Private Regulation as a Form of New Governance in the European Union: What Role Do Courts Play in Ensuring its Accountability?

Paul Verbruggen[*]

Abstract

This paper examines the potential and actual role courts play in holding private regulatory regimes promoted by the EU as forms of "New Governance" accountable for their regulatory activities. The issue of accountability of private regulators gains significance as the EU legislature regularly involves private, non-state regulatory capacity in the attainment of public policy goals. By drawing on the case of private regulation in the European advertising industry, the paper argues that the idea of centralised accountability via courts does not align with the decentralised reality that New Governance represents. While courts do remain important in rendering the impact of private regulators on firms and potential beneficiaries acceptable, they are but one mechanism of holding these regulators to account and often one of last resort. Private means and forums assume a vital complementary role to public mechanisms to offer accountability.

Introduction

Private regulation has assumed an important role in academic and political debates on new governance. While it must be stressed that private regulation is not a new phenomenon at all,[1] the novelty seems to be the fact that policy makers increasingly use forms of private regulation as strategic regulatory instruments to achieve policy objectives.[2] Also the European Union (EU) has recognized the potential of private actors and their regulation as a form of "new" governance, which signals a shift away from its hierarchical, rule-based approach to governance. As such, the European legislature has sought to promote private regulation in various forms and across various policy domains, including fair competition and consumer protection, banking and financial services, food safety, media and environmental protection.

The paper addresses the question of what role courts play in holding private actors accountable for regulatory activities. The issue of accountability of such private regulators gains relevance as policy makers and legislatures – at national, regional and global levels – progressively involve private, non-state regulatory capacity in the management and attainment of public policy goals.[3] The paper seeks to answer this

---

[*] Assistant Professor of Private Law, Business and Law Research Centre at Radboud University Nijmegen, the Netherlands. This paper was written while I was a PhD Candidate at the European University Institute, Florence, Italy (2008-2013). An earlier draft of this paper was presented at the conference 'Courts and New Governance' held at the European University Institute on 16-17 June 2011 organised by the Academy of European Law and Robert Schuman Centre for Advanced Studies.

[1] The historical roots of private regulation have been traced back to the medieval guilds and *lex mercatoria* in Europe. See for insightful examples of early private regulation in various issue areas: J. Braithwaite & P. Drahos, *Global Business* Regulation, Cambridge University Press, Cambridge 2000.

[2] F. Saurwein, 'Regulatory Choice for Alternative Modes of Regulation: How Context Matters', *Law and Policy* 33(3) 2001, p. 337.

[3] See on this development in general: B. Kingsbury, N. Krisch & R. Stewart, 'The Emergence of Global Administrative Law' *Law and Contemporary Problems* 68(Summer) 2005, pp. 15-61 and K. Abbott & D.

question by discussing the case of private regulation in the European advertising industry, which constitutes an extremely rich example of how private regulatory capacity is harnessed and used by the EU and its member states for the attainment of public policy goals such as fair competition and consumer protection.[4]

It should be stressed that the paper does not endeavour in a comprehensive evaluation of the degree of accountability of the private regulatory regime designed by the European advertising industry. Rather, the objective is to locate and discuss what role – if any – courts play in the landscape of public and private accountability mechanisms that exist in this context. The paper argues that while courts are vital to rendering private regulatory activities that affect third parties – both non-affiliated firms and potential beneficiaries – acceptable, they are but one mechanism of holding regulators to account. Furthermore, their role is often one of last resort. Private mechanisms assume a vital complementary role in holding private regulators to account for their regulatory activities. Accordingly, the paper sheds more light on the assumption that is common to (most) lawyers that courts constitute a principal forum for holding regulators accountable for their activities.

The paper proceeds as follows. First, it discusses how private regulation fits the debate on new governance in the EU (Section I). Next, it tackles the questions of why it is relevant that private regulators render account for their activities (Section II) and how private regulators can indeed be held to account (Section III). Subsequently, the paper presents the case of private regulation in the European advertising industry and discusses the role courts can play in holding private regulators in this industry accountable (Section IV). Finally, brief conclusions follow (Section V).

I. Private Regulation as Part of European Regulatory Governance Debate

How does private regulation fit the new governance debate in the EU? Let us start by defining the concept of private regulation. The concept can be defined as comprising sustained activities undertaken by private, non-state actors to change the conduct of themselves or other actors following a set of pre-defined norms and objectives.[5] These activities involve standard-setting, monitoring and enforcement, and may be administered not only by firms, company consortia or industry associations, but also by consumer groups, non-governmental organisations and other public interest groups.[6] Private regulation is therefore a wider concept than "self-regulation", which essentially concerns normative rules adopted to guide the conduct of one*self*. The

---

Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State', in W. Mattli & N. Woods (eds), *The Politics of Global Regulation*, Princeton University Press, Princeton 2009, pp. 44-88.

[4] Here the paper draws on an earlier empirical study conducted within the framework of the research project "Transnational Private Regulation: Constitutional Foundations and Governance Design" funded by the Hague Institute for the Internationalisation of Law (HiiL). See: P. Verbruggen, 'Transnational Private Regulation in the Advertising Industry (Case Study Report HiiL, Florence/The Hague 2011), http://dx.doi.org/10.2139/ssrn.2256043, accessed 3 March 2014.

[5] Adopting J. Black, 'Critical reflection on Regulation', *Australian Journal of Legal Philosophy* 27(1) 2002, p. 26.

[6] F. Cafaggi, 'New Foundations in Transnational Private Regulation', *Journal of Legal Studies* 38(1) 2011, pp. 20-49.

'private' in private regulation thus principally refers to a sense of ownership; the regulatory regime is private when it is primarily created and administered by non-state, private actors. This does not exclude the possibility that public actors can rely on, endorse or can be otherwise involved in the operation of the private regulatory regimes. Furthermore, the object of private regulation does not necessarily have to be private entities. Also public actors, such as government and public agencies, can be subject to private regulation.[7]

In Europe, private regulation features prominently in the longstanding debate on how to improve and diversify regulatory governance in the EU, which was initially sparked by the Conclusions of the European Council of Edinburgh in December 1992 on the principles of subsidiarity and proportionality.[8] Centrepiece of this debate is the 2001 White Paper on European Governance, in which the European Commission advocated that the European legislature 'must renew the Community method by following a less top-down approach and complementing its policy tools more effectively with non-legislative instruments'.[9] Scott and Trubek have famously argued that the distinctive feature of these new modes of governance is that they do not fully conform to the so-called 'Classical Community Method' of law-making, which they explain as being the adoption of a legislative instrument by the Council of Ministers or the European Parliament following the exercise by the Commission of its exclusive right of initiative, resulting in a uniform binding rule of EU law which is subject to the jurisdiction of the Court of Justice of the EU.[10] The White Paper suggests that the EU should combine formal rules with private regulatory capacities in its legislative policies by using self-regulation and, under certain circumstances, frameworks of 'co-regulation'.[11] This intention represents a shift away from the image of a hierarchical, centralised, and legalistic method of European lawmaking by insisting on the involvement of non-state, private actors (e.g. NGOs, trade bodies, and consumer representatives) and different levels of formality and enforceability in policy-making and regulation.[12]

---

[7] See on this topic: C. Scott, 'Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance', *Journal of Law and Society* 29(1) 2002, pp. 56-76.

[8] Conclusions of the Edinburgh European Council, Bull. EC 12-1992. See for a discussion and its impact on EU regulatory policy: L. Senden, *Soft Law in European Community Law,* Hart Publishing, Oxford 2004, pp. 16-22.

[9] Commission Communication of 25 July 2001, COM (2001) 428 final, p. 4.

[10] J. Scott & D.M. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', *European Law Journal* 8(1) 2002, p. 1.

[11] COM (2001) 428 final, pp. 20-21.

[12] B. Eberlein & D. Kerwer, 'New Governance in the European Union: A Theoretical Perspective' *Journal of Common Market Studies* 42(1) 2004, pp. 121-142; C. Knill & A. Lenschow, 'Modes of Regulation in the Governance of the European Union: Towards a Comprehensive Evaluation', in J. Jacint & D. Levi-Faur, *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*, Cheltenham, Edward Elgar 2004, pp. 218-244; and A. Héritier, 'New Modes of Governance in Europe. Policy Making without Legislating?' in A. Héritier (ed), *Common Goods. Reinventing European and International Governance,* Rowan & Littlefield, Oxford 2002.

Building on to the responses on the Commission's White Paper and the findings of several expert reports,[13] the Commission launched a 'Better Regulation' initiative in 2002.[14] This programme set out to enhance the EU's regulatory policies by, *inter alia*, introducing regulatory impact assessments (RIA), programmes for the simplification of regulatory environments, *ex post* reviews of legislation, and alternative regulatory instruments.[15] To clarify the intentions of the Better Regulation agenda and ensure uniformity among the European legislative institutions the European Parliament, Council, and Commission adopted the Inter-institutional Agreement on better lawmaking in 2003.[16] One section concerns the use of 'alternative methods of regulation', which are taken to be 'co-regulation' and 'self-regulation'.

Co-regulation is defined as a: "mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations)".[17] Defined in these terms, the strategy seems to presuppose the prior involvement of a European legislative authority, which identifies the objectives that should be implemented and secured by relevant private actors in the field concerned.[18] This particular conception of co-regulation, which is arguably still rather hierarchical, is modelled after the so-called 'New Approach' to harmonization, which the Commission launched in the 1980s as a strategy to boost the development of the internal market.[19] The New Approach promoted the use of standards in order to remove 'technical barriers to trade', and as a result, the legislator only stipulated the 'essential requirements' in its legislation while leaving the implementation of these requirements to private standard-setting bodies.

The second alternative method to EU regulation, 'self-regulation', is defined as: "the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)."[20] It is further clarified that this does not generally imply that the EU institutions have taken a particular position, in particular if primary EU law does not

[13] Moliter Report COM(95) 288 final and Mandelkern Group on Better Regulation, 'Final Report' (Brussels, 2001), http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf, accessed 3 March 2014.

[14] Commission Communication of 5 June 2002, COM(2002) 278 final.

[15] Commission Communication of 16 March 2005, COM(2005) 95 final and Commission Communication of 25 October 2005, COM(2005) 535 final. See for crucial discussions of the initiative: J.B. Wiener, 'Better Regulation in Europe' 2006 *Current Legal Problems*, pp. 447–518; C. Radaelli, 'Whither Better Regulation for the Lisbon Agenda?' *Journal of European Public Policy* 14(2) 2007, pp. 190-207 and C. Radaelli & A. Meuwese, 'Better Regulation in Europe: Between Public Management and Regulatory Reform' *Public Administration* 87(3) 2009, pp. 639-654.

[16] Inter-institutional Agreement on better law-making [2003] OJ C 321/4.

[17] *Ibid.*, para. 18.

[18] P. Verbruggen, 'Does Co-regulation Strengthen EU Legitimacy?' *European Law Journal* 15(4) 2009, p. 429.

[19] Technical harmonisation and standardisation: a new approach, COM (1985) 19 (not published in the Official Journal).

[20] Inter-institutional Agreement on better law-making, para. 22.

cover the area at issue or if the EU has not yet taken up legislative action in such area. Self-regulation is thus perceived as a voluntary initiative that operates at the European level, is adopted by industry itself and for itself, and is not preceded by a particular stance of the EU Institutions.

While this gives rise to the question whether there is any form of EU governance at stake at all then,[21] self-regulation understood in these terms does not rule out an active role for the EU. As the Inter-institutional Agreement explains, the Commission monitors pan-European self-regulatory processes and assesses their compatibility with EU law – in particular competition law.[22] Where self-regulation is undertaken in an area that is subject to EU competences, the Commission will also report to the Parliament and Council on the contribution the initiative can have for the attainment of general EU objectives, the level of representativeness of the parties concerned, the sectoral and geographical coverage of the initiative, and, lastly, the general added value of the commitments made by industry under the initiative.[23]

Although the Commission initially tried to advance such a co-regulatory approach in the area of environmental protection,[24] no arrangement has been designed at the European level so far.[25] While self-regulation is more common, the political climate in the EU now appears to be rather hostile to private regulation. In the aftermath of the financial crisis some have drawn attention to the failures of private regimes in the banking sector and this has had spill-over effects in other policy areas.[26] An examination of the *ex ante* RIA of legislative proposals in the EU learns that self- and co-regulation are increasingly being considered as alternative options for legislation, but are in fact rarely opted for as the final regulatory instrument.[27] In the EU impact assessment guidelines the option is *either* private regulation or legislation, but no

[21] Cf. P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials,* 4th edn, Oxford University Press, Oxford 2008, p. 159.

[22] Inter-institutional Agreement on better law-making, para. 22 and 17.

[23] *Ibid.*, para. 23.

[24] Commission Communication of 17 July 2002, COM (2002) 412 final.

[25] In seeking to explain why EU co-regulation fails materialise, Best has noted that EU competition law is a relevant factor. He holds that while co-regulation is more likely to occur in a homogeneous sector with a relatively small number of private actors, this also raises concerns for tacit collusion. See: E. Best, 'Alternative Methods and EU Policy-Making: What Does "Co-Regulation" Really Mean?' *Eipascope* (2) 2008, pp. 11-16.

[26] In September 2008, the French President Sarkozy noted in a speech that: "Self-regulation, to fix all problems, is over. Laissez-faire is over." See: 'Sarkozy Stresses Global Financial Overhaul', New York Times, http://www.nytimes.com/2008/09/26/business/worldbusiness/26france.html?_r=0, accessed 3 March 2014. Van den Hoogen and Nowak have presented limited empirical evidence that suggests that the decrease of the number of self- and co-regulatory initiatives in Europe coincides with the mounting political resistance against these initiatives in the wake of the financial crisis. See: Th. Van den Hoogen & T. Nowak, 'The Emergence and Use of Self-regulation in the European Decision-making Process: Does it Make a Difference?' *Legisprudence* 4(3) 2010, p. 359.

[27] A. Renda, 'Effectiveness of Public and Private Regulation (Presentation at the European University Institute, Florence, Italy 2010), http://privateregulation.eu/wp-content/uploads/2011/01/renda_effectiveness.pdf, accessed 3 March 2014, p. 10.

explicit consideration is given to the use of private regulation *in* EU legislation.[28] In this integrated form, private regulation remains important in many policy fields.[29]

II. The Need for Accountability of Private Regulators

A preliminary question in assessing the role of courts in holding private regulators accountable is the issue of why it is relevant for private regulators to render account for their activities. In other words, do private regulators need to be accountable for their own conduct and if so why? Accountability has been considered a key determinant of democratic legitimacy of regulatory regimes and bodies, regardless of whether they are public or private in nature, or national or transnational in their scope and application.[30] In this view, accountability is seen as a virtue, as a necessary ingredient that regulators must possess in order to motivate the behavioural response intended by the regulatory norms. At the core of this fundamentally normative conception of accountability lays the premise that a regulator, in the exercise of its regulatory powers, should be accountable to those affected by its regulatory activities.[31] The demand for the regulator's accountability is then not merely based of the formal authorization and political or financial support granted to the regime, but also on the impact it has on the rights and obligations of individuals.

Being accountable has been said to be particularly valuable to private regulatory regimes because they require that those parties affected by their authority accept these regimes and modify their behaviour in accordance to the regulatory norms or goals they set.[32] Private regulatory bodies cannot, unlike public regulators, readily rely on the authority of law to change people's conduct and they are thus likely to bolster their capacity to ensure compliance or behavioural change in other ways. Rendering account for regulatory activities is a vital strategy for private regulators to gain acceptance and legitimacy among those that are affected by their activities.

However, the individuals that are affected by regulatory activities of private regulators are not homogeneous. A firm may, for example, be affiliated to a private regulatory regime and have accepted the rules and activities of this regime as a

---

[28] European Commission, Impact Assessment Guidelines (Brussels, January 2009) SEC(2009) 92, pp. 29-31 and Annex 7. See also: A. Meuwese & L. Senden, 'European Impact Assessment and the Choice of Alternative Regulatory Instruments' in J. Verschuuren (ed), *The Impact of Legislation. A Critical Analysis of Ex Ante Evaluation,* Martinus Nijhoff Publishers, Leiden 2009, p. 173-174.

[29] EU legislation promoting the integration of private regulatory activities in public regulation concern for example accounting standards (Regulation 1606/2002/EC), unfair commercial practices (Directive 2005/29/EC), food safety (Regulation 852/2004/EC), media (Directive 2010/13/EU), payment services (Directive 2007/64/EC) and timber imports (Regulation 995/2010/EU).

[30] J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', *Regulation & Governance* 2(2) 2008, pp. 137-164 and D. Curtin & L. Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality?', *Journal of Legal Studies* 38(1) 2011, pp. 163-188.

[31] Accountability may also be conceptualised in more descriptive terms, namely as an institutional relation, arrangement or process through which an actor can be held to account for its actions by a forum. Accountability is then viewed as a mechanism (see Section III). See on both conceptions of accountability: M. Bovens, `Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', *West European Politics* 33(5) 2010, pp. 946-967.

[32] Black 2008, p. 148.

constituent member. However, due to the importance it has in market transactions the effects of a regime may also extend to non-member firms, who may see their business activities compromised if they do not comply with the regime without having explicitly consented to it. Another set of third parties that has been identified are the beneficiaries of private regulation, that is, those who are supposed to benefit from the regulatory activities of private regulators and are harmed by non-compliance with these activities.[33] Accordingly, different groups of stakeholders can be affected in very diverse ways and therefore accountability may be rendered in relation to different types of stakeholders.

To identify the specific accountability relationships between private regulators and those affected by their conduct it is useful to distinguish between an internal and external dimension of accountability of private regulators.[34] The first dimension concerns the relationship between the private regulator and its constituents or members, while the second comprises the relationship between the private regulator and third parties. Where the impact of the activities of a private regulator remains confined to its constituents, such as elections or budgetary decisions, accountability demands will be limited to those stemming from the private membership. Accountability can then be rendered internally, for example through reporting or voting procedures in the board or general assembly.

However, should the effects of private regulation transcend the community that established it and have a noticeable impact on the rights and obligations of third parties, accountability – when seen as a virtue – must also be rendered externally. More specifically, it is suggested that the need of being externally accountable, grows proportionate to the degree to which the regime resorts effects beyond the regulated entities.[35] In other words, the more spill-over effects on third parties, the more pertinent the necessity is for a regime to be accountable also to them. Private regulation may indeed have strong implications for third parties. If, for example, a public actor devolves regulatory competences to a private regulator, which might occur under a co-regulatory regime as defined by the European legislature,[36] it may unilaterally determine the rights and obligations of individuals. Third-party effects can also manifest if a private regulator, such as a trade association, assumes such an important role in the industry or sector that its authority becomes *de facto* compulsory. For third parties that are supposed to benefit from the activities of the private regulator, such as consumers, workers or minorities, it is equally important that the private regulator gives account of how it has exercised its authority and whether it has delivered on its promised outcomes if it is to gain acceptance and legitimacy among this group.

[33] Cafaggi 2011, p. 32.

[34] See on this distinction in the public domain: R.O. Keohane, 'Global Governance and Democratic Accountability' in D. Held & M. Koenig-Archibugi (eds), *Taming Globalization. Frontiers of Governance*, Polity Press, Cambridge 2003, pp. 130-159.

[35] Curtin & Senden 2011, p. 174.

[36] See text at note 17.

III. Holding Private Regulators to Account

A subsequent question that emerges when discussing accountability issues of private regulators is the question: how and via which means can they be called to account? Accountability is then conceptualised as a mechanism, an institutional relationship between an actor that needs to account for its conduct (i.e. the accountor) and the forum to which account is given (i.e. the accountee).[37] Here, accountability is not viewed as a virtue or quality that can be actively managed, but rather as a passive reality that an external forum can assess *ex post facto*.

Key questions in this more narrow and descriptive sense of accountability are: who is called to account; to whom should account be rendered; for what activity; and by which means? The means through which private regulators can be held accountable can either be private, internal or public, external in nature. For example, the adoption of particular regulatory norms by the private regulator may be subject to internal mechanisms of reporting and voting, while its enforcement activities are subject to administrative control. This suggests that the accountability mechanisms available can also vary according to the activity pursued by the regulator, namely norm-setting, monitoring or enforcement.

Courts constitute an important mechanism via which private regulators can be held to public, external account for their regulatory activities. Instruments as judicial review can mitigate concerns of third-party effects and can secure injunctive or compensatory relief against illegal or otherwise wrongful regulatory activities.[38] However, it should be stressed that courts are but one mechanism of establishing public accountability. Other commonly observed mechanisms in the public domain include reporting obligations to Parliament, ministers and commissions of inquiry, and administrative control via audit offices, ombudsmen and independent inspectors.[39]

The question is, however, whether these public instruments will be of any relevance to private regulation. Their application generally requires some form of public mandate or function, which is often absent in the private domain. Arguably, internal, private accountability mechanisms may therefore assume a vital complementary role in holding private regulators accountable. Internal voting and approval procedures, reporting obligations and budget allocation enable the private regulators to be accountable to the members of the regulatory regime, while account to third parties might be given by organising public consultations in drafting processes for new regulatory norms.

However, there are significant practical and theoretical obstacles, in particular for third parties, to holding private regulators to account. One issue is accessibility. Internal, private mechanisms may only be available to membership and therefore third parties are precluded from accessing these instruments. However, also public mechanisms may raise difficulties in terms of access. For example, *locus standi* in judicial review proceedings may be limited to those individuals that have a direct and

[37] Bovens 2010, pp. 950-954 and Curtin & Senden 2011, p. 181.

[38] J. Black, 'Reviewing Regulatory Rules: Responsibility and Hybridisation' in J. Black, P. Muchlinski & P. Walker (eds), *Commercial Regulation and Judicial Review*, Hart Publishing, Oxford 1998, pp. 123-157.

[39] C. Harlow, *Accountability in the European Union*, Oxford University Press, Oxford 2002.

individual concern in relation to private regulatory activities. As a result, third parties (including public interest groups) cannot secure judicial accountability.[40]

Another obstacle concerns transparency.[41] Accountability is indeed closely linked to the dimension of transparency: openness allows a regulator to be accountable to its constituencies and third parties, whilst the disclosure of information on decision-making and enforcement processes at the same time empowers individuals to hold the regulator to account. Therefore, the EU legislature requires that co- and self-regulation in the European context always meet criteria of transparency, such as the publicising of agreements.[42] However, private regulatory activities, in particular if they happen at a transnational level, have been said to often happen in relative secrecy, barring the potential for high standards of accountability.[43]

A further complicating factor in holding private regulators accountable is the issue of 'many hands'.[44] This problem points to the dispersal of functions and powers within a regulatory regime, making it difficult to trace back the actors responsible for the outcomes.[45] This problem is amplified in the context of transnational private regulatory regimes where functions of norm-setting and enforcement are often dispersed amongst various actors operating on multiple levels of governance (global, regional and local).[46] Indeed, it is difficult to hold to account the rule-maker for the ways in which others enforce its rules, just like it is difficult to hold to account the enforcer of rules it did not write.[47]

IV. The Case of Private Regulation in the European Advertising Industry

To illustrate the roles that courts and other public and private instruments play in holding private regulators to account, either to members of the private regulatory regime (private, internally) or to third parties (public, externally), the paper now turns to the case of private regulation in the European advertising industry.

A. Private Regulation of Advertising Practices in Europe

Across Europe, national advertising industries have developed elaborate regimes for the control of advertising practices, often termed as systems of "advertising self-regulation". These national regimes are constituted by trade or business associations

[40] Conditions for judicial review in European legislative and administrative acts, for example, are known to be particularly restrictive. See: A. Türk, *Judicial Review in EU Law*, Edward Elgar Publishing, Cheltenham 2009.

[41] See for example: T.N. Hale, 'Transparency, Accountability and Global Governance' *Global Governance* 14(1) 2008, pp. 73-94.

[42] Inter-institutional Agreement on better law-making, para. 17.

[43] See for example: E. Meidinger, 'The Administrative Law of Global Private-Public Regulation: the Case of Forestry', *European Journal of International Law* 17(1) 2006, pp. 47-87.

[44] Black 2008, p. 143 and Curtin & Senden 2011, p. 182.

[45] D.F. Thompson, 'Moral Responsibility of Public Officials: The Problem of Many Hands', *American Political Science Review* 74(December) 1980, pp. 905-915; M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', *European Law Journal* 13(4) 2007, p. 457; and Y. Papadopoulos, 'Problems of Democratic Accountability in Network and Multi-level Governance', *European Law Journal* 13(4) 2007, pp. 469-486.

[46] Cafaggi 2011.

[47] Cf. Black 2008, p. 143.

representing the three segments of the advertising industry: the advertisers that pay for the advertising, the advertising agencies responsible for the form and content of the advertising, and the media owners that carry the advertising to its intended audience. The general aim of the regimes is to ensure that advertising is legal, fair, not misleading, in good taste, and socially responsible. Accordingly, they also claim to contribute to the attainment of certain public policy objectives, such as fair competition, consumer protection and human rights protection.

The private regulatory regimes in Europe typically comprise two basic elements: (i) a code of conduct or set of guiding principles governing advertising practices; and (ii) a system for the establishment, review and application of the code or principles.[48] While these codes are primarily applied and enforced at the national level, they frequently have origins in international codes of conduct. The International Chamber of Commerce has traditionally been the central institutional player here as it has adopted codes of advertising practices since the mid-1930s. More recently, however, various European trade federations have set codes specific to their own sectors, including the Confederation of the Food and Drink Industries of the EU (CIAA) for food products and non-alcoholic drinks,[49] Brewers of Europe for beer advertising,[50] and the Interactive Advertising Bureau (IAB) for digital and online advertising.[51]

To administer the code, its review and enforcement, advertising industries have generally established a centralised private body, a self-regulatory organisation (SRO). This organisation generally comprises three bodies: (i) a board that adopts and revises codes of advertising conduct; (ii) an adjudicative council – often called 'jury' – that decides on complaints on publicised advertisements submitted by concerned stakeholders (e.g. consumers, competitors, public agencies, NGOs) and determines whether the advertising complies with or violates the applicable code(s) of conduct; and (iii) a secretariat for administrative support for the board and jury. While the SRO board typically consists of only industry stakeholders (i.e. advertiser, agency and media trade associations), juries progressively include non-industry representatives, such as consumer and NGO representatives, laymen, experts and academics, in their membership.[52]

---

[48] European Advertising Standards Alliance, *Advertising Self-Regulation in Europe and Beyond: A Reference Guide to Self-Regulatory Systems and Codes of Advertising Practice,* 6th edn, Poot Printers, Brussels 2010, p. 19.

[49] CIAA, 'The CIAA Principles of Food and Beverage Product Advertising' (Brussels, 2004), http://www.gwa.de/images/external_links/CIAA_Principles.pdf, accessed 3 March 2014.

[50] Brewers of Europe, 'Responsible Commercial Communications. Guidelines for the Brewing Industry' (Brussels, 2003), http://www.brewersofeurope.org/docs/publications/guidelines.pdf, accessed 3 March 2014.

[51] IAB Europe, 'IAB Europe EU Framework for Online Behavioural Advertising' (Brussels, 2013), http://www.iabeurope.eu/files/5013/8487/2916/2013-11-11_IAB_Europe_OBA_Framework.pdf, accessed 3 March 2014.

[52] EASA, 'Best Practice Implementation by European Advertising Watchdogs. EASA Charter Validation Progress Report 2005-2011' (Brussels, 2011), http://www.easa-alliance.org/binarydata.aspx?type=doc/Best_practice_implementation_in_European_advertising_watchdogs270911.pdf/download, accessed 3 March 2014, pp. 24-27.

In Europe there are 26 national SROs (24 EU and 2 non-EU SROs), which together deal with some 50.000 complaints on publicised advertisements annually.[53] All these SROs are united in a network called the European Advertising Standards Alliance (EASA), which was established in the early 1990s after pressures by the European Commission to adopt new and more restrictive legislation on advertising practices.[54] Since 2002, EASA does not only include SROs in its membership, but also some 15 European trade federations that represent the interests of the European advertising industry. With the mandate of both the SROs and representatives of the entire European advertising, EASA sets best practice recommendations that guide SROs in their regulatory activities. By doing so, its shares best practices and enhances the regulatory capacity of the industry. Key in this respect is EASA's best practice model, which was developed in 2004 and has been influential in triggering institutional changes among European SRO members. The model:

"(…) describes the various component parts of the model self-regulatory systems which the EASA wishes to see in place in all existing EU member states and in Accession countries. It is designed to help the EASA and its members to evaluate, initiate and develop effective and efficient systems across Europe. It will also help identify areas where investment is needed to develop existing national arrangements in order to improve the provision and operation of self-regulation (…)."[55]

The best practice model lays down operational standards for SROs as regards, *inter alia*, the practice of code drafting, adjudication of disputes and monitoring activities and, as such, provides a common roadmap for the organisation and functioning of SROs in Europe. This need for improvement and coordination of SRO activity was felt in the context of two concurrent processes crucial to the regulation of the European advertising industry, namely the drafting of the Unfair Commercial Practices Directive[56] and the Audiovisual Media Services Directive,[57] and the accession of ten countries from in Central and Eastern Europe to the EU in May 2004. Since these Directives would promote and at times require the use of private regulation as a form to regulate advertising practices,[58] and since only in very few acceding Member States centralised regimes of private regulation were in place, guidance on what private regulation was to achieve was considered essential.

---

[53] EASA, 'European Trends in Advertising Complaints, Copy Advice and Pre-clearance', (Brussels, 2011) http://www.easa-alliance.org/binarydata.aspx?type=doc/Stats_Report_2010final.pdf/download, accessed 3 March 2014, p. 11.

[54] A. Cunningham, 'Advertising Self-regulation in a Broader Context: An Examination of the European Union's Regulatory Environment', *Journal of Promotion Management* 5(2) 2000, pp. 61-83.

[55] EASA, 'Best Practice Self-Regulatory Model' (Brussels, 2004), http://www.easa-alliance.org/binarydata.aspx?type=doc&sessionId=lcijs155p0y21d55a3wsq555/EN_BestPracticeModel.pdf, accessed 3 March 2014.

[56] Directive 2005/29/EC of the European Parliament and of the Council (Unfair Commercial Practices Directive), OJ 2005 L 149/22.

[57] Directive 2010/13/EU of the European Parliament and of the Council (Audiovisual Media Services Directive), OJ 2010 L 95/1.

[58] See notes 65, 66 and 67 *infra*.

To take on this project EASA actively engaged with the European Commission. DG Health and Consumer Protection (DG SANCO), which had some concerns of its own in relation to private regulation in the advertising sector,[59] recognised the chance this presented to drive the development of private regulation, in particular in the new accession states, and saw to it that the Best Practice Self-Regulatory Model was discussed in a wider forum. To that end, the Commission established in 2005 a 'Round Table on Advertising Self-Regulation', including staff of the Commission, interested NGOs and representatives from the industry. The concluding report of the roundtable identified a number of factors that should be used to enhance the impact of SRO activity and increase their effectiveness.[60] The factors strongly overlap with what EASA's best practice model suggests. The Commission's report thus implicitly recognises and endorses the approach taken by EASA. This confirmation has offered a firm degree of political credibility to EASA in the advertising industry as well as in relation to the Commission. As a result, EASA sits prominently in the Commission-led discussion forums for private regulation of advertising for alcoholic beverages[61] and food products,[62] and for online behavioural advertising,[63] in which the Commission tries to bring the industry and civil society groups together to tackle important regulatory issues that arise in these domains.

How does this sketch of private regulation in the European advertising industry align with the definitions of self- and co-regulation as the EU has formulated them in the European debate on new governance and better regulation? For sure, it does not meet the narrow definition of co-regulation in the Inter-institutional Agreement on better lawmaking since a specific legal framework in which the advertising industry is commanded to implement public policy goals is absent.[64] Private regulation in this field is more likely to be seen as self-regulation because it is adopted by the industry and for the industry primarily. Nonetheless, there is a wider sense of co-regulation here in that key European Directives on advertising suggest, encourage or even require the adoption of codes of conduct to discipline the advertising industry and tackle particular advertising practices. The Unfair Commercial Practices Directive, for example, holds that the control exercised by SROs should be encouraged as it may eliminate unfair and misleading commercial practices and thus avoid the need for recourse to public enforcement.[65] Furthermore, the Audiovisual Media Services Directive stipulates that 'Member States shall encourage co- and/or self-regulatory

[59] Commission Communication of 2 October 2001, COM(2002) final 531, p. 5 and 7.

[60] Directorate-General Health & Consumer Protection, 'Self-Regulation and the Advertising Sector: A Report of Some Discussion among Interested Parties (Madelin Report)' (Brussels, 2006) http://www.easa-alliance.org/binarydata.aspx?type=doc/DGSANCO_advertisingRT_report.pdf, accessed 3 March 2014.

[61] EU Alcohol and Health Forum, http://ec.europa.eu/health/alcohol/forum/index_en.htm, accessed 3 March 2014.

[62] EU Platform on Diet, Physical Activity and Health, http://ec.europa.eu/health/ph_determinants/life_style/nutrition/platform/platform_en.htm, accessed 3 March 2014.

[63] European Advertising Standards Alliance, 'New Standards for Online Behavioural Advertising', http://www.easa-alliance.org/Issues/OBA/page.aspx/386, accessed 3 March 2014.

[64] See text at note 17 *supra*.

[65] Recital 20 and Articles 10 and 11 of Directive 2005/29/EC.

regimes at national level'[66] for audiovisual media services and that Member States and the Commission shall encourage the development of codes of conduct concerning the advertising of fatty and sugars-rich foods to children.[67]

This shows the diversity of forms in which private regulation may manifest in the European context, something that is not sufficiently recognised in the official policy documents on new governance, the Inter-institutional Agreement on better lawmaking and impact assessment guidelines of the European Commission. Moreover, the agreement does not recognise the multi-level dimension that European private regulation is likely to imply. As the case of advertising shows, European organisations are often composed of national member organisations which on the one hand provide input for pan-European activities and on the other hand implement these activities at the national level following their own industry structures, cultures and traditions. More specifically, while rule-making activities may thus occur at both the European and national level, the monitoring and enforcement of those rules is primarily carried out at the national level by the SROs. Given the interdependence of the European and national levels of governance, it is thus rather difficult to qualify initiatives of private regulation such as those in the field of advertising as 'European' or 'national'. The Inter-institutional Agreement on better lawmaking, by contrast, only talks of self-regulation 'at European level'.[68]

B. The Need to be Accountable

The need for accountability follows the impact that regulatory activities of private regulators have on the rights and obligations of individuals.[69] By adopting private codes of conduct that go beyond legal standards, private regulators in the European advertising industry (i.e. the national SROs, EASA and European trade federations) can effectively limit the use of particular advertisements and advertising techniques that are otherwise seen as legal and fair. More specifically, the decision of an SRO that an advertising campaign violates a code of conduct may restrict the exercise by the firm of its constitutional rights, such as the freedom of (commercial) expression and of religion, or of its contractual rights that follow from the private arrangement underpinning the advertising campaign.[70]

Importantly, the regulatory function of codes of advertising conduct is not limited to SRO membership and may extend to firms that have not subscribed to the regime. Third-party firms may see their rights impaired and therefore account must not only be rendered internally among members, but also externally in relation to those non-affiliated firms. These firms may be affected by the regulatory activities of SROs as a result of the role that media owners play in the private regimes. Media owners enforce the sanctions that SROs impose after the jury has found an advertisement to violate

[66] Article 3(7) of Directive 89/552/EEC. See also recital 36 of the Directive.

[67] Article 3e(2) of Directive 89/522/EEC.

[68] Inter-institutional Agreement on better law-making, para. 22.

[69] See text at note 31 *supra*.

[70] The limitations exist only if the private codes of conduct go beyond legal standards applicable to advertising practices. For example, legal prohibitions of misleading advertising, children's advertising and tobacco advertising, have been considered constitutional in the US, Canada and Europe. See: R. Shiner, *Freedom of Commercial Expression,* Oxford University Press, Oxford 2003, p. 110.

the applicable code. Given the intermediary role media owners have in the advertising industry, they can act as a gatekeeper and effectively block most of the non-compliant ads. When enrolled in the SRO structures, the media thus allow the SROs to prevent or stop the use of non-compliant advertising in a relatively fast and inexpensive way.

However, this enrolment also offers the SROs the chance to extend their potential influence to advertisers that are not affiliated with the private regime. Broadcasting laws may hold media owners liable for publication of non-compliant advertising and therefore media are unlikely to distinguish between firms that are associated with the SRO and those that are not when enforcing the SRO decisions. Non-members may thus see their ads being halted or boycotted much against their will. Given that blocking ads may imply that the freedom of commercial expression is curtailed and the underlying contractual obligations to print, broadcast or otherwise diffuse advertisement in point are not complied with – often having substantive financial repercussions – SRO activities can thus seriously affect the disposition of third-party firms.

Another, yet more exceptional way in which SROs can influence the behaviour of third-party firms is when it is delegated public regulatory powers. In this case, the SRO is formally mandated to exert unilateral influence on the exercise of the rights of individuals who did not consent to the private codes and procedures it applies. A rare example of such delegation is found in the United Kingdom, where the regulator for media and telecommunications, the Office of Communications (OFCOM), has formally contracted out its statutory powers to adopt and enforce codes of conduct for television and radio advertising under the Control of Misleading Advertising Regulations 1988 and the Communications Act 2003 to the British SRO concerned with broadcast advertising.[71] The practical and legal implications of such delegation for the regulatory capacity of the SRO are significant. The rules and decisions adopted by the private delegatee do not only bind those firms that have voluntarily signed up to them, but become legally binding to all concerned. This effect could not be achieved without a public law mandate as fundamental principles of private law (i.e. private autonomy, privity and freedom of contract) and the rule of law principle would object to it. Since the potential impact of regulatory activities on third parties thus grows significantly, the need to publicly account for these activities increases proportionately.

Arguably, the necessity for SROs to be accountable for their regulatory activities also emerges in relation to the third parties that are supposed to benefit from the activities of the SROs. In the case of misleading and comparative advertising these beneficiaries are mostly notably consumers, while in the case of sexist, violent and otherwise socially irresponsible advertising they are likely to concern civil society organisations and the general public. SROs and the advertising industry at large generally claim that by administrating an effective private regime they contribute to higher levels of consumer protection and benefit the cause of NGOs in the fields of food and drink products (food and alcohol), women empowerment, the environment and privacy rights. By making public the extent to which they have indeed succeeded in delivering on promised outcomes, SROs can render account for their activities to the potential beneficiaries of private regulation.

[71] Authorisation of the Contracting Out (Functions relating to Broadcasting Advertising) and Specification of Relevant Functions Order, SI 1975/2004 (hereinafter: Authorisation of the Contracting Out 2004).

C. Accountability of Private Regulators and the Role of Courts

Various instruments can be deployed to manage the accountability of private regulatory bodies in the European advertising industry or to hold them to account for their respective regulatory activities *ex post facto*. To disentangle the various accountability relationships it is useful to differentiate between the activities for which account is given (rule-making v. enforcement), the forum to which account is rendered (internal v. external) and the nature of the instruments via which this is done (public v. private). Table 1 offers an overview of these variables to the various accountability relationships for the regulatory activities of the private regulators in the European advertising industry.

Activity	*Actors*	*Forums*		*Instruments*	
		Internal	*External*	*Private*	*Public*
Rulemaking	EASA, European trade federations, National SROs	General assembly, Board.	European Commission, public authorities, NGOs.	Voting, approval, consultation, budgetary decisions, reporting	discussion panels, reporting
Enforcement	National SROs	None*	Public authorities, courts, the general public	Complaint handling procedures	Publication of decisions, reporting, judicial review

(*) SRO juries are supposed to remain independent from the rule-makers and therefore there is no accountability relationship between the rule-maker and enforcers in the private regimes.

Table 1. Variables for accountability relationships. Source: Own elaboration

Rulemaking

Private regulators may account for their rulemaking activities in the private domain through internal reporting obligations. Voting and approval procedures also ensure accountability to those affected by the private regulatory activities. Account is then primarily given to the regulator's membership or constituencies. Internal rules of association and decision-making structures ensure that members have the final say in the adoption of national or European codes of conduct or EASA best practice guidance, and can hold the committees drafting these rules to account. Such mechanisms are typically closed to third parties. However, private regulators are increasingly organising public consultations procedures via which interested (third) parties can participate in code drafting processes.[72] However, the final decision to adopt a code remains with the industry itself and outsiders are not awarded formal voting rights.

[72] EASA 2011, p. 24.

EASA and European trade federations have also sought to account for their respective rule-making activities to third parties by participating in the various European Commission-led discussion forums on private regulation in advertising.[73] In these discussion panels the strengths and weaknesses of (proposed) private codes are addressed between the industry, NGOs and public officials, thus allowing for information sharing and greater transparency. On these occasions, private regulators have made public commitments to improve the status quo and make progress on the implementation of private regulatory regimes. Progress is monitored under the auspices of the private regulators themselves and should be reported back to the participants of the forum.[74]

A public agency is likely to hold an SRO to account for its rulemaking activities if it has delegated (a part of) its regulatory powers to the SRO. The example of OFCOM and the British regime for broadcast advertising has been mentioned already.[75] The contract that delegates a share of the statutory competences of OFCOM to the SRO leaves the public agency with a right to veto the adoption of new codes of conduct and requires SRO to consult the public agency in the drafting process preceding the adoption of new codes of conduct.[76] In addition, the SRO has an annual reporting duty to OFCOM on its rulemaking and enforcement activities.[77] These instruments provide OFCOM with a very strong grip on the SRO activities.

Courts do not appear to play a significant role in holding private regulators in the advertising industry to public account for their rulemaking activities. In the case of private regulation in the European advertising industry, courts – both at the EU and Member State levels, have not been sought to challenge the rulemaking activities of SROs, EASA and other trade associations. One possible explanation for this is the fact that the right to freedom of association may block a potential role for courts. This constitutional right warrants that individuals can establish and join associations at free will, and offers a strong guarantee for firms to create a trade association and set their own normative rules to regulate membership and membership conduct. As long as these rules do not conflict with public law norms, in particular with rules of competition law and human rights obligations, courts have very little legal bases to overthrow the rules of private regulators.

[73] The forums are the Roundtable on Self-Regulation (note 60), the Alcohol and Health Forum (note 61), the EU Platform for Action on Diet, Physical Activity and Health (note 62), and the Roundtable on Interest Based Advertising (note 63).

[74] An example is the report of the Brewers of Europe, a European trade association for beer brewers, on the implementation on its commitment made to the EU Alcohol and Health Forum to develop responsible beer commercials. See: Brewers of Europe, 'Responsible Beer Advertising through Self-regulation. 7 Operational Standards: A Commitment by The Brewers of Europe' (Brussels, 2010), http://www.brewersofeurope.org/docs/flipping_books/responsible_beer_ad_2010/index.html, accessed 3 March 2014.

[75] See text at note 71 *supra*.

[76] Article 4(b) Authorisation of the Contracting Out 2004.

[77] Article 5 Authorisation of the Contracting Out 2004.

Enforcement

An important strategy through which national SROs seek to ensure accountability and gain acceptance for the enforcement activities carried out by their juries is by incorporating 'outsiders' in the composition of their juries that oversee the procedures for handling complaints about publicised advertising. As noted, SROs are progressively including non-industry representatives as members of their juries.[78] This is not only an important strategy to prevent risks of regulatory capture and strengthen claims of credibility and independence, but is also valuable in rendering account to outsiders for SRO decisions. By making its enforcement activities dependent on a jury of which the (majority of) members do not represent industry interests, the SRO aims to make its enforcement activities and the impact it has more acceptable to both members and outsiders. The publication of these decisions increases transparency and further contributes to the aim of acceptance. There are, however, no internal mechanisms in place in SROs to hold the juries accountable for decisions to, for example, the SRO board or its wider membership. From the perspective of the independence of the juries this is indeed desirable.

Nonetheless, the SRO juries can be held to account for their enforcement action by public authorities and courts. As held above, the private regime for broadcast advertising in the United Kingdom, for example, must report annually to OFCOM on its enforcement activities.[79] Individuals that have been negatively affected by an SRO jury decision can initiate court proceedings to challenge this decision. If the court validates the decision and the challenges brought against it are refuted, it renders the influence exerted by the SRO on the individuals legitimate and acceptable. Accordingly, courts can thus be viewed as important mechanisms through which private regulators can be held to account for their enforcement activities.

Two procedures appear relevant in holding SROs accountable in court for their enforcement activities, namely judicial review and tort law procedures. The first is a particular type of procedure that can be described as the process by which a court of law reassesses the legality and validity of the regulatory activities of a public body or of a private body performing public functions.[80] This implies a limited review of the activity in point: a court will not reassess the merits of the case, but instead evaluates whether or not the activity is reasonable and proportionate taking into consideration all of the facts to the case. The court may for example assess whether a decision meets general principles of procedural fairness, such as notice, hearings, productions of reasons and impartiality in decision-making, and whether other public law standards, including human rights obligations, have not been impaired.

Only in a limited set of countries judicial review has been available to challenge enforcement action taken by SROs. In jurisdictions such as New Zealand[81] and the United Kingdom,[82] decisions of the local SROs have been considered susceptible to

[78] See text at note 52 *supra*.

[79] See note 76 *supra*.

[80] See in general: C. Lewis, *Judicial Remedies in Public Law*, 4th edn, Sweet & Maxwell, London 2009, p. 11

[81] *Electoral Commission v Cameron*, 2 NZLR 421 (1997).

[82] *Advertising Standards Authority Ltd v. The Insurance Service Plc,* ALR 77 (1989).

judicial review on the basis of the 'public law function' that these private bodies exercise.[83] In New Zealand, courts have been able to assess SRO decisions in relation to human rights infringements.[84] In the United Kingdom, where the case law is more developed, the grounds most commonly relied upon to challenge a decision of the local SRO in judicial review proceedings concern those of excess of powers,[85] proportionality of a human rights challenge,[86] and procedural unfairness.[87]

In other jurisdictions, however, judicial review has remained limited to decisions taken by regulatory bodies endowed with public law competences by statutory acts or executive decisions. Since SROs have not usually been attributed such public law powers, judicial review is not a viable route to challenge the decisions of the SROs in these countries. Here, civil tort claims, such as negligence and libel, have been used as an alternative legal vehicle to challenge allegedly wrongful SRO decisions in court. In these cases, claimants typically seek to establish that the SRO decision that found their advertising to infringe the applicable code of conduct was unlawful or slanderous and led them to sustain to damages. They therefore petition the judge to either prevent the SRO from enforcing its decision or to allow them to seek redress for the damages they incurred due to the SRO decision.[88] This provides third parties with an ultimate course of legal action to address and dispute the decisions of SROs and the external effects these decisions have.

V. Conclusions

Private regulation seen as part of the new governance debate in the EU throws up significant challenges in terms of legitimacy and accountability. The paper has addressed the specific question of what role courts may potentially play in holding private regulators accountable for their regulatory activities and has sought to answer this question in the light of the case of private regulation in the European advertising industry, which presents a wide variety of forms of industry-driven private regulation that are not adequately captured by the EU policy documents on new governance and better regulation. By conceptualising accountability as both a virtue and mechanism, and by differentiating between the internal and external dimensions of accountability, the analysis developed in this paper has highlighted both the complexity and variety of the accountability relationships existing between private regulators and the individuals

[83] See for a discussion: P.P. Craig, *Administrative Law*, 6th edn, Sweet & Maxwell, London 2008, pp. 880-894 and A. Butler, 'Is this a Public Case?' *Victoria University of Wellington Law Review* 31(4) 2000, pp. 747-780.

[84] See for example: *Easton v. Human Rights Commission and Advertising Standards Authority*, NZHC 47 (2010).

[85] See for example: *Advertising Standards Authority Ltd v. Charles Robertson (Developments) Ltd* WL 1019598 (1999).

[86] See for example: *Matthias Rath B.V. and Matthias Rath Ltd v. The Advertising Standards Authority Ltd and The Independent Reviewer of the Advertising Standards Authority Ltd*, EWHC Admin 428 (2000); and *Kirk Session of Sandown Free Presbyterian Church v. Advertising Standards Authority*, NIQB 26 (2011).

[87] See for example: *Stephen Buxton (Trading as the Jewelry Vault) v Advertising Standards Authority* EWHC Admin 2433 (2002) and *SmithKline Beecham PLC v Advertising Standards Authority,* EWHC Admin 442 (2000).

[88] See for a comprehensive analysis: P. Verbruggen, 'Advertising' in F. Cafaggi (ed), *Enforcement of Transnational Private Regulation: A Case Book*, Edward Elgar, Cheltenham forthcoming.

affected by their regulatory activities. Courts, it was established, are but one mechanism via which private regulators in can be held to account. Their role is first and foremost based upon a conception of centralised responsibility, which is contested by the reality of today's regulatory policies, both at the national and European level.[89] Contemporary approaches to regulation often involve the delegation – both formal and informal – of regulatory tasks and powers from governmental to private actors that may operate on different levels of governance. Centralised accountability via courts does not sit easily with this decentralised, multi-level reality of regulation and regulatory policy.[90]

The case of private regulation in the European advertising industry that has been discussed in this paper clearly represents a shift away from the hierarchical and centralised approach to regulatory governance in the EU. It was also found that the private regulators in this issue area may be held accountable for their respective rule-making and enforcement activities through a variety of public and private instruments. Private regulators may at the same time proactively manage their accountability in relation to those affected by their regulatory activities – both non-affiliated firms and potential beneficiaries – by way of publicly reporting on their achievements, organising public consultations on code drafting and securing independent and credible complaint handling procedures. While courts remain vital to rendering the regulatory activities that affect third parties acceptable, their role is often one of last resort. Private mechanisms thus assume a crucial complementary role in holding private regulators to account for their regulatory activities.

[89] Cf. C. Scott, 'Accountability in the Regulatory State', *Journal of Law and Society* 27(1) 2000, pp. 38-60.
[90] Black 2008, p. 143.