users' information."[33] As basic principles, the Guidelines demand that the following six requirements be complied with when personal information of smartphone users is collected and utilised:

1. Ensuring transparency (i.e. notice to the user about the collection and use);
2. Offering an opportunity for the user's involvement in the process (i.e. notice, consent and/or opt-out);
3. Making sure that the collection method is proper;
4. Taking appropriate security measures;
5. Providing a contact point for complaints and inquiries; and
6. Adopting "privacy by design".

The Guidelines then request providers of apps, personal information collecting modules and smartphone advertisements to promulgate and publish a privacy policy reflecting the six basic principles. The privacy policy is to include (1) the name of the entity collecting personal information, (2) the information to be collected, (3) the method of collection (automatic or through the user's action), (4) the purpose of collecting the personal information, (5) the manner of giving notice, acquiring consent and having the user involved in the process, (6) whether or not the collected information is offered to a third party, as well as whether or not the personal information collecting module is incorporated, (7) the contact point, and (8) the procedure for amending the privacy policy. In the absence of a statutory basis to regulate app providers, the Guidelines have adopted self-commitment through publication of the privacy policy.

In order to enforce the self-regulation, the MIC further coordinated follow-up meetings, which concluded by publishing the "Smartphone Privacy Initiatives II" in 2013.[34] This Report elaborated on the idea already sug-

33 "The Smartphone Privacy Initiatives", dated August 2012, available at *http://www.soumu.go.jp/main_content/000171225.pdf* (in Japanese). The summary in English is available at *http://www.soumu.go.jp/main_content/000371721.pdf.*

34 "Smartphone Privacy Initiatives II", dated September 2013, available at *http://www.soumu.go.jp/main_content/000236366.pdf* (in Japanese). The summary in English is available at *http://www.soumu.go.jp/main_content/000371722.pdf.*

gested in the first Report that a third party verify whether, and to what extent, the app providers have promulgated and implemented the required privacy policy. The Report does not endorse the idea of nominating a single entity to exclusively carry out verification. Rather, verification may be carried out by various entities competitively as long as the common criteria for verification is developed and shared. Based on this report, the MIC has since 2014 published the outcomes of verification in the annual "Smartphone Privacy Outlook".[35] The findings were then reflected in the 2017 revision of the Guidelines, the "Smartphone Privacy Initiatives III".[36]

V. Self-regulation Coordinated by the State in the Absence of a Statutory Basis

1. Voluntary Undertakings on Consumer-oriented Management

Though it might sound oxymoronic, the state may coordinate self-regulation even where there is no statutory basis. A recent example of this kind of state-induced self-regulation in Japan is the facilitation of consumer-oriented management.

The concept of "consumer-oriented management" appeared in the Basic Consumer Plan adopted by the Cabinet in March 2015.[37] The Basic Consumer Plan vaguely refers to it as "business activities emphasising the consumers' interests", and the Plan expects the government to facilitate such consumer-oriented management.

In order to discuss how to implement this policy, the Consumer Affairs Agency called for a study group on the facilitation of consumer-oriented management, which in turn published a Report in April 2016.[38] The Report describes the concept as meaning that:

– The business entity puts itself in the shoes of consumers in general (as opposed to those of the actual customer) and accepts the protection of con-

35 "Smartphone Privacy Outlook" (2014) at h*ttp://www.soumu.go.jp/main_content/000371719.pdf;* "Smartphone Privacy Outlook II" (2015) at *www.soumu.go.jp/main_content/000371720.pdf;* "Smartphone Privacy Outlook III" (2016) at *http://www.soumu.go.jp/main_content/000416561.pdf;* "Smartphone Privacy Outlook IV" (2017) at *http://www.soumu.go.jp/main_content/000496537.pdf* (all in Japanese).

36 "Smartphone Privacy Initiatives III", dated July 2017, available at *http://www.soumu.go.jp/main_content/000495608.pdf* (in Japanese). The summary in English is available at *http://www.soumu.go.jp/main_content/000371722.pdf.*

37 "The Basic Consumer Plan", dated 24 March 2015, available at *http://www.caa.go.jp/adjustments/pdf/150324adjustments_1.pdf.*

38 The Report of the Study Group on Consumer-Oriented Management, *http://www.caa.go.jp/information/pdf/160406_houkokusho.pdf.*

sumers' rights and the enhancement of consumers' interests as central to their management;
– The business entity, further, carries responsibility for creating a sound market and gains trust from consumers by promoting consumer safety and fairness of transactions, by providing necessary information to consumers, by paying due consideration to the knowledge and experience of the consumer, and by establishing an internal system to respond to complaints; and
– The business entity, in the middle to long term, operates its business with its social responsibility in mind, aiming to build a sustainable and preferable society.

The concept apparently has connotations for corporate governance, as it refers to how business entities are managed. The Report requires that (1) the top management commit to consumer-oriented management, (2) corporate governance be established for this purpose, (3) each employee take consumer interests seriously and (4) the section on operations and the sections on quality, consumers and compliance liaise with each other.

These requirements are rather surprising given that the recent corporate governance debate in Japan has centred on how to make management take shareholder interests seriously.[39] The emphasis on consumer interests as "central to the management" might seem to be a reversion to the traditional stakeholder-interests model. However, reviewed more carefully, perhaps these requirements have been raised because of such recent developments in corporate governance. It is exactly because the statutory framework of corporate law now focuses on shareholder interests and the demands of the capital market that the interests of the consumer – who is also an important stakeholder – need to be explicitly addressed. In this sense, this self-regulation operates in the absence of a statutory basis.

As a concrete policy measure, the government collaborates with industry organisations and consumer groups to establish a "platform" for consumer-oriented management. The platform will encourage each business entity to make "voluntary declarations on consumer orientation" (whose template is appended to the Report of the Study Group). The voluntary declarations, together with specific undertakings made by each company pursuant to the declarations, are to be published on the website of the platform. It has also been suggested that companies which have made an outstanding effort be commended on the platform.

39 See G. GOTO/M. MATSUNAKA/S. KOZUKA, Japan's Gradual Reception of Independent Directors, in: Puchniak/Baum/Nottage (eds.), Independent Directors in Asia (Cambridge 2017) 135.

2. Technical Standards for DVDs Recording Television Programmes

Technical standards are usually genuine self-regulation which involve no inducement by the state. Still, in some cases the technical standard affects a party's legal rights, in which case the state has a reason to step in. Recording devices have repeatedly given rise to this problem, as their use is closely related to copyright issues.[40]

Under current digital technology, the reproduction of copyrighted content is controlled by codes known as the digital rights management (DRM) system. In Japan, the technical standards for DRM in the telecommunications and broadcasting sectors are adopted by the standard-setting organisation for these sectors, titled the Association of Radio Industries and Businesses (ARIB). The members of ARIB include manufacturers, telecom service companies and broadcasting entities.

In 2004, digitalised satellite broadcast introduced the DRM system known as "copy once." The user could record a television programme on his or her personal recording device (hard disk of a DVD recorder) but could not produce a copy from the recorded data. If the user copied the data to another recording device (a DVD disk), the original copy (the data recorded on the hard disk) disappeared. The system was based on the technical standards adopted by ARIB for digitalised satellite broadcasting, and its aim was to protect copyrighted content included in the satellite television programme. Consumers, however, often complained that the "copy once" standard was inconvenient.

In fact, it was not only a matter of inconvenience but a matter of legal rights. The Copyright Act provides that reproduction for personal use is not prevented by copyright.[41] When technologies such as photocopying machines and cassette tape recorders developed and enabled general consumers to make a private copy of copyrighted works, the Copyright Act introduced the levy system inspired by the German copyright law. The type of machines subject to levies is designated by the Cabinet Order.[42] The "copy once" standard prevented consumers from making copies of satellite television programmes even for the personal use, which however is legally authorised under the Copyright Act. The fact that DVD recording machines

40 This issue is discussed in greater details in S. KOZUKA, Copyright law as a new industrial policy?, in: Otmazgin/Ben-Ari (eds.), Popular Culture and the State in East and Southeast Asia (London 2012) 106.

41 Art. 30 (1) of the Copyright Act. On this issue, see P. GANEA/C. HEATH, Economic Rights and Limitations, in: Ganea/Heath/Saito (eds.), Japanese Copyright Law (The Hague 2005) 58–60.

42 Art. 30 (2) of the Copyright Act.

and disks were subject to levies under the Cabinet Order was perceived as "adding insult to injury" or "imposing duplicate burdens on the consumer."

Subsequently it was decided that terrestrial broadcasting switch from an analog to a digital system by 2011. This meant that terrestrial broadcasting could also be subject to the DRM system. Given that the great majority of the public in Japan enjoy television programmes on terrestrial broadcasting, any inconvenience due to the technical standard was considered a matter not to be neglected. The MIC, through a series of Council meetings as always, coordinated a consensus among broadcasting entities, manufacturers, copyright holders and consumers on the new DRM system, named "Dubbing 10." The new system allows ten copies of the same data, but still restricting the second generation of a copy (copy from a copy). The consumer can now record a television programme on the hard disk of a DVD recorder and produce nine copies on DVD disks. If the consumer makes a tenth copy on a disk, the original data on the hard disk will disappear. A person who receives a DVD disk with copied data on it cannot copy that data to another disk.

Copyright holders (including performers who hold neighbouring rights) accepted this as a compromise but expected that they would be rewarded by the expansion of compensation through levies. However, this was opposed severely by manufacturers, who have the task of collecting levies from the consumers,[43] as well as by consumers to a lesser extent. Because the issue involved the copyright law regime, the Cultural Affairs Agency attempted to coordinate the matter through the Copyright Subdivision of the Council for Cultural Affairs, but only in vain.

Theoretically, the issue lay in the conflict of views about how to protect copyright in the face of vast developments in digital technology. The levy system assumes that private copying cannot be captured and compensates the copyright holder through a lump-sum payment from consumers, while the DRM system is based on the premise that each and every instance of private copying can be captured and controlled by current technology. Unless this issue is addressed, any coordination on the copyright law side is destined to fail. But the debate on this issue is so fundamental that there is no prospect of reaching a quick consensus. In the meantime, slight improvements in technical standards are serving as a substitute for a fundamental reform of copyright law.

Because the technical standards for the DRM system affect parties' rights under the copyright law, and because their adoption is a substitute for

43 According to the Copyright Act, the duty to pay the levy is on the purchaser of the designated recording machine (Art. 30 (2)), but the manufacturer is to cooperate by collecting the due amount from the purchaser and delivering the collected amount to the collecting organisations (Art. 104-5).

copyright law reform, the involvement of copyright holders and consumers in the process was required. However, ARIB, as the standard setting organisation, does not represent these stakeholders. For this reason, the government stepped in to coordinate the matter, which changed the nature of the technical standards from genuine to state-induced self-regulation.

VI. CONCLUSIONS

Though not at all exhaustive, the overview in this paper has shown that state-induced self-regulation abounds in Japan. There is probably more state-induced self-regulation than true self-regulation. This is not surprising, as the concept of "state-induced" covers a large variety of engagement by the state whereas "true" self-regulation, by definition, refers only to cases where there is no involvement of the state at all.

In terms of the subject-matter, state-induced self-regulation is, among other areas, resorted to in the fields of technology-related law (internet provider's liability, smartphone privacy, technical standards for DVDs) and consumer law (sales of financial products, consumer-oriented management). These spheres of economic activity experience rapid changes in the prevailing factual setting, the result being an underlying context which statutory regulation alone can hardly keep pace with. Thus it may be useful to rely on the expertise – and collaboration – of the relevant industry actors. On the other hand, more traditional areas, such as (general) contract law or real property law, seem to rely less on self-regulation induced by the state.

Finally, there is also variety in the state's motivation for inducing self-regulation. In some cases, as in the law of corporate accounting, the motivation is to defer to the expertise that the private sector possesses. In others, the state appears to find "co-regulation" to be the most effective; here the typical example stands as smartphone privacy initiatives. Still another type of motivation is that the state expects the industry to engage in a "race to the top" by voluntarily undertaking a heavier burden than is mandatory under the statute. Self-commitment is a good measure to make such competition take place, this being intended, for example, under the Act on the Sales of Financial Products and with the platform for consumer-oriented management.

All these varieties deserve further and more analytical examination. It is, however, beyond the scope of this paper, not least because such an analysis requires more examples.