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

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Self-Regulation Induced by the State in Germany

*Jens-Hinrich Binder**

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I. INTRODUCTION

“Self-regulation induced by the state”, the topic allocated to this contribution within the overall concept of the symposium, clearly represents a somewhat puzzling blend of two concepts that, at first sight, seem to be hardly reconcilable. To be sure, the term “regulation”, as such, comes with a wide variety of meanings in both German¹ and Anglo-American² academic terminology, but

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1 See, for a survey of the uses of the term in the areas of administrative, private and economic law, e.g., J.-H. BINDER, *Regulierungsinstrumente und Regulierungsstrategien im Kapitalgesellschaftsrecht* (Tübingen 2012) 36–39. See also, surveying a narrower range of sources, P. BUCK-HEEB/A. DIECKMANN, *Selbstregulierung im Privatrecht* (Tübingen 2010) 17–19.

2 E.g., B. M. MITNICK, *The Political Economy of Regulation* (New York 1980) 6 (“Regulation is the policing according to a rule, of a subject’s choice of activity, by an entity not directly party to or involved in that activity”); R. BALDWIN/M. CAVE, *Understanding Regulation* (Oxford 1999) 2 (“a specific set of commands [...] to be applied by a body devoted to this purpose”, “deliberate state influence”, and “all forms of social control or influence” as alternative meanings); R. A. POSNER, *Theo-*

the state (legislators or administrative agencies) interfering in private activities in order to accomplish a specific objective or set of objectives is a key characteristic recognised by them all. “Self-regulation”, then, refers to the ordering of certain relationships and/or interests of private actors by rules and principles – and, possibly, also enforcement mechanisms – agreed upon by these actors themselves.³ Against this backdrop, the concept of “self-regulation induced by the state” (or, to use a more established terminology, “enforced self-regulation”⁴ or, with a slightly different meaning, “co-regulation”⁵) seems to be squaring the circle: Genuine self-regulation, driven exclusively by the regulatees’ own desire to establish and submit to a certain order, can and not infrequently will occur where the state either willingly or accidentally refrains from taking legislative or administrative steps to impose and enforce such an order, and where it is in the regulatees’ best interest to step in. In cases of self-regulation induced by the state, by contrast, the state itself actually *does* regulate – but it chooses to do so under self-imposed restraints: Not just by deliberately leaving part of the regulatory task to the regulatees, but also, perhaps even more importantly, by making arrangements to ensure that the regulatees actually do engage in self-regulatory activities in the first place. In other words: The state, in the case of state-induced self-regulation, delegates control over the substantive design of regulation, but it retains the initiative to regulate and, to a varying degree, also the control over fundamental policy decisions that inform and govern the substantive design.⁶

In this light, state-induced self-regulation bears some functional similarities with the concept of delegated legislation exercised by administrative bodies within a framework defined by statutory law. As will be explored in more detail below, both concepts share at least some common motives: In a

ries of Economic Regulation, *Bell Journal of Economics and Management Science* 5 (1974) 355 (“pattern of government intervention in the market”).

- 3 See, surveying the German literature, e.g., A.C. THOMA, *Regulierte Selbstregulierung im Ordnungsverwaltungsrecht* (Berlin 2008) 32–34; from a private law perspective, see BUCK-HEEB/DIECKMANN, *supra* note 1, 13–17; and see also, using a different terminology, BINDER, *supra* note 1, 252–261. For a representative view in the English academic literature, see, e.g., BALDWIN/CAVE, *supra* note 2, 39–41, 63–65, 125–126, for a definition, see *ibid.*, 125: “Self-regulation can be seen as taking place when a group of firms or individuals exerts control over its own membership and their behaviour.”
- 4 BALDWIN/CAVE, *supra* note 2, 39–41 and 133–136; I. AYRES/J. BRAITHWAITE, *Responsive Regulation* (Oxford 1992) 101–132.
- 5 Cf. AYRES/BRAITHWAITE, *supra* note 4, 101: “Coregulation, *as distinct from* enforced self-regulation, is usually taken to mean industry-association self-regulation with some oversight and/or ratification by government” (emphasis added).
- 6 See, e.g., BALDWIN/CAVE, *supra* note 2, 39–41 and 133–136; AYRES/BRAITHWAITE, *supra* note 4, 101–132.

way, the use of both state-induced self-regulation and delegated legislation reflects, explicitly or implicitly, the insight that direct regulation by the state may be deemed insufficient in view of either (a) a lack of understanding of the real-world relationships and activities to be regulated on the part of the relevant legislative body, or (b) the inability of a formal legislative process to keep up with a rapidly changing social, technical or economic environment, or (c) the inability to attain a satisfactory level of compliance with legislative requirements, or, (d) the desire to reduce the costs of public regulation and enforcement, or finally, (e) all four aspects simultaneously or in varying combinations. State-induced self-regulation, as discussed in the previous chapter, thus seeks to activate not just the regulatees' expertise but also their self-interest in order to generate solutions that are not just mutually beneficial but also more advanced in technical terms than direct regulation by the state could ever hope to be. In particular, state-induced regulation may help to overcome the fundamental problem of timely access to accurate information on the relevant real-world phenomena, which is the precondition for effective regulation.⁷ At the same time, it seeks to avoid or at least minimise negative externalities – which might otherwise arise precisely because the regulatees can be expected to maximise their own welfare in the regulatory process – by defining a more or less specific framework of policy objectives and restrictions for the design features.

As a result, state-induced self-regulation is bound to lack a number of the perceived advantages of genuine self-regulation: First, state-induced self-regulation is *not*, or not primarily, triggered by the genuine desire of private actors to establish, and submit to, an order that reflects their own interests and policy choices. Secondly, it is *not* free to define its scope of application. Thirdly, and perhaps more importantly, it is *not* free in the policy choices that dictate both the procedural framework for decision-making and technical solutions adopted. Almost by definition, state-induced self-regulation thus lacks some of the key ingredients that foster the legitimacy of genuine self-regulation from the regulatees' perspective. This is by no means trivial, as it is generally agreed that it is the legitimacy of genuine self-regulation that leads to the rather high level of acceptance usually identified as one of the clear functional advantages in comparison to direct state regulation.⁸

7 See generally, e.g., AYRES/BRAITHWAITE, *supra* note 4, 110–116; BALDWIN/CAVE, *supra* note 2, 40–41, 134; see also BINDER, *supra* note 1, 274–277; A. OGUS, *Regulation: Legal Form and Economic Theory* (Portland 2004), 107; THOMA, *supra* note 3, 66–69; cf. also, discussing the advantages of self-regulation generally, BUCK-HEEB/DIECKMANN, *supra* note 1, 220–228.

8 BINDER, *supra* note 1, 276; on high levels of acceptance as a perceived advantage of self-regulation generally, see BUCK-HEEB/DIECKMANN, *supra* note 1, 223.

Against this backdrop, this paper seeks to explore the relevance of the concept of “state-induced self-regulation” in German private law, which, it should be noted from the start, can hardly be underestimated. In many fields, the relevance of state-induced self-regulation far exceeds the relevance of what has been referred to as “genuine” self-regulation, discussed in other contributions to the symposium. In order to prepare the ground, it will be appropriate, in section II below, to sketch a more specific map of the use of state-induced self-regulation in German law – or at least present an inevitably superficial and subjective selection of phenomena that may or may not prove illustrative of other examples as well. While this will help to outline the application of the concept within the German legal system, it will, of course, not be sufficient if we look for a truly comprehensive explanation of the phenomenon. For an in-depth analysis of the causes of state-induced self-regulation, it obviously would be necessary to take into account also the history of the relevant phenomena, which cannot be accomplished within the constraints of the present paper, however. But even the rather rough sketch that follows may well facilitate a better understanding of the fundamental policy questions pertaining in particular to “state-induced self-regulation”: What are the perceived benefits, especially compared to both direct regulation by the state and autonomous self-regulation? What are the relevant substantive and procedural requirements that must be met in order to achieve the desired results, taking into account also the factual circumstances in which the regulatory processes are set to take place? And finally, how does state-induced self-regulation relate to the statutory legal framework applicable to the relevant economic activity? These questions will be taken up again and addressed in section III, below, following the sketch of selected fields of state-induced self-regulation and on the basis of a closer inspection of one specific example from the area of company law and corporate governance.

II. THE LANDSCAPE: A ROUGH MAP OF STATE-INDUCED SELF-REGULATION IN GERMANY

1. Overview

“State-induced self-regulation” is certainly not a new phenomenon – and, as this symposium amply illustrates, is by no means confined to Germany. Similar arrangements have also been observed in a wide range of other jurisdictions both within and outside Europe, as, for example, a collected volume edited by a number of German legal scholars has demonstrated as recently as 2014.⁹ Within Germany, the interpretation of the concept in academic writings has long been dominated more or less exclusively by a

public law perspective. “Regulated self-regulation”, from this perspective, was (and continues to be) seen as a regulatory strategy that could be deliberately activated by the state in order to replace direct forms of regulation, that is, legislation and/or measures by administrative bodies – as a form of regulation particularly well-suited for a modern liberal economy, whose complexity exceeds the regulatory capacity of the state itself. A number of contributions stand out as drivers for this view.¹⁰ Among these, a collected volume, published in 2001, played a particularly formative role for the ensuing academic discussion¹¹ before a number of doctoral dissertations then began to explore the relevant issues for specific areas of economic activities. To name but a few milestones: One of the first of these studies, Steffen Augsberg’s “Rechtsetzung zwischen Staat und Gesellschaft”,¹² went some way to develop both the functional characteristics and potential applications in the field of securities regulation. On a related topic, Johannes Junker’s “Gewährleistungsaufsicht über Wertpapierdienstleistungsunternehmen”,¹³ examined the application of the concept in the regulation of securities firms. A later monograph, “Regulierte Selbstregulierung im Ordnungsverwaltungsrecht”, by Anselm Christian Thoma then covered a more comprehensive range of areas where “regulated self-regulation” was employed.¹⁴ The private law perspective has followed suit, however, starting with Gregor Bachmann’s seminal Habilitation thesis on “Private Ordnung”,¹⁵ a number of chapters in Petra Buck-Heeb’s and Andreas Dieckmann’s “Selbstregulierung im Privatrecht”,¹⁶ and an analysis of relevant arrangements in the field of corporate law.¹⁷

Specifically in the context of private law, areas of application have been, *inter alia*, media law,¹⁸ product safety regulation,¹⁹ and corporate and secu-

9 P. COLLIN et al. (eds.), *Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20. Jahrhunderts* (Frankfurt/Main 2014).

10 Note that the following survey should be read as a list of representative writings rather than an exhaustive list.

11 W. BERG et al. (eds.), *Regulierte Selbstregulierung als Steuerungskonzept des Gewährleistungsstaates – Ergebnisse des Symposiums aus Anlass des 60. Geburtstages von Wolfgang Hoffmann-Riem* (Berlin 2001).

12 S. AUGSBERG, *Rechtsetzung zwischen Staat und Gesellschaft – Möglichkeiten differenzierter Steuerung des Kapitalmarktes* (Berlin 2003).

13 J. JUNKER, *Gewährleistungsaufsicht über Wertpapierdienstleistungsunternehmen* (Berlin 2003).

14 THOMA, *supra* note 3 (analysing media law, product safety regulation, environmental law and the enforcement of accounting standards).

15 G. BACHMANN, *Private Ordnung. Grundlagen ziviler Regelsetzung* (Tübingen 2003).

16 BUCK-HEEB/DIECKMANN, *supra* note 1.

17 BINDER, *supra* note 1, 261–263.

18 For an in-depth introduction and analysis, see, THOMA, *supra* note 3, 83–172.

rities law, with new forms of “regulated self-regulation” implemented, in particular, in the areas of accounting and financial reporting²⁰ as well as corporate governance standards for public companies.²¹ Obviously, the classification of most of these different fields as “private law” is far from uncontroversial, which may give rise to doctrinal concerns particularly within the German legal tradition, where the conceptual distinction between the realms of public and private law has been upheld particularly vigorously. Generally, the obliteration of the traditional borders between the two fields will come as much less a surprise to an international academic audience, especially in a world increasingly dominated by the influence of the Common Law tradition, where the distinction between the two areas traditionally has played a much lesser role. All the same, it is also the case in Germany that in any of these areas *public* law elements can be said to interact with elements of *private* law, especially when it comes to the enforcement of standards developed within self-regulatory arrangements. It is thus particularly at the enforcement level that the different applications of “self-regulation induced by the state” demonstrate the need for a comprehensive, functional understanding of law-making and law enforcement, where elements of public and private law can be activated, at least to some extent, as interchangeable, functionally related instruments – and where they should be understood as such.²²

On closer inspection, the different phenomena mentioned above fall broadly into one of two categories: In the first one, the state has incorporated pre-existing self-regulatory arrangements into a new regulatory approach, which may or may not involve the imposition of changes to residu-

19 See, e.g., THOMA, *supra* note 3, 172–226.

20 See THOMA, *supra* note 3, 261–298; see also BUCK-HEEB/DIECKMANN, *supra* note 1, 122–145. For a discussion of self-regulatory arrangements, including arrangements induced by the state, in the area of securities law, see AUGSBERG, *supra* note 12 and CH. WAHLERS, *Private Selbstregulierung am Beispiel des Kapitalmarktrechts* (Göttingen 2011). See also BINDER, *supra* note 1, 262–263 and TH. SCHÜLKE, *IDW-Standards und Unternehmensrecht. Zur Geltung und Wirkung privat gesetzter Regeln* (Berlin 2014) (discussing the relevance of accounting standards promulgated by the German Institut der Wirtschaftsprüfer, a professional organisation in the accounting industry).

21 E.g., BINDER, *supra* note 1, 258–260, 270–271; BUCK-HEEB/DIECKMANN, *supra* note 1, 90–103; M. WEISS, *Hybride Regulierungsinstrumente* (Tübingen 2011).

22 Cf., discussing the need for a comprehensive understanding of norm enforcement mechanisms that includes elements of both public enforcement (e.g., by supervisory authorities) and private law (e.g., through the use of liability rules), BINDER, *supra* note 1, 205–210. See also, discussing the need for a comprehensive, intra-disciplinary analytical framework in the area of product safety regulation, H. T. WEISS, *Die rechtliche Gewährleistung der Produktsicherheit* (Baden-Baden 2008) 40, 519–604.

al decision-making procedures and/or the substantive content (*infra* 2.). The second category, by contrast, is more straightforward. In this category, self-regulatory arrangements have only been established in response to the introduction of new legislation, which requires the regulatees to implement such arrangements (*infra* 3.).²³ While the first category certainly qualifies as “regulated self-regulation”, in that direct *public* regulation is imposed on the relevant self-regulatory arrangements, it is perhaps disputable whether the relevant phenomena would also qualify as “state-induced self-regulation” within the meaning employed in the present symposium. There are, however, essentially three reasons why they should nonetheless be considered – at least as part of a first approach to the relevant issues: *First*, depending on the degree of state influence, the differences between the two concepts are gradual rather than fundamental. *Secondly*, the functional characteristics are likely to be similar. And *thirdly*, from an analytical perspective, the process of incorporation of autonomous self-regulation into a state-controlled regime may prove particularly interesting in this context, as such a transformation is likely to change the relevant actors’ incentive structure, with possible implications both in terms of substantive content and compliance.

2. *Category 1: State-induced Self-regulation Where Existing Self-regulatory Arrangements Have Been in Place Prior to Relevant Legislation*

a) *Product Safety Regulations*

As a first example of state legislation introduced *ex post* in order to regulate pre-existing forms of self-regulatory arrangements, the area of product safety regulation is particularly illustrative. In this area, safety certificates (indicating, for example, the contents of a particular product or adherence to certain qualitative requirements) have played an increasing role in the protection of consumers and consequently have been recognised as useful tools for the development, and promotion, of high standards of product safety in both national and European legislation. Within Germany, such certificates have been developed with regard to general requirements (applicable to a wide range of different products) as well as sector-specific

23 Note that this distinction is not identical to the conceptual distinction between “co-regulation” and “enforced self-regulation” as developed in Anglo-American regulatory theory (as to which see, *supra*, text and notes. 4 and 5. For example, BALDWIN/CAVE, *supra* note 2, 39, define self-regulation as “‘enforced’, where it is subject to a form of governmental structuring or oversight” (emphasis added): If the government merely oversees the relevant arrangements, they would fall into the first of the two categories defined above, whereas a self-regulatory process *structured* by the government would fall into the second.

standards (applicable to certain types of products), even prior to the incorporation of the concept in mandatory legislation.²⁴ For more than two decades now, the certification of products both as a condition for market access and as an additional source of information for consumers has taken place in a complex interplay between (a) the European Commission, (b) national authorities, (c) independent private bodies engaging in the development of, and the monitoring of compliance with, relevant standards, and (d) the manufacturers subject to that regime. While details are outside the scope of the present contribution,²⁵ one aspect is of a particular interest: With the incorporation of self-regulatory arrangements into a regime of state regulation and enforcement, the certification of products has transformed from a more or less autonomous system of self-regulation, where the development and promotion of relevant standards was driven purely by industry interests, into a regime where the state retains a tight control of both the substantive contents of privately developed standards and their enforcement. Within this framework, each manufacturer has a wide range of incentives to comply with the relevant standards (which include, first and foremost, the marketability of the relevant products for which certification is mandatory but also sanctions under private and criminal law) and to submit to scrutiny by a private law body.²⁶

b) Labour Relations

A second, rather special example of regulatory incorporation of pre-existing self-regulatory arrangements can be found in labour relations, where collective bargaining between employers and trade unions was formally recognised by 1949 legislation²⁷ setting out requirements for the content of collective agreements on wages and working conditions, including provisions

24 THOMA, *supra* note 3, 177–178. And see, for a comprehensive analysis of the relevant self-regulatory standards, H. T. WEISS, *supra* note 22, 412–414.

25 For an in-depth account of the (complex, sector-specific) legal frameworks encountered at the national and the European levels, see, e.g., THOMA, *supra* note 3, 178–226, 447–453; H.T. WEISS, *supra* note 22, 81–124 (outdated on the facts, but still valid in principle). Today, the key legal basis at the national level is the Product Safety Act (*Produktsicherungsgesetz*) of 8 November 2011 (BGBl. 2011 I 2178) (as amended). The relevant European law instrument is Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008, setting out the requirements for accreditation and market surveillance relating to the marketing of products, OJ L 218 of 13 August 2008, 30.

26 THOMA, *supra* note 3, 215–218; see also H. T. WEISS, *supra* note 22, 412–420.

27 *Tarifvertragsgesetz* [Law on Collective Labour Agreements] of 9 April 1949, *Gesetzblatt der Verwaltung des Vereinigten Wirtschaftsgebietes* 1949, 55/68; newly enacted on 25 August 1969, *Bundesgesetzblatt* 1969, I, 1323 (as amended).

on the implications of such agreements for covered labour contracts, as well as some procedural arrangements for the negotiating process. Obviously, both trade unions as well as employers and employers' organisations – i.e., the parties to such arrangements – existed prior to the enactment of the 1949 law, and the same is true for collective agreements as such. However, it was only with the introduction of the legal regime, complemented with the recognition of collective bargaining as a legal concept protected under the *Grundgesetz* (the German Constitution of 1949), that collective agreements received their status as a highly influential tool for the regulation of labour relationships – a concept that continues to be characteristic of labour relations in this country to the present date.²⁸ From a doctrinal perspective and within the context of the present symposium, collective bargaining presents a particularly interesting example of regulated self-regulation in that the precise nature of collective agreements has been, and continues to be, the subject of intensive controversy. Some authors and earlier judgments of the Federal Labour Court (the highest court of appeals for labour issues) have interpreted such arrangements as essentially a form of delegated legislation, given that the relevance for third parties not directly involved in the negotiations is based on state legislation, not the individual will of these parties.²⁹ According to a more modern interpretation, however, which has now been accepted also by the courts, collective agreements should rather be interpreted as representing a special, collective form of contractual agreements, whose validity is based on the relevant parties' decision to submit to their terms and conditions.³⁰ Against this backdrop, collective bargaining in German legal doctrine is particularly illustrative of the hybrid nature of “regulated self-regulation” and clearly also of the difficulties in defining its position between public regulation and private ordering of social relationships.

28 See generally, e.g., BUCK-HEEB/DIECKMANN, *supra* note 1, 198–203.

29 E.g., Bundesarbeitsgericht [Federal Labour Court], 15 January 1955 – 1 AZR 305/54, reported in BAGE (Amtliche Sammlung der Entscheidungen des Bundesarbeitsgerichts) 1, 258, at 264; *id.*, 23 March 1957 – 1 AZR 329/56, reported in BAGE 4, 240, 251; see, for a review of the history of the doctrine and the key sources, M. LÖWISCH/V. RIEBLE, Grundlagen, in: *id.* (eds.), Tarifvertragsgesetz (4th ed., Munich 2017) para. 30.

30 E.g., Federal Labour Court, 25 February 1998 – 7 AZR 641/96, reported in BAGE 88, 118, at 123; 21 July 2004 – 7 AZR 589/03, reported in *Zeitschrift für Tarifrrecht* 2005, 255, para. 20; *id.*, 7 June 2006 – 4 AZR 317/05, reported in *Neue Zeitschrift für Arbeitsrecht (NZA)* 2007, 343, para. 30; for an in-depth discussion, see, e.g., LÖWISCH/RIEBLE, *supra* note 29, paras. 31–39.

3. *Category 2: State-induced Self-regulation in the Absence of Prior Self-regulatory Arrangements*

A prominent example of self-regulatory arrangements established on the initiative and under the control of the state can be found in media regulation, where the protection of minors and the protection of personal data have been addressed through a complex framework of state legislation, public enforcement agencies, and self-regulatory bodies established and formally recognised under the applicable statutory provisions. In this setting, self-regulatory bodies play an important role in the critical assessment of media contents and in the enforcement of substantive legal requirements.³¹ Other examples can be found in the area of corporate governance: As early as 1998, a private law-standard-setting organisation – *Deutsches Rechnungslegungs-Standardisierungs-Komitee* (DSRC) – was established and formally recognised by law in order to contribute to the development of accounting standards for listed groups.³² In order to improve the enforcement of accounting standards and in reaction to prominent accounting scandals in the USA and in Europe, legislation was enacted in 2004 to establish a two-tier enforcement system for the regulation of corporate financial information of listed companies, whereby a private enforcement body – *Deutsche Prüfstelle für Rechnungslegung e.V.* – was established in order to scrutinise accounting documents in cooperation with the relevant firm before formal enforcement measures are taken by the financial markets supervisory authority.³³ In both cases, the initiative clearly originated in state legislation.

31 See, further, THOMA, *supra* note 3, 82–172. For a comparative analysis of the relevance of self-regulatory arrangements within the context of private law positions in the field, see also L. WALLENHORST, *Medienpersönlichkeitsrecht und Selbstkontrolle der Presse* (Berlin 2007) (comparing German and English law).

32 For the legal basis, see § 342 German Commercial Code, *Handelsgesetzbuch*, HGB, as amended by Article 2 Gesetz zur Kontrolle und Transparenz im Unternehmensbereich of 27 April 1998 (BGBl. 1998 I 786). See, for further discussion, BUCK-HEEB/DIECKMANN, *supra* note 1, 125–128; W. EBKE/B. PAAL, in: K. Schmidt (ed.), *Münchener Kommentar zum Handelsgesetzbuch* (3rd ed., Munich 2013) § 342, paras. 1–19; SCHÜLKE, *supra* note 20, 88–107.

33 For the legal basis, see §§ 342b–342e HGB, as amended by Bilanzkontrollgesetz of 15 December 2004 (BGBl. 2004 I 3408). And see, for further discussion, e.g., BUCK-HEEB/DIECKMANN, *supra* note 1, 132–135; B. PAAL, in: K. Schmidt (ed.), *Münchener Kommentar zum Handelsgesetzbuch* (3rd ed., Munich 2013) Vorbemerkungen zu §§ 342b bis 342e, paras. 1–8; THOMA, *supra* n. 3, 261–298 and 462–464.

4. *A Comparison: State-induced Self-regulation and the Functional Characteristics of Self-regulatory Arrangements*

While the technical details cannot be explored any further within the present context, the brief outline of specific examples of state-induced self-regulatory arrangements in Germany nonetheless highlights a number of common features and, arguably, provides helpful insight into the underlying policy objectives. A key characteristic common to all the different examples just touched upon is, obviously, the rather technical nature of the relevant social and/or economic activities and relationships – the term “technical” in this context being used as a catchphrase for activities and relationships that are characterised by problems of a nature that is not easily accessible to outsiders, in view of a specific expertise required to develop the necessary understanding and/or in view of the remoteness of the relevant community of actors. In such areas, the relevance of state-induced self-regulation as a solution to the problem of timely and accurate information (that would otherwise create impediments to effective *legislative* solutions) becomes particularly obvious.³⁴ This certainly holds true for areas like product safety regulation, where the definition of problem-adequate standards requires a degree of sophisticated scientific knowledge and insight into the regulated activities that would be extremely difficult to build and keep updated at the legislative level. Similarly, the enforcement of corporate accounting standards clearly should benefit from the practical experience and insights of actors employed in the private enforcement body. On closer inspection, similar considerations also apply in the area of labour relations, where collective agreements ideally should facilitate tailored solutions that reflect the parties’ individual circumstances much more directly, and adequately, than could ever be achieved in the formal legislative process, where the relevant information is, by definition, available only in an intermediated form. At first sight, the area of media regulation constitutes an exception in this regard, for what would be more accessible to external scrutiny than standards of media coverage? Even if other objectives for legislative self-restraint and delegation to self-regulatory arrangements may be said to play a more important role in this field, however, this example does not qualify as a total outlier with respect to the information problem: Judging which media content should be permissible and which should not evidently requires an assessment of the relevant qualitative standard which, in the absence of self-regulatory arrangements, could only be developed *ex post* by courts adjudicating individual cases under inevitably rather general principles of law. For example, the protection of minors

34 On which, see *supra*, text accompanying note 7. See also, discussing the function of regulated self-regulation as a means to compensate for structural information deficits on the part of the state, THOMA, *supra* n. 3, 66–67.

from excessively brutal content or from the explicit exhibition of sexual activities in media coverage can, of course, be defined as a legal obligation for media companies. Likewise, statutory provisions aiming at the protection of personal information (e.g., in the form of defamation laws or laws against the publication of details of one's private life) are not just conceivable but do, in fact, exist. Yet if, in the absence of self-regulatory arrangements in the form established by German media law, the development of more granular common standards inevitably had to rely on the judiciary, the protection would probably be much less effective than in the present scenario, where standards are being developed proactively and in a consensus between market participants and stakeholders. Notably, it would not exclusively be based on extreme cases that ultimately reach the courts *ex post*, *i.e.*, after violations of rights have occurred. In other words, it is also in this area that the integration of self-regulatory elements helps to activate the private knowledge of individual actors and, thereby, to calibrate the relevant standards to real-world circumstances and practices.³⁵

In addition to reflecting how information problems faced by legislators fuel the trend towards state-induced self-regulation, the cited examples also indicate that state-induced self-regulation can claim to be more flexible in procedural terms than state legislation itself. The legislative process, for both constitutional and political reasons, is formalistic, usually time-consuming, dependent on political cycles, and possibly fraught with compromises that may reflect issues entirely unrelated to the relevant problems as such. Against this backdrop, the delegation of regulatory powers to private bodies may not just help to focus the debate on those issues that really need to be addressed; rather, as relevant information is readily available it also facilitates an ongoing adaption to changed circumstances, to the extent that the process is sufficiently flexible so as to allow swift reactions.³⁶ Finally, in each of the examples described above, the integration of private actors in the regulatory process may also come with advantages in the form of enhanced compliance, to the extent that the involvement of regulatees and stakeholders may increase acceptance of the substantive content and, ideally at least, reduce the need for formal enforcement measures.³⁷

These advantages are, of course, contingent on a rather complex set of specific conditions, some of which will be addressed in the subsequent case study. Two aspects are particularly noteworthy in this regard: *First*, the

35 Cf. WALLEHORST, *supra* note 31, 500–502 (discussing the advantages of self-regulatory arrangements in the resolution of complaints against media coverage generally). But see THOMA, *supra* n. 3, 432–434 (denying that this rationale plays a role).

36 Cf. BUCK-HEEB/DIECKMANN, *supra* note 1, 220–222.

37 See *supra*, note 8 and accompanying text.

structure and composition of the relevant self-regulatory bodies obviously play a key role. In order for the regulatory process to really facilitate adequate solutions on the basis of relevant real-world information, state-induced self-regulation needs to include all relevant sources of information, which may also require the inclusion of stakeholders other than the regulatees themselves, in particular where the regulated activities will give rise to third-party implications.³⁸ *Secondly*, and related to the foregoing, the procedural framework for reaching decisions within the self-regulatory body is also of essence. Even where the relevant decision-making bodies do reflect a sufficiently representative range of relevant stakeholders, flawed decision-making processes may lead to flawed results that are biased by self-interest or reflective of an inability to agree on anything but the lowest common denominator.³⁹ Obviously, addressing these problems through the technical integration of self-regulation into the legislative framework and into enforcement measures is a core issue for the effective implementation of state-induced self-regulation. That task is not made easier by the fact that the self-interest of the regulated parties is probably the key driver in their willingness to get involved in the first place: Just as genuine self-regulation rests on the parties' own interest in creating a reliable order for their own affairs, integrating the regulatees in state-induced regulatory arrangements will hardly be successful unless their own interests are protected to some extent. This highlights a possible trade-off between the acceptance of self-regulatory arrangements, which will depend on the level of respect for the regulatees' own interests, on the one hand, and the protection of third party stakeholders on the other hand.⁴⁰

III. A CASE STUDY: THE GERMAN CORPORATE GOVERNANCE CODE

1. *The Code Within the Statutory Framework*

For present purposes, the German Corporate Governance Code (*Deutscher Corporate Governance Kodex*, DCGK) presents a particularly interesting case for a number of reasons – not least because its legal nature, which has been the subject of some controversy, remains far from settled. As will be discussed in a moment, many authors would classify the Code as a product of autonomous rule-making by industry and stakeholder representatives – and thus, not as an emanation of “state-induced self-regulation” at all. According

38 Cf. (discussing the need to ensure balanced representation of interests in the decision-making process) BUCK-HEEB/DIECKMANN, *supra* note 1, 278–283.

39 Cf. (discussing the decision-making procedure) BUCK-HEEB/DIECKMANN, *supra* note 1, 283–289.

40 See also BALDWIN/CAVE, *supra* note 2, 136.

to others, the state's influence on both the decision-making process and the substantive content is far too strong as to support this view. Needless to say, this controversy comes with substantial implications for the evaluation of the Code in general and for its legitimacy and effectiveness in particular.

The Code is promulgated and updated on a regular basis by a commission of academics, representatives of listed companies, and representatives of shareholders' associations and trade unions.⁴¹ The commission was first established in 2001 on the recommendation of an independent panel of experts appointed and convened by the federal government. Then as today, the purpose⁴² was to complement the (to a large extent mandatory)⁴³ provisions of the German Stock Corporation Act (*Aktiengesetz*, AktG) with a document that promotes concepts and standards of good corporate governance, taking into account the characteristics of German company law as well as international trends and standards. From the beginning, the Code – first published in 2002 – was also conceived as a tool to familiarise investors in general and, in particular, foreign (institutional) investors as to the key elements of corporate governance in Germany and, thereby, to promote foreign direct investment in German equity markets.⁴⁴ Against this backdrop, the Code, which is published by the Federal Ministry of Justice in the Official Journal of the Federal Republic pursuant to § 161 AktG, combines a summary of the relevant statutory framework with recommendations to follow specific standards, and it makes additional suggestions promoting good practice in certain areas.⁴⁵

2. Evaluation

In principle, the Code clearly seems to be fully in line with a global trend towards self-regulation in matters of corporate governance, and this is re-

41 See, for the present composition of the Commission, <http://www.dcgk.de/de/kommission/mitglieder.html>.

42 Cf. the explanatory notes to the bill introducing § 161 AktG, Bundestags-Drucksache 14/8769, p. 21.

43 Pursuant to § 23(5) AktG, the articles of association can deviate from the Act's provisions only where this is expressly allowed.

44 See generally, e.g., AUGSBERG, *supra* note 12, 294–300; BUCK-HEEB/DIECKMANN, *supra* note 1, 97–98; SCHÜLKE, *supra* note 20, 108–112; M. WEISS, *supra* note 21, 63–72; see also BINDER, *supra* note 1, 258–260. And see the contribution made in this volume by F. MÖSLEIN, p. 83.

45 See <http://www.dcgk.de/de/kodex.html>. A number of commentaries on the Code exist, see, e.g., T.H. KREMER et al. (eds.), *Deutscher Corporate Governance Kodex – Kommentar* (6th ed., Munich 2016); H.-U. WILSING (ed.), *DCGK – Deutscher Corporate Governance Kodex* (Munich 2012); L. FUHRMANN et al. (eds.), *Deutscher Corporate Governance Kodex* (Frankfurt/Main 2015).

flected by the fact that both the very concept and the structure are derived from corporate governance codes in the Anglo-Saxon world.⁴⁶ On closer inspection, however, unlike the relevant counterparts in foreign jurisdictions, it is indisputably an instrument of state-induced self-regulation rather than a product of genuine self-regulation⁴⁷ – and it is, for that matter, even characterised by a rather high degree of state influence on both procedural and substantive matters. Conceptually, the Code certainly satisfies a number of key conditions for an effective application of the concept: As mentioned before, the drafting commission is sufficiently diverse as to reflect not just the views of industry representatives but also the perspective of a wider group of stakeholders, including both investors and the workforce. Over the years, the commission's deliberations have also become more transparent, with consultation procedures and conferences held prior to amendments to the Code's recommendations and suggestions.

At the same time, however, the drafting commission, formally known as a "Regierungskommission" (literally: a government commission), is clearly a body appointed by the state, with its composition being effectively determined by the Federal Ministry of Justice. And, rather than relying on voluntary acceptance by the industry, compliance with the Code is fostered by a rather strong mechanism set out as part of the mandatory legal framework for listed companies: Pursuant to § 161 AktG, the executive and the supervisory boards have to publish, on an annual basis, a declaration of compliance (or, indeed, non-compliance) with the Code's recommendations – and where they have decided not to comply, they also have to publish an explanation for their non-compliance. In this sense, the comply-and-explain approach is a good example of indirect enforcement of standards, with market pressure (in particular, stock exchange prices reflecting investors' interest in the maintenance of good corporate governance standards) ex-

46 See, e.g., K.J. HOPT, Die internationalen und europarechtlichen Rahmenbedingungen der Corporate Governance, in: Hommelhoff et al. (eds.), *Handbuch Corporate Governance* (2nd ed., Stuttgart 2009) 39, 41–44.

47 See, for a similar assessment, e.g. M. WEISS, *supra* note 21, 100–103; see also MÖSLEIN, *supra* note 44. For an even stronger, albeit not convincing view (DCGK as state regulation), see P. HOHL, Private Standardsetzung im Gesellschafts- und Bilanzrecht (Berlin 2007) 48–50. This is not the majority position, however, see e.g., reaching the opposite conclusion, BUCK-HEEB/DIECKMANN, *supra* note 1, 100; U. SEIBERT, Transparenz- und Publizitätsgesetz, *Zeitschrift für Wirtschaftsrecht* (ZIP) 2001, 2192; C.H. SEIBT, Deutscher Corporate Governance Kodex und Entsprechenserklärung (§ 161 AktG-E), *Die Aktiengesellschaft* (AG) 2002, 249, 250; P. ULMER, Der Deutsche Corporate Governance Kodex – ein neues Regulierungsinstrument für börsennotierte Aktiengesellschaften, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* (ZHR) 66 (2002) 150, 158–164.

pected to nudge management into high levels of compliance with the Code. In addition, incorrect compliance reporting may also expose the relevant company, in certain circumstances, to challenges against decisions of the shareholders' meeting, thereby jeopardising the swift execution of such decisions – which increases incentives to accept, and follow, the Code's approach yet further.⁴⁸

At first sight, this seems to have worked out as expected. The level of compliance with the Code's recommendations has been high to date, and practitioners have observed a rather strong tendency towards convergence of, and standardisation in, corporate governance arrangements, in particular with an increased professionalisation of supervisory boards in listed companies in recent years.⁴⁹ On closer inspection, however, the results appear to be, at best, mixed. Empirical studies on the connection between stock prices and compliance levels are inconclusive, casting doubt on the effectiveness of the chosen enforcement mechanism.⁵⁰ To be sure, the Code certainly does reflect the general objective of activating private interests and private knowledge, and thus a key policy objective of state-induced self-regulation generally. Whether the legal environment is in fact sufficiently conducive for the attainment of this objective is an open question, however. Comparing German stock corporation law to the legal frameworks in other jurisdictions – and, in particular, to US law – one cannot escape the conclusion that the general statutory environment leaves comparatively little scope for experimental approaches toward the development of governance standards and practices by the industry itself, given the highly prescriptive and to a large extent mandatory character of the German law on stock corporations.⁵¹ Moreover, even in areas not covered by detailed mandatory provisions, the readiness of the state to actually allow an open-ended development of relevant standards in the form of Code recommendations has been, at best, half-hearted. Although the government has, to date, refrained from exercising direct substantive influence on the Code, there has been a clear tendency to transform existing recommendations into mandatory legislation, thereby transferring the relevant issue back into the scope of direct regulation, especially in areas perceived to be of particular

48 See, e.g., J. KOCH, in: Hüffer/Koch, Aktiengesetz. Kommentar (12th ed., Munich 2016), § 161 para. 3; P. LEYENS, in: Hopt/Wiedemann (eds.), Großkommentar zum Aktiengesetz (4th ed., Berlin 2012), § 161 paras. 48–49. And see, discussing the implications for the Code's effectiveness as a regulatory tool, BINDER, *supra* note 1, 271–272; SCHÜLKE, *supra* note 20, 112–126.

49 For an empirical study, see A. VON WERDER et al., Größere Kodexskepsis im General Standard?, Die Aktiengesellschaft (AG) 2011, 491, 493.

50 Cf., surveying the available empirical evidence, BINDER, *supra* note 1, 276.

51 See, *supra* text and note 43.

social or political importance. Notable examples include the remuneration of directors and board diversity, where the Code's recommendations evidently were perceived to be too weak by legislators and were then replaced by mandatory provisions in the Stock Corporation Act.⁵²

Such developments, in a democratic society, are certainly not illegitimate per se. They can, and perhaps should, be expected where specific policy objectives are identified as too important to be left to private experiments. Against this backdrop, however, it should not come as a surprise that the Code has in recent years met with increasing criticism from industry representatives, legal practitioners and academics.⁵³ One of the key concerns expressed in this context is that the high level of compliance could actually be interpreted as a result of enforcement pressure rather than positive acceptance of the Code's recommendations, reflecting growing doubts as to its substantive quality – and, indeed, its legitimacy – among regulatees and their advisers. If that is true, adherence to the Code's recommendations could no longer be interpreted as reflecting real improvements in corporate governance arrangements; in fact, the Code could even be criticised as being an actual impediment to such improvements.

While the underlying technical problems cannot be examined in detail within the present paper,⁵⁴ the Code thus highlights not just the potential for state-induced self-regulation in terms of both substantive content and potential enforcement mechanisms, but also possible deficiencies in the concept. To be sure, the Code and its statutory environment (in particular, § 161 AktG demonstrate quite impressively that both *formal* state influence (in the form of enabling legislation, but also through disclosure rules and comply-and-explain requirements) and *informal* influence (on the selection of the relevant decision-makers and in on-going political pressure placed

52 E.g., W. BAYER, Grundsatzfragen der Regulierung der aktienrechtlichen Corporate Governance, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2013, 1, 5 f.; KOCH, *supra* note 48, para. 5a; G. SPINDLER, Zur Zukunft der Corporate Governance Kommission und des § 161 AktG, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2011, 1007.

53 See, summarising the discussion, KOCH, *supra* note 48, para. 5a. And see, for particularly critical (though not representative) assessments, SPINDLER, *Neue Zeitschrift für Gesellschaftsrecht* 2011, 1007; W. TIMM, Corporate Governance Kodex und Finanzkrise, *Zeitschrift für Wirtschaftsrecht (ZIP)* 2010, 2125, 2128.

54 For more in-depth analyses, see, e.g., BAYER, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2013, 1; G. BACHMANN, Überlegungen zur Reform der Kodex-Regulierung, in: Krieger et al. (eds.), *Festschrift für Michael Hoffmann-Becking zum 70. Geburtstag* (Munich 2013) 75; K. J. HOPT, Der Deutsche Corporate Governance Kodex: Grundlagen und Praxisfragen, in: Krieger, *ibid.*; P. O. 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.

upon them) can collaborate highly effectively in order not just to kick-start self-regulatory arrangements, but also to shape their substantive outcomes. In this regard, the Code clearly presents not only a highly successful example of state-induced self-regulation in general but also an illustrative example of how the content and the enforcement of self-regulatory arrangements can be structured by statute. As mentioned before, however, there probably exists a trade-off between, on the one hand, the need to exercise some regulatory influence on self-regulatory arrangements in order to protect public policy and, on the other hand, the need to preserve the necessary procedural and substantive freedom for those private actors that are engaging in the relevant self-regulatory processes. It is only where these are kept sufficiently free so as to accommodate their legitimate self-interest that state-induced self-regulation can be expected to yield the anticipated benefits. The German Corporate Governance Code is a highly illustrative example in this regard – a case where, arguably at least, the state's influence has reached an intensity that may simply be too high for these benefits to be achieved.

IV. CONCLUSIONS

Germany is clearly a jurisdiction where the concept of state-induced self-regulation has been embraced in a number of different contexts. The various emanations of the principle examined above highlight the potential benefits but also the risks inherent to the very concept. State-induced self-regulation clearly can help to activate the self-interest of the regulatees for the attainment of more problem-adequate regulatory solutions than could be achieved through direct regulation, in particular because relevant solutions can be expected to be more adequately suited to the underlying real-world problems and because the participation of the regulatees in the formulation of the solutions could increase acceptance and foster compliance. The risk of externalities – self-regulating actors ignoring, or acting against, the interests of relevant third-party stakeholders – can effectively be addressed through appropriate procedural and/or substantive precautions. However, as the above case study suggests, state control over procedures and substance also entails the risk that the state can overdo its influence in this regard – with possible repercussions not just in terms of the quality of regulatory responses, but also in terms of the readiness of regulatees to participate and ultimately submit to the relevant standards. As mentioned before, the very concept, *prima facie*, seems to amount to squaring the circle – an attempt to reconcile what cannot be reconciled. The examples examined here would indicate that squaring the circle can indeed be possible; but they also show that the pros and cons have to be assessed as carefully as the trade-off between state influence and expected benefits has to be calibrated.