



**FACULTY OF LAW
AND ADMINISTRATION**
University of Lodz

Justyna Nowak

**Self-regulation and co-regulation on the foodstuffs market
– between actual consumer protection
and entrepreneurs' actions for false appearance's sake**

PhD thesis written at the Department of European Economic Law
under supervision of prof. UŁ dr hab. Monika Namysłowska

Łódź 2021



Journal Article

Self-regulation and co-regulation on the foodstuffs market
-- between actual consumer protection
and entrepreneurs' actions for false appearance's sake

This thesis is a work of the Department of Business Economics Law
under supervision of Prof. Dr. Ingrid Isenhardt

1. Research background and hypothesis

Legal sciences for some time now have witnessed a phenomenon consisting of shifting of law-making powers from public bodies upon private actors, what have led to the establishment of self-regulation and co-regulation system, both enriching legal systems with new rules, additional enforcement tools, but also further challenges. Working with food law, I've been observing newly created codes of good practices with growing interest and finally decided to examine their essence not only from professional, but also from academic perspective. In the course of the research it has become more apparent, that foodstuffs markets are suitable for the research, being abundant in private norms of different content, form and scope of application, created with or without public bodies' engagement. As far as my opinion is concerned, the most interesting part of their functioning is their use in relations between entrepreneurs and consumers, what has determined the aim of my research. It generally narrows down to examining private norms' influence upon food business operators being directly or indirectly engaged in their implementation as well as on consumers, who, according to my initial assumption, shall be the ultimate beneficiaries of voluntary commitments. I established the way codes of conduct may affect particular actors on the market in a way of thorough analysis of the processes of their creation and functioning, with regards to those provisions of law, which either directly refer to codes of conducts or otherwise concern self-regulation and co-regulation. A full study thereof and their role vis-à-vis consumers has not yet been developed.

The aim determining the shape of the doctoral dissertation underlay the research hypothesis stating that self-regulatory and co-regulatory mechanisms shall be deemed as appropriate and effective tools in consumer protection, which was verified throughout ancillary research questions, being as follows:

- a) what are self-regulation and co-regulation and what is the mutual relation of these terms?
- b) what elements does the essence of private norms consist of?
- c) what are the common elements of self-regulation and co-regulation with generally applicable law and what are their common elements with contractual sources of obligations?

- d) what types of private norms are there on the foodstuffs markets?
- e) are there any limitations in application of self-regulatory and co-regulatory mechanisms to particular sectors of economy or groups of issues, and if so – what are they?
- f) do entrepreneurs decide to voluntarily restrict their freedom of action on the market for the consumers' benefit, and if so – why does this happen?
- g) which provisions of generally applicable law affect or may affect the efficiency of consumer protection by private norms?
- h) what mechanisms contained directly in self-regulatory and co-regulatory acts, or bounded therewith, affect or may affect the efficiency of consumer protection by private norms?
- i) what relationships are there between self-regulatory and co-regulatory acts, and generally binding provisions of law and what is their influence on the level of consumer protection in a way of private norms?
- j) what mutual relationships are there between self-regulatory and co-regulatory acts and what is their influence on a level of consumer protection thereby?

Ancillary questions were accompanied by two initial assumptions identified during primary examination of self-regulation and co-regulation. First one came down to the statement, that all self-regulatory and co-regulatory acts, even those binding upon entrepreneurs in B2B relations, were somehow connected with consumer protection. Some of them stated that goal explicitly, whereas in case of others only their in-depth analysis allowed me to conclude that they were oriented to protect most vulnerable actors on the markets.

Significant part of the research concerned relation of codes of conduct and generally applicable law, what also resulted in assuming certain presumptions of how the role of private norms in consumer protection is shaped. This part of the project was grounded on the second initial assumption concerning the relation between the stated law and private norms within the EU. The interaction between the two types of sources of legal commitments I found being based on the collaboration principle. This conclusion I made having observed, that public authorities and private regulators, despite their sometimes divergent goals, generally strive for the creation of complex and consistent legal environment.

Answering the aforementioned ancillary questions as well as corroboration of the initial assumptions were the unavoidable steps towards final verification of the scientific hypothesis, determining the shape of the dissertation. For that purpose I made a reference to the primary criterion of adequacy as well as subsequent thereto the criterion of efficiency. The latter became relevant for the hypothesis, since the first one revealed private norms' adequacy for consumer protection. Secondary, but still essential, there were the criteria of organizational and financial character. They may not have themselves decided upon the positive verification of research hypothesis. Nevertheless they turned out to be useful to prove certain advantages of self-regulation and co-regulation over the generally applicable law provisions.

2. Research steps and conclusions

Self- and co-regulatory mechanisms play more and more significant role in contemporary legal systems. Not that long ago they tend to appear where no initiative by legislators could be observed. Nowadays they are deemed more as a complementary element to the stated law, rather than its alternative, what can be corroborated with the food sector example.

Despite their long tradition (first private norms would be implemented in ancient times to regulate the conduct of soldiers), their acknowledgement by public organs took place at the entry into force of the directive 2005/29/EC. Its aim has been to prevent any signs of overuse of consumers' confidence in private norms. On the day of its adoption, the codes of conduct have acquired the status of provisions, the non-compliance or improper observance of which is, under certain circumstances, sanctioned as unfair commercial practice. Admittedly, the directive does not contain the terms "self-regulation" and "co-regulation". Instead, it uses the term "codes of conduct". According to the theory on the forms in which private norms appear, described in chapter I, based on the wide definition of the code of conduct provided for by the directive, these names are equivalent. The notion of code of conduct embraces various range of voluntary standards in the form of codes of good practices, quality systems, codes of ethics in their broad and narrow sense, as well as other forms of sets of voluntarily implemented commitments. The directive proves that the EU legislator himself has noticed the importance of self-

regulation and co-regulation in legal transactions, what justifies the need and significance of the research conducted.

The structure of the doctoral thesis reflected a manner in which particular aspects of codes of conducts functioning on the market had to be analysed in order to verify the hypothesis. Prior to any detailed evaluation of consumer-oriented features thereof, I found it of utmost importance to decide upon the scope of the research, by determining the meaning of the basic terms such as self-regulation and co-regulation, to identify their essential elements and differences between them, as well as to group types of private norms which could be distinguished in the food sector, what has been described in chapter I. Chapter II aimed at explaining why entrepreneurs decided to give up on their freedom by assuming additional obligations in the form of private norm, what happened directly or indirectly for the benefit of consumers. This has been done by reiterating their advantages and disadvantages in overall, but also from the perspective of particular participants of the market and the main functions of self-regulatory and co-regulatory acts. Chapter III and chapter IV contains the description of public and private mechanisms that affect the functioning of the codes of conduct with regard to consumer protection. By public mechanisms I mean the stated law and guidelines issued by public authorities, which despite their non-binding character, origin from the legislator's activity. Those consist of goals and principles of the given area of law subject to self-regulation or co-regulation, in this case – food law, the free movement of goods principle, competition rules and unfair commercial practices regulations at both – EU and national levels. Private mechanisms generally embrace the way codes of good practices are created, their content, supervisory organs and their modes of action, together with sanctions which are applied in the event of any infringement of voluntary commitments by entrepreneurs. Additionally, one of the most vital mechanisms identified in the course of my research as having great influence upon the way self-regulation and co-regulation function with regard to consumers protection, is the relation between codes of conduct and generally applicable law provisions, as well as mutual relation between private norms themselves. Its vastness and significance made me analyse that issue separately, in chapter V of the thesis.

In the course of verification of the adopted research hypothesis throughout subsequent parts of the dissertation, primarily it was required to make a reference to the preliminary assumptions. Both of them I considered corroborated. The first assumption

means that in the territory of EU and Great Britain, while it was still a Member State, universally binding law and self- and co-regulation have always been interdependent due to the collaboration of public bodies and code owners. This is evidenced by the number of codes of good practices in the food sector, references to the self-regulatory and co-regulatory initiatives contained in acts of generally applicable law and other documents issued by public authorities, including encouragements for entrepreneurs to bound themselves with voluntary commitments. Last but not least numerous relations developed over the years between codes of conduct and acts of law in force also speak for the truthfulness of the assumption.

According to the second assumption, the essence of codes of conduct come down to the protection of consumer interests, regardless of whether they are adopted in professional relations or in relations with final purchasers of foodstuffs. Its confirmation can be found not only in the substantive side of the commitments, but also in the definition of their goals by private regulators. Additionally the assumption can be proved with the location of law provisions referring to private norms, placed among unfair commercial practices in the directive 2005/29/EC.

At the same time the second of the confirmed assumptions means that establishing private standards can be perceived as an expression of finding a golden middle between various strivings of individual market participants. In the course of creation of codes of conduct, a natural conflict of interests of professionals and consumers takes place. Reaching a compromise between them assumes the form of voluntary obligations established by entrepreneurs. Joining a self-regulation or co-regulation act thus restricts the entrepreneur's freedom on the market. Nevertheless, business entities are using this route more and more often. This is because those mechanisms are also capable to benefit their signatories, what sometimes can be found explicitly expressed in their content. The list of advantages and functions of private standards presented in chapter II shows that the number of profits achieved by entrepreneurs may even exceed those of consumers. The significance of the latter is, of course, much greater. This is due to the essence of consumer-oriented private norms, but the amount of gainings for business activity still justifies the increasingly noticeable participation of codes of conduct in legal aspects of food market functioning.

Having confirmed initial assumption, I came to the conclusion that private norms are adequate and efficient mechanisms for the consumer protection, even though the success rate of self- and co-regulation on the markets from the consumers' perspective is

barely possible to be assessed. That happens because of lack of unambiguous indicators such as monetary criterion in economic sciences. The criteria assumed for the purpose of this thesis, i.e. adequacy and efficiency are of more vague nature. Nevertheless the in-depth analysis carried out in the thesis may help to use them properly in the overall evaluation of private norms.

The basic criterion is the adequacy. For its purpose I assumed the double-sided nature of self- and co-regulation mechanisms being private sources of obligations similar to contracts from one side, and acts bearing resemblance to the stated law from the other. For legal acts being the way B2C relations are tackled, also the private norms, reminding of stated law in many aspects, may be treated as a source of consumer protection. It cannot be omitted however, that in comparison with legal acts, self-regulatory and co-regulatory acts' scope of application, due to their voluntary nature, is significantly smaller. That leads directly to the question of their efficiency, thus to the second of assumed criteria. Its analysis I've carried out having in mind every single mechanism of both – private and public nature – described in chapters III-V of my thesis. Their amount, diversity, stage of creation and/or functioning of private norms to which they apply as well as scarce *de lege ferenda* postulates, were decisive for the statement that self-regulatory and co-regulatory mechanisms are efficient way of protecting non-professional actors of food market, on condition however they remain complementary to stated law and to the extent their creation and their enforcement comply with recommendations gathered in the thesis, which had been already underlined by public organs and doctrine members as well as those developed during the research.

3. Methodology

The following methods were adopted in the course of the research. First of all, I applied the dogmatic method consisting in the analysis of legal acts on two levels – self-regulatory and co-regulatory acts in force on the EU and national food markets in selected Member States, as well as generally applicable acts of law regulating issues related to the production and trade in foodstuffs. Only the combination of these two analyses allows to obtain a full picture of the usefulness of self-regulation and co-regulation for the protection of consumer rights.

The dogmatic method was accompanied by an analysis of the literature and jurisprudence, carried out – as was the case with legal acts – on two levels. It covered the judgments of courts and public administration bodies, as well as the rulings of disciplinary bodies operating by the codes of good practices.

In order to assess the effectiveness of self-regulatory and co-regulatory acts, I also used a functional method concerning not the private norms themselves, but the overall goals they are to pursue and their effects. The application of this method led me to go beyond the content of the acts subject to the examination, directing my research work towards legal phenomena and related social events.

The last of the methods used in the course of the research is an empirical method, possible due to my position of a judge in a disciplinary court established in one of the codes existing on the Polish food supplements market, i.e. the Code of Good Practices in Advertising of Food Supplements. It has enabled me to acquire a detailed insight into the process of issuing judgments by the disciplinary bodies established under self-regulatory and coregulatory acts and the manner of their functioning.

Łódź, 29.10.2021
Justyna Nawek

