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

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Table of Contents

Preface.....	iii
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I. Phenomenology of Self-Regulation

Terminology, Development, and Institutional Framework of Self-regulation in Japan <i>Marc Dernauer</i>	3
Terminology, Development, and Institutional Framework of Self- regulation in Germany <i>Petra Buck-Heeb</i>	27

II. Types of Self-Regulation

Genuine Self-regulation in Japanese Capital Markets: The Steward- ship Code. In Comparison to the Corporate Governance Code <i>Hiroyuki Kansaku</i>	61
Genuine Self-regulation in Germany. Drawing the Line <i>Florian Möslein</i>	83
Self-regulation Induced by the State in Japan <i>Souichirou Kozuka</i>	109
Self-Regulation Induced by the State in Germany <i>Jens-Hinrich Binder</i>	127

III. Theory und Practice of Self-Regulation

Self-regulations and Constitutional Law in Japan as Seen from the Perspective of Legal Pluralism <i>Yuki Asano</i>	147
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Self-commitments and the Binding Force of Self-regulation with Respect to Third Parties in Germany <i>Patrick C. Leyens</i>	157
Legitimacy and Limits of Self-regulation in Japan <i>Takahito Kato</i>	181
Legitimacy and Limits of Self-regulation in Germany <i>Andreas Dieckmann</i>	195

IV. Self-Regulation in Transnational Perspective

<i>Lex Mercatoria</i> and Self-Regulation in Transnational Perspective <i>Yuko Nishitani</i>	213
The Hague Principles on Choice of Law. Their Addressees and Impact <i>Jürgen Basedow</i>	245

V. Comparative Resume

Self-Regulation in Private Law in Japan and Germany. A Comparative Perspective <i>Moritz Bälz/Michael Pfeifer</i>	261
Contributors	281

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

*Marc Dernauer**

- I. Introduction
- II. Definition
 - 1. General Concept
 - 2. Self-regulation and Self-administration
 - 3. Conformity with Public Interests?
 - 4. Self-regulation in “Private Law”
 - 5. Self-regulation as an Ambiguous Form of Rule-making
- III. Historical Development
 - 1. Self-regulation in Pre-modern Japan (before 1868)
 - 2. Developments in the Meiji, Taishō, Shōwa, and Heisei Periods
- IV. Frame of Self-regulation in Japan
 - 1. Diversity of Self-regulation
 - 2. Categories of Self-regulation
- V. Typical Features of Self-regulation in Japan
- VI. Conclusion

I. INTRODUCTION

Despite the fact that self-regulation is only rarely discussed in the media and only in part thoroughly analyzed by legal scholars,¹ it is a widespread and important ordering phenomenon in today’s Japanese society. Moreover, as two basic forms of decentralized social regulation and monitoring, self-regulation and the similar concept of self-administration have a long and parallel tradition in Japan, going back to the 13th century.

II. DEFINITION

1. *General Concept*

In Japan, there is no legal or generally accepted definition of “self-regulation” – in Japanese it is called “*jishu kisei* (自主規制)” – but the prevalent

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1 H. HARADA, *Jishu kisei no kōhō-gaku-teki kenkyū* [Public-law Research on Self-regulation], Vol. 1 of Kyūshū University’s legal publication series “*Kyūshū Daigaku hōgaku sōsho*” (Tōkyō 2007) 2–3, 16–17.

concept can be described as a “discretionary ordering by private entities in response to an outside impact and in conformity with public interests”.²

“Ordering”, in Japanese, “*kisei* (規制)”, refers to regulation *and* monitoring on the basis of defined rules. This primarily refers to measures that restrict the actions of individuals or entities, but depending on the context it may also include guidance instruments such as the awarding of benefits of various forms.³ In many examples of self-regulation, both kinds of instruments of ordering can be found. The ordering can pertain to fully legally binding rules or to rules of less or no binding force, including any type of “soft law” as well as informal arrangements and cooperations. Therefore, the ordering can involve both formal and informal means.⁴

“Discretionary” can mean “voluntarily” or “genuine”, but it also includes examples of self-regulation where the state participates in, induces or orders self-regulation as well as instances where it entirely or partly leaves to the entity the choice of *how* to carry out self-regulation in view of a particular objective and certain defined specifications.

An “outside impact” is interpreted very broadly. It can refer to legal requirements, administrative demands, legal or administrative incentives, and other external social and economic factors that have an influence on the entity.

Problems are caused mainly by the remaining elements “private entities” and “conformity with public interests”.

2. *Self-regulation and Self-administration*

Whereas self-regulation usually refers only to regulations adopted by private law entities, self-administration refers to regulation and monitoring carried out by public law entities for the performance of public tasks. It is recognized, however, that there are some self-regulatory private entities and

2 HARADA, *supra* note 1, 14, 239 (in Japanese: “*Aru shiteki hō-shutai ni taishite gaibu kara inpakuto ga ataerareta koto o keiki ni, tōgai hō-shutai no nin’i ni yori, kōteki rieki no jitsugen ni tekigōteki na kōdō ga torareru yō ni naru koto* ある私的法主体に対して外部からインパクトが与えられたことを契機に、当該法主体の任意により、公的利益の実現に適合的な行動がとられるようになること”). Harada, a public law scholar, used this definition in his comprehensive work on self-regulation, which is often cited by other authors. Some other authors, however, refrain from consenting to or offering a precise definition. They suggest that the phenomenon is too complex and manifold. They instead confine themselves to categorizing the various forms of appearances of self-regulation, describing its functions and pointing to the various legal problems involved; see for example J. NAGAO, *Jishu kisei to hō* [Self-regulation and the Law] (Tōkyō 1993) 1, 2, 3–6, 16–20, 21 et seq. in his comprehensive work on self-regulation in the field of private law.

3 HARADA, *supra* note 1, 8–10.

4 NAGAO, *supra* note 2, 4–5.

self-administrative public law entities which are in their nature very similar to each other.

For example, on the one hand there are the bar associations in Japan (the Japan Federation of Bar Associations (JFBA, *Nihon Bengoshi Rengō-kai*, 日本弁護士連合会) as well as the many local bar associations) which are public law entities with (mainly) public tasks. Sections 31 and 45 Attorneys Law⁵ stipulate that the JFBA and its local associations are legal entities that have the duty to guide and monitor attorneys-at-law and attorney's corporations (hereinafter referred to only as "attorneys") for the purpose of improving the performance of their duties and maintaining the dignity of attorneys in view of their mission and occupation. For this purpose, the JFBA and the local bar associations also have the competence to take disciplinary measures and impose disciplinary sanctions on attorneys (Sections 56 et seq. Attorneys Law). Relevant duties of the attorneys in this regard are not only stipulated in the Attorneys Law itself but are also provided in by-laws of the Bar Associations, and they are in particular laid down in the "Basic Rules on the Duties of Practicing Attorneys",⁶ adopted by the JFBA on 10 November 2004, which define both a code of ethics and a code of conduct for attorneys. Furthermore, people qualified to work as attorneys in Japan are legally required to register as a member with a local bar association before practicing law. The autonomy and the competences conferred to the JFBA and the local bar associations by the Attorneys Law is commonly understood as "self-administration" or "self-governance" (*jichi*, 自治) rather than self-regulation. The JFBA itself holds the view that:

"The JFBA and the local bar associations have a high degree of self-governance [...] Self-governance is essential for preserving the independence of the legal profession [...] For this reason, the JFBA and bar associations differ from other professional associations in that they are not governed by a regulatory agency and from a financial perspective are operated entirely from dues and other revenues collected from members."⁷

On the other hand, there are the Japanese Institute of Certified Public Accountants (JICPA, *Nihon Kōnin Kaikeishi Kyōkai*, 日本公認会計士協会); the Japan Patent Attorneys Association (JPAA, *Nihon Benrishi-kai*, 日本弁理士会); the Japan Federation of Certified Public Tax Accountants' Associations (JFCPTAA, *Nihon Zeirishi-kai Rengō-kai*, 日本税理士会連合会) and its local associations; the Japan Federation of *Shihō Shoshis*' (Judicial Scriveners) Associations (*Nihon Shihō Shoshi-kai Rengō-kai*, 日本司法書士会

5 *Bengoshi-hō*, 弁護士法, Law No. 205/1949.

6 *Bengoshi shokumu kihon kitei*, 弁護士職務基本規定; available at <https://www.nichibenren.or.jp/en/about/us/regulations.html>.

7 JAPAN FEDERATION OF BAR ASSOCIATIONS, Brochure (publication date unknown) 10, available at <https://www.nichibenren.or.jp/en/about/us/brochure.html>.

連合会) and its local organizations; the Japan Federation of Administrative Procedures Legal Specialists (Administrative Scriveners) Associations (*Nihon Gyōsei Shoshi-kai Rengō-kai*, 日本行政書士会連合会) and its local associations; and other professional organizations (most of them “quasi-lawyers” professional associations). All these organizations are special private law entities (*tokubetsu minkan hōjin*, 特別民間法人) with functions very similar to those of the bar associations. They also have, in particular, the duty to guide and monitor their compulsory members in order to ensure, for the sake of public interests, a professional performance of their duties and an adherence to the ethical standards of the profession. They can also adopt by-laws for the purpose of “self-regulation”.

With the difference that the JFBA and the local bar associations have the competence to punish their members (also severely) on their own initiative in case of any misconduct, whereas the members of all other associations are primarily disciplined by specific government agencies based on statutes,⁸ the mentioned types of professional organizations are in fact quite similar, as self-regulation and self-administration are not easy to distinguish from each other. Based on the law applicable to the respective professional association and the adopted by-laws, all these organizations also have at least some mild means of sanctioning their members in cases of misconduct. Moreover, the bar associations, in particular the JFBA, and the Japanese Institute of Certified Public Accountants are sometimes both qualified as organizations whose nature is comparable to non-profit public law cooperatives serving the public good (*kōkyō kumi'ai*, 公共組合).⁹

3. *Conformity with Public Interests?*

Many experts endorse the view that the only forms that should be recognized as examples of self-regulation are those where the regulating purpose and its implementation are in conformity with public interests.

This criterion, however, neglects several items, in particular that (1) “illegal” self-regulation may in fact exist, (2) it sometimes may not be easy to tell whether a certain regulating activity is legal or illegal, and (3) legal self-regulation may after a while become illegal self-regulation, or vice versa, because of legislative actions or decisions rendered by courts or administrative bodies, such as the Japan Fair Trade Commission (JFTC).

In fact, as opposed to examples of self-regulation that qualify as being desirable and trade-enhancing in nature (sometimes referred to as “adminis-

8 K. ISHIDA, Ethical Standards of Japanese Lawyers: Translation of the Ethics Codes for Six Categories of Legal Service Providers, *Pacific Rim Law & Policy Journal* 14/2 (April 2005) 383, 385.

9 HARADA, *supra* note 1, 3.

trative self-regulation”), some forms of self-regulation in Japan are eyed with particular suspicion, especially by economists, political scientists and foreign politicians. That is to say, they are viewed as forms of self-regulation that fall into the category of “protective self-regulation”, which aims at shielding industry from competition by creating defensive boundaries to trade.¹⁰ The boundaries between administrative and protective self-regulation are also often found to be blurred.¹¹

Therefore, generally neglecting those forms of self-regulation that are illegal at a certain point in time, be it by accident or fault, does not seem to be wise when discussing the whole phenomenon of self-regulation. In the context of some academic disciplines and in the framework of particular inquiries, such as when analyzing an economic system or anti-monopoly law and policy, lawfulness should certainly not be a valid criterion for identifying and evaluating cases of self-regulation.

4. *Self-regulation in “Private Law”*

Although the academic symposium in whose context this paper was drafted addressed mainly the phenomenon of self-regulation in “private law”, from the Japanese perspective at least, it is often not easy to distinguish between the categories of “private law” and “public law”. There are many examples of self-regulation where these two broad legal categories overlap.

For example, there are cases where model standard terms of business for specific branches were designed by a joint commission of delegates from industry associations, consumer organizations, ministry officials, academics and others. Although these model standard terms were generally prepared as samples for use in private business transactions, the government administration was heavily involved in their specification (through representatives of ministries) and one certainly cannot deny a public interest in the use of fair standard business terms by entrepreneurs in relations with their customers, in particular consumers.

As a further example, one can consider the regulating and monitoring activities of professional organizations – either under public law or under private law – activities which, for instance, the Japanese bar associations

10 U. SCHAEDE, *Industry Rules: The Replacement of Government Rules by Self-Regulation*, Philipps-University Marburg Center for Japanese Studies' Occasional Papers No. 25 (2001) 8 et seq. Protective self-regulation of various kinds is regarded by some authors as also being a particular feature of “cooperative capitalism” (see U. SCHAEDE, *Cooperative Capitalism: Self-regulation, Trade Associations and the Antimonopoly Law in Japan* (Oxford et al. 2000)), which is often criticized as an impediment to fair and free international trade.

11 SCHAEDE, *supra* note 10, 2001, 9.

and the tax accountants' associations perform. Irrespective of the character of the organization as a public law or private law entity, it is the case that such activities involve public tasks and public interests although they also mostly extend to fostering private business activities of their members and regulating or influencing contractual relations.

Moreover, some rules in respect of business conditions and the activities of financial products' dealers are set by financial market operators (e.g. the Tokyo Stock Exchange, Inc., *Kabushiki Kaisha Tōkyō Shōken Torihiki-jo*, 株式会社東京証券取引所) or by the Japan Association of Securities Dealers (JSDA, *Nihon Shōkengyō Kyōkai*, 日本証券業協会), which were adopted on the basis of the Financial Instruments and Exchange Act (FIEA)¹² and in part approved by the competent supervisory authority.¹³ On the one hand, the activities of these entities involve public tasks and interests such as ensuring the sound development of the national economy, the proper functioning of financial markets, and the protection of customers, but on the other hand they also reflect a private interest in fostering business activities in the field of financial services. Some of these rules also regulate private contractual relations, such as the formation and content of financial service contracts and purchase contracts pertaining to financial products.

The Japanese public discussion on self-regulation also does not pay much attention to differentiating between self-regulation under "private law" and self-regulation under "public law". With the exception of some particular fields, such as capital market law, self-regulation is primarily discussed by administrative law scholars from the perspective of public law,¹⁴ with these individuals generally tending to treat the cases of self-regulation as a "public law" issue.

The same applies for the differentiation asking whether the rules set through self-regulation are of a "public law" or "private law" nature. For instance, Japanese courts that have to judge compensation claims brought by consumers/investors against dealers of financial products because of a financial loss suffered as a result of the purchase of a financial product will in some cases also cite a relevant violation of rules set by the Tōkyō Stock Exchange or the Japan Association of Securities Dealers as one reason for finding liability of the dealer under tort law or contract law, without sufficiently discussing the nature of the specific rule.¹⁵ As long as the respective

12 *Kin'yū shōhin torihiki-hō*, 金融商品取引法, Law No. 25/1948.

13 The supervisory agency for financial markets and market participants in Japan is at present the Financial Services Agency (FSA, *Kin'yū-chō*, 金融庁), which was founded in 2000.

14 One exception in this regard is Jisuke Nagao, who undertook a comprehensive analysis primarily from the viewpoint of private law (see *supra* note 2).

rule is covered by the statutory authorization in the Financial Instruments and Exchange Act mentioned above, there is not so much a question of whether the rule has legally binding force, which however is certainly a pertinent question in other cases of self-regulation. The question here is, rather, whether the rule is of a “civil law” or “public law” nature. In civil law, it is the prevailing view that a violation of a public law provision normally has no effect in civil law.¹⁶ This is in particular the general concept applied by the Japanese courts.¹⁷ When evaluating the civil law effect of a violation of rules set by self-regulation, there is a similar problem, as the nature of the rules can be quite different.¹⁸ Since the Financial Instruments and Exchange Act is – with only a few exceptional provisions – public law, can it therefore be that the rules set by the Tōkyō Stock Exchange or the Japan Association of Securities Dealers are binding “private law” as concerns third persons? Should the case law be given a different interpretation? Such theoretical problems might not yet have been sufficiently explored, since – as stated above – the Japanese courts indeed sometimes take a violation of self-regulatory rules into consideration without exploring their nature in detail.

15 A. M. PARDECK, *Shōken torihiki kan'yū no hōki-sei: “kaiji gimū” “setsumei gimū” o koete* [Regulating the Solicitation of Securities Transactions: Beyond Disclosure and the Duty to Explain] (Tōkyō 2001) 110 et seq. A similar state of affairs can be found in the case law on the civil law liability of dealers of commodity futures contracts with respect to the violation of statutes set by the commodity futures exchange market operators and rules set by the association of commodity futures dealers; see M. DERNAUER, *Verbraucherschutz und Vertragsfreiheit im japanischen Recht* (Tübingen 2006) 195–196, 219–228. Nagao takes the view that despite the fact that the strength of the binding effect of self-regulation may be quite different depending on the specific form of self-regulation, the violation of a rule set by self-regulation could generally be taken as a basis for arguing for liability under tort law (*supra* note 2, 17). In respect of cases dealing with the question of the tort liability of a commodity futures dealer, Nagao also confirms that while the rules set by the commodity futures exchange market operators and the rules set by the association of dealers of commodity futures are of various nature (*supra* note 2, 60–61, 67 et seq.), the Japanese courts often take a violation of rules into account (*supra* note 2, 68–69, 82). On the other hand, Nagao acknowledges that the conception of the courts differs and that some courts do not take such violations into account as (*supra* note 2, 71 et seq.). He himself is of the opinion that a violation of such rules could be taken into account as a “violation of a duty of care” in a civil law sense and that it thus could be at least one contributing factor toward the tort liability of the respective dealer (*supra* note 2, 82).

16 PARDECK, *supra* note 15, 110.

17 For details see DERNAUER, *supra* note 15, 176 et seq.

18 NAGAO, *supra* note 2, 16.

5. *Self-regulation as an Ambiguous Form of Rule-making*

As a result, “self-regulation” in Japan today is a very broad, very important, and – at the same time – quite ambiguous subject, one which is still not sufficiently explored in regard to its legal nature and legal effects.

III. HISTORICAL DEVELOPMENT

1. *Self-regulation in Pre-modern Japan (Before 1868)*

Although a precise dating is difficult, the first forms of self-regulation of guilds (*za*, 座) of merchants can be traced back at least to the Kamakura period (1192 to 1333).¹⁹

The country at that time was ruled mainly by a military government (*ba-kufu*, 幕府) having its headquarters in East Japan, in Kamakura, but the many domains – that is fiefdoms and provinces – were semi self-governed. Likewise, estates in the domains and the villages in the domains – as the direct producers of rice and the other agricultural goods on which the society was based – were to a high-degree self-governed. This basic structure, which historians call a *hōken* (封建) *kind of government*²⁰ existed for centuries and on into modern times. A *hōken* government is basically characterized by a central government that invests someone or multiple persons and his/their heirs with ruling in the provincial domains (a position which they keep on the condition of good behavior) and who themselves internally organize the domain in a similar manner.²¹

In those times, the shipping of tax, rent and goods required carriers, and transport was cumbersome and fraught with risk. Specialized merchants took on those tasks particularly in regard to long-distance transactions, and they also engaged in money lending.²² Merchants partly united in guilds that had various functions, such as dealing with the authorities, negotiating privileges against tax payment, and ensuring that the same price (preferably all that the market would bear) was paid by customers for a specified quality and amount of goods and services.²³ Some guilds began to operate in greater areas, some even on a nation-wide scale.²⁴ The lords, their vassals, the temples and the government were very willing to leave organizing trade, transport and related

19 C. STEENSTRUP, *A History of Law in Japan until 1868* (Leiden et. al. 1996) 91–92, 100.

20 STEENSTRUP, *supra* note 19, 72–73.

21 STEENSTRUP, *supra* note 19, 72.

22 STEENSTRUP, *supra* note 19, 91.

23 STEENSTRUP, *supra* note 19, 91.

24 STEENSTRUP, *supra* note 19, 91.

tasks to the guilds, since in the class society of Japan at that time, which lasted for hundreds of years into modern times, trading and money lending were generally considered to be unworthy activities; nevertheless, they of course demanded payment for granting such rights and privileges.

The guilds organized and regulated themselves primarily in the interest of their members and tried to monopolize trade in the markets, villages and towns while fighting off other guilds and single merchants. The guilds elected their own leaders and executive committees and laid-down their competences, in- and outside the guild, in guild by-laws.²⁵

In spite of sporadic bursts of legislation against them, the guilds survived for centuries because of their economic usefulness. Thereby, they also served a legal necessity, namely the regulation of relationships between the producers (domains and estates as wells as artisans) and the traders. Those relationships were left mostly unregulated by the central military government in Kamakura (which later resettled under a different dynasty in Edo – now present-day Tōkyō), by the court in Kyōto and by the provincial lords in their domains as regulation by the latter was mainly agriculturally focused and preoccupied with affairs of the warrior class and the nobility.²⁶ As a result, one can say that self-regulation and self-administration were both already common phenomena in 13th-century Japan.

Four centuries later, in the Edo period (1603 to 1868), Japan was rapidly developing into a unified market. Super-wholesalers (*toiya*, 問屋), active in broader areas or on a national level, united in special guilds (*nakama*, 仲間) that organized the trade for their members with trade-facilitating effects such as ensuring quality standards, but also with trade-restrictive effects achieved through discrimination against outsiders and price-fixing.²⁷ The primary function of these guilds was to intermediate between the *toiya* on the one side and, on the other side, the central government in Edo, the provincial lords in their domains (now called *han*, 藩) and their *samurai* and *hatamoto* vassals, individuals who themselves had neither experience nor interest in trade and other business activities such as banking. Through these guilds, the rulers also taxed the individual merchants. Moreover, these guilds had to pay a fee themselves to the local rulers and/or the central government in order to be allowed to operate.²⁸ Sometimes, those *nakama*-guilds were granted a monopoly in certain business areas and were then called *kabu-nakama* (株仲間).²⁹ At some points in time, the central govern-

25 STEENSTRUP, *supra* note 19, 92.

26 STEENSTRUP, *supra* note 19, 92.

27 STEENSTRUP, *supra* note 19, 121–122, 148–149.

28 STEENSTRUP, *supra* note 19, 121–122, 148–149.

29 STEENSTRUP, *supra* note 19, 148.

ment legislated against abuses of the *nakama*-guilds, in particular trade-restrictive measures. The government set maximum prices for certain goods and services, confiscated the assets of offending merchants and sometimes even abolished exploitative *nakama*-guilds, but only with limited success.³⁰

In some instances, single merchants developed into nation-wide active, family-owned and family-regulated enterprises,³¹ operating in a variety of business areas. One example is the Mitsui merchant house, originally founded by Takatoshi Mitsui at the end of the 17th century. More than 200 years later, this trading house developed into the Mitsui *zaibatsu*, which was dissolved after World War II; nevertheless, its surviving components continue to form the current Mitsui *keiretsu*, an important, largely informal group of companies. The Mitsui merchant house regulated itself based on a house law (first codified in 1722 with later supplements and amendments, particularly in 1900).³²

2. *Developments in the Meiji, Taishō, Shōwa, and Heisei Periods*

The *toiya*-wholesalers and *nakama*-guilds disappeared after the Meiji Restoration in 1868, that is, at the beginning of Japan's modern era. In the Meiji period (1868 to 1912) and the Taishō period (1912 to 1926), modern-type stock companies took over and basically free competition flourished.³³ Business associations played a less important role for several decades. However, close contacts between politicians, bureaucrats and economic leaders – especially from the big Japanese merchant houses (e.g. the Mitsui merchant house, see above), which later came to be known as the “*zaibatsu* (財閥)”, developed and offered a forum for informal cooperation and coordination with the common goal of quickly developing the Japanese economy.³⁴ This has even been described by some scholars as a characteristic pattern of the Japanese economic and political system that is still clearly visible in postwar Japan. According to that view, Japan could be characterized as a network state in the sense that government power is intertwined with that of the private sector.³⁵ With the beginning of the Meiji period, the

30 STEENSTRUP, *supra* note 19, 122, 149.

31 STEENSTRUP, *supra* note 19, 138.

32 Japan: An Illustrated Encyclopedia (Tōkyō 1993) 982 under the entry “Mitsui”.

33 STEENSTRUP, *supra* note 19, 149; HARADA, *supra* note 1, 71.

34 CH. JOHNSON, MITI and the Japanese Miracle. The Growth of Industrial Policy, 1925–1975 (Stanford 1982), Tuttle edition (1986) 85 et seq.; D.B. SMITH, Japan since 1945. The Rise of an Economic Superpower (London et al. 1995) 19–21.

35 D. I. OKIMOTO, Japan, the Societal State, in: Okimoto/Rohlen (eds.), Inside the Japanese System. Readings on Contemporary Society and Political Economy (Stanford 1988) 211, 214–215.

government commenced to identify, nourish and protect certain key industries for the economic development of the country, and it cooperated closely with the leaders of the relevant industry sectors (in particular of the *zai-batsu*) for the achievement of this goal. As a result, particularly those pampered industries flourished.³⁶

At the beginning of the Shōwa period (1926 to 1989), in the 1930s and in particular after the 1931 Manchurian incident, the economy became increasingly controlled by the government administration.³⁷ The control became stricter especially after the beginning of the Second Sino-Japanese War and World War II in the Pacific.³⁸ In addition to legislative measures and central economic planning,³⁹ management and control of the Japanese economy by the government was exercised also through and with the support of newly established business or industry associations (which, however, often were based on already existing industry associations) with compulsory membership for companies in most industry sectors (so-called “control associations” (*tōsei-kai*, 統制会)).⁴⁰ One example is the “Control-Association for Electric Machines (*Denki Kikai Tōsei-kai*, 電気機械統制会)”, established in 1942, which developed into the present day “Japan Electronics and Information Technology Industries Association (JEITA, *Denshi Jōhō Gijutsu Sangyō Kyōkai*, 電子情報技術産業協会)”.⁴¹

After the war, the former wartime cooperation between industry and the government administration evolved to a certain extent into a less formal but nevertheless close relationship, partially intermediated by the successor industry associations, for the purpose of rebuilding the Japanese economy.⁴² There were also some new enterprise groups of particular market power

36 T. ITO, *The Japanese Economy* (Cambridge, London 1992) 20, 31–33; R. MINAMI, *The Economic Development of Japan. A Quantitative Study* (2nd ed., London et al. 1994) 25–26, 113–116, 120–121; SMITH, *supra* note 34, 6–10, 11–12.

37 T. NAKAMURA, *The Japanese War Economy as a Planned Economy*, in: Pauer (ed.), *Japan’s War Economy* (London, New York 1999) 9, 11 et seq.

38 HARADA, *supra* note 1, 75–79; NAKAMURA, *supra* note 37, 13, 14–15.

39 For an overview: Y. KAWAGUCHI, *Nihon kindai hōsei-shi* [A History of Modern Japanese Law] (Tōkyō 1998) 393–402; NAKAMURA, *supra* note 37, 11–21.

40 HARADA, *supra* note 1, 75–80; NAKAMURA, *supra* note 37, 17–18; S. OTTO, *National Policy Companies and their Role in Japan’s Wartime Economy*, in: Pauer, *supra* note 37, 124, who discusses as a further control instrument the founding of national policy companies (*kokusaku gaisha*, 国策会社) and who, furthermore, mentions at page 124 the numerous cartels in many industry sectors which were also used by the government to guide and control the economy.

41 HARADA, *supra* note 1, 94.

42 MINAMI, *supra* note 36, 121–124; G.C. ALLEN, *The Japanese Economy* (London 1981) 31 et seq.; B. BALASSA, *Japan’s Trade Policies*, in: *The Japanese Economy Part 1, Volume III* (London 1998) 126, 149–152.

(*keiretsu*, 系列)⁴³ which partly developed from the former *zaibatsu* and with whom the government administration could deal directly. On the whole, this cooperation and coordination of the economy in some sectors seems to have been – although disputed⁴⁴ – quite successful and to have helped Japan's economy to regain and even surpass pre-war economic strength within a short number of years. By the end of the 1960s, Japan had surpassed West Germany to become the second largest market economy in the world.⁴⁵ There were of course additional factors that contributed to the rapid rebuilding of the Japanese economy after the war, which cannot be discussed here in detail.⁴⁶ The government administration, in particular the Japanese Ministry of International Trade and Industry (MITI, *Tsūshō Sangyō-shō*, 通商産業省),⁴⁷ exercised its influence to shape industry in particular by means of informal administrative guidance (*gyōsei shidō*, 行政指導),⁴⁸ often also through intermediation and self-regulation of the industry associations,⁴⁹ but it also had some legal supervisory competences which could be used if need be (the so-called “carrot and stick mechanism”⁵⁰). Informal cooperation between the government administration and

43 ITO, *supra* note 36, 180 et seq.

44 ITO, *supra* note 36, 201–204.

45 Japan: An Illustrated Encyclopedia, *supra* note 32, 308, at the entry “economic history”.

46 For an overview of the structural, political and economic conditions and policies see ITO, *supra* note 36, 52–67; U. SCHAEDE, Change and Continuity in Japanese Regulation, *ZJapanR/J.Japan.L.* 1 (1996) 21, 21–23. More detailed: T. NAKAMURA, *The Postwar Japanese Economy. Its Development and Structure* (2nd ed., Tōkyō 1995) 33–143.

47 The MITI is the predecessor organization of the present Ministry of Economy, Trade and Industry (METI, *Keizai Sangyō-shō*, 経済産業省).

48 JOHNSON, *supra* note 34, 242 et seq.; F.K. UPHAM, Law and Social Change in Postwar Japan (Cambridge, London 1987) 166–204; ITO, *supra* note 36, 196, 198–200; NAKAMURA, *supra* note 46, 88–95; ALLEN, *supra* note 42, 41 et seq.; D.I. OKIMOTO, The Costs of Japanese Industrial Policy in: Okimoto/Rohlen, *supra* note 35, 222, 223–224; Y. MURAKAMI, The Japanese Model of Political Economy, in: Yamamura/Yasuba (eds.), *The Political Economy of Japan. Volume 1: The Domestic Transformation* (Stanford 1987) 33, 47–56; M. UEKUSA, Industrial Organization: The 1970s to the Present, in: Yamamura/Yasuba (*ibid.*) 469, 475–476; SMITH, *supra* note 34, 90–93, 107–109, 166–167; BALASSA, *supra* note 42, 141; S. TSURU, The Mainsprings of Japanese Growth: A Turning Point?, *The Atlantic Papers* No. 3 (Paris 1976) 33–38.

49 HARADA, *supra* note 1, 83–87, 249 (general development), 94–98 (example of the semiconductor and computer industry); SCHAEDE, *supra* note 10, 2001, 5–6.

50 SCHAEDE, *supra* note 46, 23; H. BAUM/M. BÄLZ, § 1 Rechtsentwicklung, Rechtsmentalität, Rechtsumsetzung, in: Baum/Bälz (eds.), *Handbuch Japanisches Handels- und Wirtschaftsrecht* (Cologne 2011) 1, 24.

industry (and also policy-making) that was undertaken with the aim of developing the Japanese economy was further fostered by guidance and consultation provided by “old boy’s networks”. These groups of retired bureaucrats were employed by private companies for the purpose of maintaining a good and mutually-benefiting relationship with the authorities (also referred to as *amakudari*, 天下り, literally “descending from heaven”).⁵¹ Later, in many sectors, the coordination and self-regulation under the guidance of Japanese ministries extended also to purposes such as protecting consumers, establishing fair business practices, shaping labor relations, and protecting the environment, i.e. purposes that do not primarily involve the growth of the economy or the generation of enterprise profits.

On the whole, prominent elements of this policy include: informal communication in tandem with informal and formal coordination between industry and the government administration, often intermediated by industry associations and committees (*shingi-kai*, 審議会)⁵² featuring representatives from the supervising ministries, industry (including industry associations) and other parties; various forms of financial and non-financial support from the ministries for the industry sectors considered to be of particular importance for economic development; a weak anti-trust monitoring;⁵³ and a partial protection of the Japanese market through customs and non-tariff barriers to trade.⁵⁴ This period generally lasted until the beginning of the 1990s (with some adjustments in the 1980s⁵⁵) and has been classified in various ways: as a model of a strong state-guided high-growth system with a close cooperative relationship between the state bureaucracy and the private business world,⁵⁶ as a developmental state model,⁵⁷ as “Japan Incorpor-

51 Cf. U. SCHAEDE, The “Old Boy” Network and Government-Business Relationships in Japan, *Journal of Japanese Studies*, Vol. 21 No. 2 (1995) 293–317.

52 For the importance of committees (or deliberation councils) for the coordination between industry and the government administration see e.g. SCHAEDE, *supra* note 46, 24.

53 ITO, *supra* note 36, 204–206; F. WALDENBERGER, The Changing Role of Competition Policy in Japan, in: Metzger-Court/Pascha (eds.), *Japan’s Socio-Economic Evolution. Continuity and Change* (Kent 1996) 191, 199–210; SCHAEDE, *supra* note 10, 2001, 14–15; K. YAMAMURA, Procarter Policy: The Advantages, in: Okimoto/Rohlen, *supra* note 35, 220–221. For the specific nexus between guidance and competition policy see L. LESZCZYŃSKI, Economic Guidance and the Antimonopoly Law: Traditions versus Legal Changes, in: Metzger-Court/Pascha (*ibid.*) 221–243.

54 BALASSA, *supra* note 42, 134–154;

55 SCHAEDE, *supra* note 46, 22–25.

56 JOHNSON, *supra* note 34, 309 et seq.

57 JOHNSON, *supra* note 34, 17, 305 et seq.

rated”⁵⁸ or – more simply – as a period of very active industrial policy.⁵⁹ Even in consideration of the adjustments in the 1980s, in particular the many measures of deregulation, Japan is still characterized as an economic system of “consultative capitalism”.⁶⁰

Growing trade frictions in the 1980s, in particular with the U.S.,⁶¹ a growing self-confidence of some industry sectors in their developed economic strength,⁶² a general upswing in the support for the concept of a deregulated and lean state, the beginning of a long-lasting economic and financial crisis, which has been by some also identified as a failure of the hitherto policy model,⁶³ and – finally – a call for a stronger democratization of the Japanese society brought about many political, legal and economic reforms in the 1990s and 2000s.

As a result, the formal and informal strong influence of the government administration on the policy of the industries was reduced, but not eliminated. Additionally, the phenomenon of *amakudari* may have on the whole decreased – in view of continuous criticism during the past decades; nonetheless, it seems to be still a pattern of continuity.⁶⁴ Moreover, a strong cooperation and coordination among the industry sectors themselves still exists, in particular intermediated by business associations and often implemented by means of self-regulation.⁶⁵ Since institutionalized mechanisms of the past have only been adjusted but not totally replaced, the Japanese economic system can still be qualified as a form of “consultative capitalism” or “cooperative capitalism”.⁶⁶

Today, in many industry sectors, self-regulation continues to be an important and necessary tool for the implementation of many policy goals, be they genuine goals of the sector itself or imposed ones. Considering the

58 SMITH, *supra* note 34, 107.

59 SCHAEDE, *supra* note 10, 2001, 11.

60 SCHAEDE, *supra* note 46, 26–27, 28.

61 ITO, *supra* note 36, 365–384

62 SCHAEDE, *supra* note 46, 23–24.

63 BAUM/BÄLZ, *supra* note 50, 27–29; SCHAEDE, *supra* note 10, 2001, 2–3.

64 A. VAN RIXTEL, The Change and Continuity of *Amakudari* in the Private Banking Industry, in: Metzger-Court/Pascha, *supra* note 53, 244, 261; C.P. JONES, Bridging Corruption and Legitimacy: Amakudari, Japan Times of 12 April 2015; C. P. JONES, The Influence of Amakudari on the Japanese Legal System, ZJapanR/J.Japan.L. 40 (2015) 1–57; HARADA, *supra* note 1, 246.

65 HARADA, *supra* note 1, 87 et seq. Some argue that governmental influence by formal regulation and informal administrative guidance has been to a great extent replaced by self-regulation of the industry itself (SCHAEDE, *supra* note 10, 2001, 8, 12 et seq., 16–18), thereby maintaining a strong cooperative economic system, cf. SCHAEDE, *supra* note 10, 2000.

66 SCHAEDE, *supra* note 10, 2000.

hitherto style of the Japanese legislation in industrial policy and the administrative guidance by the supervisory authorities, the industry perceives self-regulation as a reasonable and effective way to implement certain common policy goals rather than as a means of escaping administrative control. Even if a specific form of self-regulation involves guidance by the supervising ministry, this is not considered as causing grave problems. The Japanese companies and industry associations have long learnt to deal with the authorities on formal and informal terms in order to achieve their goals.

IV. FRAMEWORK OF SELF-REGULATION IN JAPAN

1. *Diversity of Self-regulation*

In Japan, there are not only many examples of self-regulation visible, but also a great diversity of its forms. Self-regulation is present in many areas of public law and private law, for example in: finance, investment and capital market law; banking law; consumer law; media law;⁶⁷ data protection law;⁶⁸ environmental law;⁶⁹ labor law; social security law;⁷⁰ construction and construction planning law;⁷¹ and the legal framework of many liberal professions or industry associations.

In addition, there are certainly also many forms of illegal and anticompetitive cooperation among industry competitors, which may also involve industry associations, but this is a matter of cartel and competition law that cannot be further explored here.

a) *Finance, Investment, and Capital Market Law*

In finance, investment and capital market law, we find a variety of self-regulation undertaken by the Japanese stock exchanges and the Japan Association of Securities Dealers. Covered aspects include: auditing standards for initial and further public offerings of company shares and other financial instruments, the governance of financial markets participants for the prevention of illegal acts,⁷² and the monitoring of sales transactions in order

67 HARADA, *supra* note 1, 36–38.

68 HARADA, *supra* note 1, 38–39.

69 HARADA, *supra* note 1, 39–42.

70 HARADA, *supra* note 1, 44–48.

71 HARADA, *supra* note 1, 48–51.

72 For an example of self-regulation in the field of commodity futures transactions by the association of commodity futures dealers and by commodity futures exchange market operators, see NAGAO, *supra* note 2, 61–82. For an example of self-

to detect insider trading and cases of unnatural price formation in securities and other financial products.⁷³ The competence for such self-regulation is based on provisions of the Financial Products and Exchange Act (FIEA), and the measures require approval by the competent supervising authority, at present the Financial Services Agency (FSA, *Kinyū-chō*, 金融庁). One particular example is Japan's Corporate Governance Code set by the Tokyo Stock Exchange, which has been in force since 1 June 2015.⁷⁴ In addition, all financial product dealers have to prepare and set public policy objectives for the solicitation of customers based on the Financial Products Sales Act⁷⁵ (Sections 9 and 10).

b) *Accounting Law*

In the area of accounting law that borders not only financial and capital market law but also company and tax law, a standard for accounting was set and continues to be further developed by the Committee for Enterprise Accounting (*Kigyō Kijun Shingi-kai*, 企業基準審議会), established by the supervisory agency in financial law, the Financial Services Agency (FSA). Members of the committee include in particular delegates from the Japanese Institute of Certified Public Accountants (JICPA, *Nihon Kōnin Kaikeishi Kyōkai*, 日本公認会計士協会) in addition to bureaucrats from the FSA.⁷⁶

In contrast to the aforementioned cases of self-regulation in the field of finance and capital market law, there is no duty or competence provided by law for the setting of an accounting standard; however, a Cabinet Order based on the Financial Instruments and Exchange Act provides that an accounting standard set by that committee is to be regarded as “fair and rea-

regulation in the field of securities transactions by the Japan Association of Securities Dealers (JSDA), see PARDECK, *supra* note 15, 104–111.

73 HARADA, *supra* note 1, 30–31. See also the present forms of self-regulation mentioned by the Japan Exchange Group, Inc., which operates the Tōkyō Stock Exchange, Inc. and the Ōsaka Exchange, Inc., the two largest exchange markets in Japan, on its homepage (<http://www.jpx.co.jp/regulation/index.html>; last visited on 15 May 2017).

74 For the relevant documents and explanations see the homepage of the Japan Exchange Group, Inc. at <http://www.jpx.co.jp/english/equities/listing/cg/>. For details about the Japan Corporate Governance Code see, for instance, the numerous articles in the special edition (on the setting of the corporate governance code) of the law review *Jurisuto* (ジュリスト) 2015, No. 9 (September). See also N. NAKAMURA/Y. KURAHASHI, *Kōporēto gabanasu kōdo no yomikata, kangaekata* [How to Read and Appraise the Corporate Governance Code] (Tōkyō 2015).

75 *Kin'yū shōhin no hanbai-tō ni kansuru hōritsu*, 金融商品の販売等に関する法律, Law No. 101/2000.

76 HARADA, *supra* note 1, 32–33.

sonable". A common feature here again is that the authorities participate in the standard-setting process.

Moreover, the JICPA is also the self-regulating association for monitoring all public accountants in Japan, as already mentioned, and is itself supervised by the FSA.

c) Banking Law

In banking law, based on the Bank Act,⁷⁷ banks have to install a compliance regime which involves regular duties of reporting to the FSA.⁷⁸

d) Consumer Law

In the area of consumer law, there are the following forms of self-regulation that are particularly noticeable.

- (1) In cooperation between the industry associations of numerous sectors and the relevant supervising ministry, model standard terms of business for various kinds of contracts have been prepared and published.⁷⁹ In most cases a special committee established by the supervising ministry served as the venue for the deliberation and setting of the model standard terms of business. As regards the setting of model standard terms, there is neither a legal basis for these activities nor a legal competence for the participation of the ministries. Rather, the ministries here exercise informal administrative guidance. However, in many sectors, establishing a business requires the permission of the supervising ministry and the preparation of (fair and complete) standard terms of business. The ministries in these cases usually take into consideration whether and to which degree the respective entrepreneur follows the model standard terms of business.
- (2) Various industry associations offer ADR-proceedings. The maintenance of some ADR bodies is required by law (e.g. the ADR body of the Door-to-door Selling Association (*Nihon Hōmon Hanbai Kyōkai*, 日本訪問販売協会), Section 29 SCTA);⁸⁰ some were initially established based on

⁷⁷ *Ginkō-hō*, 銀行法, Law No. 59/1981.

⁷⁸ HARADA, *supra* note 1, 29.

⁷⁹ HARADA, *supra* note 1, 34; NAGAO, *supra* note 2, 83–112; DERNAUER, *supra* note 15, 418–420.

⁸⁰ Law on Special Commercial Transactions (*Tokutei shō-torihiki ni kansuru hōritsu*, 特定商取引に関する法律), Law No. 57/1976.

- informal requests by the supervising ministries⁸¹ (e.g. the various product liability ADR centers⁸² administered by industry associations).
- (3) The Consumer Product Safety Association (CPSA, *Seihin Anzen Kyōkai*, 製品安全協会) awards the “SG (safety guaranteed)” certification (*SG māku*, SGマーク) for consumer goods if these comply with the SG safety standard set by the Association and approved by the Ministry of Economy, Trade and Industry (METI, *Keizai Sangyō-shō*, 経済産業省).⁸³
 - (4) There are many other product standards, such as the SG certification, that are either set by law or self-regulation, where compliance with the respective standards can, under certain conditions, be certified by private entities instead of supervising authorities. As a result, the manufacturer or the distributor of the respective product may advertise it by using a certification mark (*ninshō*, *shōmei māku*, 認証・証明マーク). Therefore, the accredited certification bodies granting the respective certifications are often the users of the certifications themselves, a specific business association of the users or third-party entities that were established by the business associations in the respective sector. Here, Japan follows a worldwide trend in product certification and monitoring, visible particularly also in the EU.⁸⁴
 - (5) Private self-certification in some areas even extends to industry facilities. One recent controversially discussed example is the self-monitoring regime in respect of nuclear reactors, introduced by law in 2003,⁸⁵ which came under enormous criticism after the 2011 Tōhoku earthquake.

e) *Labor Law*

In labor law, employers can enter into collective agreements with labor unions, based on the Labor Union Act,⁸⁶ which supersede individual agreements in labor contracts. Moreover, employers with more than ten employees also have to stipulate general work regulations (*shūgyō kisoku*,

81 HARADA, *supra* note 1, 35.

82 L. NOTTAGE/Y. WADA, Japan’s New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?, *ZJapanR/J.Japan.L.* 6 (1998) 40, 51–56.

83 HARADA, *supra* note 1, 35–36.

84 Cf. for example: H.C. RÖHL/Y. SCHREIBER, *Konformitätsbewertung in Deutschland* [Survey on Conformity Assessment in Germany and other countries for the German Federal Ministry for Economic Affairs and Technology, in particular in the EU] (April 2006) 31 et seq.; HARADA, *supra* note 1, 191–193.

85 HARADA, *supra* note 1, 30.

86 *Rōdō kumi’ai-hō*, 労働組合法, Law No. 174/1949.

就業規則) for all employees, based on the Labor Standard Act,⁸⁷ which, if reasonable, also supersede individual contractual terms in labor contracts.⁸⁸

f) *Retirement Homes*

Private retirement and nursing homes are much less regulated by law than similar public facilities. They are however subject to self-regulation by the Japan Association for Private Retirement and Nursing Homes (*Zenkoku Yūryō Rōjin Hōmu Kyōkai*, 全国有料老人ホーム協会), supplemented by informal administrative guidance by the competent prefectural administration and the Ministry of Health, Labor, and Welfare (*Kōsei Rōdō-shō*, 厚生労働省).⁸⁹ This pertains to the service conditions as well as the contracts with residents. The Association, for instance, offers ADR proceedings for residents of member facilities. They also prepare model standard terms of business for contracts with residents. In addition, upon request for membership the Association checks compliance with the guidelines of the Ministry of Health, Labor, and Welfare for the establishment of such private facilities (Guidelines). The Association, however, has no specific legal competence for monitoring the operation and management of the facility thereafter or for non-compliance with the law, the Guidelines or the rules set by the Association. If in fact the Association becomes aware of a member facility's non-compliance with laws or with the rules of the Association, it can only intervene on the basis of self-established rules. An expulsion from the Association, however, has no effect on the facility's ability to continue its operation.

g) *Others*

It must be mentioned that there are many more similar cases of self-regulation than those mentioned above. Moreover, in almost all industry and liberal professions sectors there are member associations that operate based on self-established rules, in part based on a specific law entrusting them with specific self-regulatory tasks, in part without any legal basis.

2. *Categories of Self-regulation*

As can be inferred from the aforementioned examples, the forms of self-regulation can be very different. They vary in particular with regard to whether or not the self-regulation was implemented based on a legal provi-

87 *Rōdō kijun-hō*, 労働基準法, Law No. 49/1949.

88 HARADA, *supra* note 1, 42; S. NISHITANI/H.P. MARUTSCHKE, *Arbeitsrecht, Sozialversicherung, Geschäftstätigkeit von Ausländern in Japan*, in: Baum/Bälz, *supra* note 50, 418, 421–425.

89 HARADA, *supra* note 1, 46–48.

sion (sometimes even as a duty), the degree and mode of involvement of the Japanese authorities (usually ministries), and the mode of involvement of industry associations. In most cases of self-regulation, the involvement of a particular industry association and a particular ministry is pivotal. Corresponding with these elements, also the nature of the rules established by self-regulation and the opportunities and procedures for their enforcement can be very different. The forms of self-regulation in Japan can be broadly divided into the following categories.

a) Genuine Self-regulation

There are cases of genuine (*dantai jiritsuteki*, 団体自立的) self-regulation in Japan. Significant for such cases is that self-regulation was established neither on the basis of a law nor by inducement and participation of the government administration. Pre-formulated standard terms of business used by entrepreneurs are one typical example. At present, there is neither a civil law provision determining the requirements for the incorporation of business terms into a contract nor one for evaluating a specific clause in respect of its reasonableness, save for more general civil law and consumer law instruments.⁹⁰ In some sectors, however, the supervising ministry has the legal competence to check the reasonableness of the terms of business used by entrepreneurs. Moreover, the industry association(s) in the respective sector may establish model standard terms of business and have some informal or formal guidance opportunities towards its members based on self-established rules of the association. Sometimes, there are also ministries involved in the establishment of committees for the preparation of model standard terms of business for a specific business sector and a specific type of contract.⁹¹

Another example is the setting of uniform technical standards for specific new products, in particular in the area of electric and electronic devices, such as standards for electric and electronic components, mobile communication devices, and audio, video and digital recording technologies (DVDs, CDs etc.), these often being developed and set by private entities. In the area of electric and electronic devices, the setting of technical standards in Japan is often guided by the earlier-mentioned Japan Electronics and Information Technology Industries Association (JEITA),⁹² the most relevant

90 Legal provisions regulating the incorporation of standard business terms into a particular contract (as applicable contract clauses) and their specific validity, however, will become part of the Japanese Civil Code in a few years, after the entry into force of Law No. 44 of 2 June 2017 reforming the law of obligations, which has to be effected, at the latest, by 2 June 2020 (by government ordinance).

91 For references see *supra* note 79.

92 HARADA, *supra* note 1, 109–115.

industry association in this industry sector. In addition, there are also *ad hoc* standards created by a single company or by a consortium of companies, or technical standards developed by a private standard-setting organization established by companies in the same technical area. These *de facto* standards can become *de jure* standards, on the national level as part of the Japan Industrial Standards (JIS) and on the international level as part of the International Electrotechnical Commission (IEC) standards.⁹³ Depending on the *de facto* standard, the implementation of the standard is either technically necessary for product makers or informally safeguarded by the internal rules of the standard setting organization itself. Anti-competitive agreements among companies could be also assigned to this category.

In addition, all member associations in the various industry and liberal professions sectors that operate based on self-established rules without any specific legal basis, and all cooperation agreements among and between groups of legal entities, in particular between companies, could be regarded as belonging to this category of self-regulation.

If compliance with the rules established under genuine forms of self-regulation is in fact not necessary, as in the case of some technical standards, the binding effect of those rules is mostly rather weak. If the product market, however, requires the implementation of the standard, for instance if the respective device is a part of another device whose specifications are determined by the standard, there is a *factually* binding effect. If an industry association is involved, it is often important how much internal formal and informal influence the association has on its members; in other cases, it depends on whether the market participants are willing to sanction any non-compliance with the rules through their reactions.

b) Self-regulation Informally Guided by the Government Administration

Although informal inducement and guidance by ministries through administrative guidance (*gyōsei shidō*), ministerial decrees (*tsūtaisū*, 通達), financial support and other measures is one particular feature of many types of self-regulation in Japan, cases of ministerial guidance and support completely without any legal basis have become rare.

As examples, one could point to the mentioned setting of model standard business terms guided mainly by the MITI/METI as well as also to the coordinated research, development and marketing project in the electronic industry for semiconductor related technologies from the 1960s on, which was also guided by the MITI and intermediated by predecessors of the JEITA and related organizations. Although informal guidance by ministries

93 HARADA, *supra* note 1, 114.

and similar entities has only limited legal effect itself, it works where the respective ministry can claim special expertise or where it can exercise influence by legal decisions on other issues as coercive means. Rules established solely on the basis of informal involvement of the authorities are usually considered as having no legally binding effect.

The adoption of Japan's Corporate Governance Code in 2015⁹⁴ may also be assigned to this category. The Code was introduced by the Tōkyō Stock Exchange and prepared by a committee of experts (the "Council of Experts"); it is applicable for all companies listed at this stock exchange. In the preamble under item 11, the Council explains:

"Moreover, unlike laws and regulations the Code is not legally binding. The approach it adopts for implementation is "comply or explain" (either comply with a principle or, if not, explain the reasons why not to do so). In other words, the Code assumes that if a company finds specific principles (General Principles, Principles and Supplementary Principles) inappropriate to comply with in view of their individual circumstances, they need not be complied with, provided that the company explains fully the reasons why it does not comply."

c) Legally Induced Self-regulation or Regulated Self-Regulation

The cases of self-regulation induced by or based on a legal provision (legally induced (*yūdō*, 誘導) or regulated self-regulation respectively) are particularly numerous and diverse. Here in particular, the degree of formal and informal participation of the government administration varies.

Most of the above-mentioned examples presented to demonstrate the diversity of self-regulation in Japan belong to this category, e.g. the self-regulation of the Japanese stock exchanges and the Association of Securities Dealers, the setting of accounting standards, which are also influenced by international standards of the same kind, and the setting of the SG safety standards.

Self-regulation belonging to this category is safeguarded either by possible legal actions – either within the self-regulated framework or outside, that is by way of a possible intervention of the authorities – or by initiating court proceedings.

As a special type of this category one can consider those cases where the compliance with a specific standard can be certified and monitored by user companies themselves, by a business association of users or by an accredited third-party organization established by users of the standard.

Many of the rules established by self-regulation of this type have a legally binding nature. However, the degree of their effectiveness varies substantially.

94 Available at <http://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jdy-att/20150513.pdf>.

V. TYPICAL FEATURES OF SELF-REGULATION IN JAPAN

One can summarize the following common features of self-regulation in Japan: Most cases of self-regulation in the field of private law in Japan involve a prominent involvement of business associations in the relevant area.⁹⁵ Many important cases of self-regulation are induced by or based on legal provisions. In most cases of self-regulation, the Japanese government administration – usually the supervising ministry – guides the self-regulation by formal or/and informal means.⁹⁶ The structure of the cooperation and coordination between and among the government administration (mostly ministries), the business associations and the individual entities is often opaque and complicated. Through this type of self-regulation, the interests of the government administration, industry interests, and – more recently – also the interests of involved and affected third parties are being taken into account and balanced.⁹⁷ The degree of effective implementation varies greatly, depending on the specific form of self-regulation.

VI. CONCLUSION

In Japan, self-regulation is a broad and ambiguous topic. Nevertheless, self-regulation – in various functions – has a long tradition and is widely used at various levels of society, not only in industrial or economic contexts, and also in various forms.

In comparison to Germany, the functions and basic categories of self-regulation do not seem to differ so much. Moreover, growing international cooperation in some areas contributes to the development of parallel and similar forms of self-regulation worldwide.

Notable for Japan, however, are the degree and forms of participation of the supervising ministries in the respective sectors – in particular the informal guidance instruments. Moreover, most cases of self-regulation are based on law.

Self-regulation in Japan is generally considered as an effective means of ordering, drawing upon the special expertise of the government administration as well as the respective industry, and as a means to also incorporate particular third-party interests, where necessary. It is not so much regarded as a means for avoiding formal legal regulation. Industry has long since adapted to cooperation and coordination with the supervising ministries on the basis of a regulated self-regulation scheme.

95 HARADA, *supra* note 1, 117.

96 HARADA, *supra* note 1, 117–118.

97 HARADA, *supra* note 1, 118.