

Self-regulation as a regulatory strategy: The Italian legal framework¹

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Introductory remarks. The concept of self-regulation and the aims of this study

The increased regulatory function of private law and the development of regulatory strategies involving a plurality of actors have radically changed the traditional view of the regulatory State. These crucial changes require a new attention to the interaction between public and private regulators.³

On the one hand, important developments have occurred in relation to public regulation as well.⁴ If, in the recent past, private regulation has been useful to define regulatory areas not covered by the public sphere, today there is a relevant trend towards a different form of co-regulation between public and private regulators.⁵ The role of private regulation is increasing more as a complement to public regulation rather than as an alternative thereto, reflecting the crisis of the regulatory state, but, at the same time, posing serious questions concerning the legitimacy of private regulators.⁶

On the other hand, the development of self-regulatory mechanisms has increased the role and power of private regulators.

In recent years, European legal and political sciences are paying growing attention to the concept of self-regulation, as a regulatory strategy in order to implement supranational policies. Despite this attention in the European context, self-regulation still remains a rather vague and elusive concept. As Price and Verhulst pointed out: 'The initial problem of every approach to self-regulation pertains to definition and semantics. There is no single definition of self-regula-

1 The results of this paper were first the object of an international Conference ('Rethinking Self-Regulatory Modes and Strategies in Europe') at the European University Institute in October 2005, where I first presented these issues. The workshop was organized by Prof. Fabrizio Cafaggi in collaboration with the RSCAS project entitled 'New Modes of Governance' (NEWGOV), www.eu-newgov.org and within a large comparative research project on 'Self-regulation as a Regulatory Strategy. A comparative law perspective'.

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3 On the point, see F. Cafaggi, *Rethinking private regulation in the European regulatory space*, EUI Working Paper Law No. 2006/13, Italy. On the evolution of the regulatory state, see recently C. Scott, 'Regulation in the age of governance: the rise of the post regulatory state', in J. Jordana & D. Levi Faur (eds.), *The politics of regulation*, 2004, pp. 145 *et seq.*

4 There has also been a strong development of new modes of public regulation in recent years. For example, different models have developed among which independent regulatory agencies have become predominant. On this issue see recently R. Caranta *et al.* (eds.), *Independent Administrative Authorities*, 2004.

5 Recently see M.A. Frison Roche, 'Définition du droit de la régulation économique', in M.A. Frison Roche (ed.), *Les régulations économiques: légitimité et efficacité*, 2004, pp. 7 *et seq.* See also M.A. Salvati, 'I rapporti tra Stato ed economia come rapporti tra regolazione pubblica e privata', in C. Franchini & L. Paganetto (eds.), *Stato ed economia all'inizio del XXI secolo*, 2002, pp. 29 *et seq.*; G. Napolitano, *Pubblico e privato nel diritto amministrativo*, 2003, p. 160.

6 For these thoughts, see again Cafaggi 2006, *supra* note 3.

tion that is entirely satisfactory, nor should there be':⁷ this is so mainly because it has developed for different reasons, in different circumstances and in different countries. Rob Baggott, in an article published in 1989,⁸ defined self-regulation as an institutional arrangement whereby an organization regulates the standards of behaviour of its members. The essence of self-regulation would be a process of collective government. In 1996, Julia Black specified that the term 'self-regulation' is used to describe the discipline of one's own conduct by oneself: 'self-regulation describes the situation of a group of persons or bodies, acting together, performing a regulatory function in respect of themselves and others who accept their authority'.⁹

This does not mean, however, that the State may not in fact have a role in the regulation. Many forms of self-regulation have involved the State either as an initiator of the self-regulatory exercise, or as a participant in the exercise or as the ultimate guardian of the rights of citizens.¹⁰ In other words, instead of taking over all the components of regulation, the self-regulator may be involved at the legislation stage by developing a code of practice, while leaving enforcement to the government, or the government may establish regulations, but delegate enforcement to the private sector. At times, the government may mandate a regulator to adopt and enforce a code of self-regulation. More often, however, a self-regulatory body may engage in self-regulation in an attempt to stave off government regulation. Alternatively, self-regulation may be undertaken to implement or supplement legislation.

In 1995, Ogus clearly underlined that 'there is no clear dichotomy (...) between "self-regulation" and "public regulation", but rather a spectrum containing different legislative constraints, outsider participation in relation to rule formulation or enforcement (or both), and external control and accountability. Thus, at one extreme, rules may be private to a firm, association or organization; at the other, they may have to be approved by a government minister or some independent public authority. Secondly, the rules or standards issued by the SRA may have varying degrees of legal force: they may be formally binding, codes of practice which presumptively apply unless an alleged offender can show that some alternative conduct was capable of satisfactorily meeting the regulatory goals, or purely voluntary'.¹¹

More generally, if it is true that self-regulation implies an organization regulating the standards of its members, why should an organization wish to do this? What are the advantages traditionally claimed for self-regulation over public regulation? First, in Ogus' view,¹² since self-regulatory agencies can normally command a greater degree of expertise and technical knowledge of practices and innovatory possibilities, information costs for the formulation and interpre-

7 See M.E. Price & S.G. Verhulst, 'In search of the self: charting the course of self-regulation on the Internet in a global environment', in C. Marsden, *Regulating the global information society*, 2000, p. 58. On this point, J.R. Shackleton, 'UK privatisation – US deregulation', 1985 *Politics*, October, pp. 8-16, considers self-regulation as a significant feature of regulation in Great Britain. More specifically, a number of reports and studies have confirmed that in several policy areas – such as the regulation of the professions, advertising and the press, to name a few – British policy makers have opted for a higher degree of self-regulation than their counterparts in other countries. As to the Italian literature on self-regulation, see recently F. Cafaggi, *Reframing self-regulation in European Private Law*, 2006. Notably, see also F. Cafaggi, 'Crisi della statualità, pluralismo e modelli di autoregolamentazione', 2001 *Politica del diritto*, no. 4, pp. 543-585.

8 R. Baggott, 'Regulatory reform in Britain: the changing face of self-regulation', 1989 *Public Administration* 67, p. 438.

9 See J. Black, 'Constitutionalising Self-Regulation', 1996 *Modern Law Review* 59, p. 24. As to the Italian literature on self-regulation, see, among others, C. Alvisi, 'Pubblico e privato nei sistemi autoregolamentari. Il problema dei controlli sull'autonormazione nel settore della pubblicità commerciale', 1999 *Resp. comunicazione e impresa*, p. 463, who defines self-regulatory mechanisms as complex phenomena of self-regulation of private actors, as private legal orders able to replace, precede or complete statutes ('fenomeni complessi di autoregolamentazione dei privati ... veri e propri ordinamenti privati, che suppliscono, precedono e spesso sostituiscono o completano l'intervento del legislatore').

10 J.W. Maxwell *et al.*, 'Self-regulation and social welfare: the political economy of corporate environmentalism', 2000 *Journal of Law and Economics*, no. 2, p. 584. See also A. Cannataci & J. P. Bonnici, *Can Self-Regulation satisfy the transnational requisite of successful Internet Regulation?*, 17th Bileta Annual Conference, 5-6 April 2002, Free University, Amsterdam.

11 Notably A. Ogus, 'Rethinking Self-regulation', 1995 *Oxford Journal of Legal Studies*, no. 1, p. 100.

12 *Ibid.*, p. 98.

tation of standards are lower. Secondly, for the same reasons, monitoring and enforcement costs are also reduced. Thirdly, to the extent that the processes of, and rules issued by, self-regulators are less formalized than those of public regulatory regimes, there are savings in the costs of amending standards.

More specifically, the focus of the research will be on self-regulatory mechanisms at the national (Italian) level focusing firstly on the constitutional law dimension. Constitutional law may in fact envisage a number of legal provisions which are able to affect, directly or indirectly, recourse to self-regulation, either promoting or prohibiting it. It will be crucial to identify such provisions and to evaluate their relationships within the context of the constitutional order and their overall relevance *vis-à-vis* the practice of self-regulation. For instance, can the (Italian) constitutional conceptions of private autonomy affect the legal system's capacity to adopt self-regulation? Within this framework, it will be essential to answer some specific questions. Is there any direct or indirect link between self-regulation and constitutional values? Does the Constitution impose any duty on the State with regard to self-regulatory mechanisms, such as, for example, an obligation to monitor their activity, to control their internal organisation and procedures, to supervise their interaction with third parties? To what extent is self-regulation compatible with the rule of law?

Part II of this study will focus the debate on the specific sectors where self-regulation has been traditionally experienced, paying attention to the remarkable transformation in the law-making process, which is moving towards forms of co-regulation, delegated self-regulation and *ex-post* recognised self-regulation.¹³

I. The constitutional law dimension

The first part of the study is centred around the question of whether there are constitutional mechanisms affecting recourse to self-regulation in Italy.

The Constitution of 1948 is the basic law of the Italian State, occupying the main place in the hierarchy of legal sources.¹⁴ It consists of two parts, preceded by a section on fundamental principles. The two parts are concerned with the rights and duties of citizens and the structure of the Republic, respectively. To put it succinctly, the first part deals with the civil, political, economic and social rights of citizens, while the second part concerns the mechanisms by which the State creates laws, governs the country, provides for the resolution of disputes and polices the Constitution itself.

Generally speaking, the present Italian Constitution does not deal directly with self-regulatory mechanisms. Nevertheless, several constitutional provisions can be found which are able to indirectly affect recourse to self-regulation. An indirect but clear link can thus be established between self-regulatory means and constitutional law.

I.1. Fundamental rights

As stated above, the first section of the Italian Constitution deals with fundamental principles. A very important question must be answered before analysing individual rights and their potential relationship with self-regulatory mechanisms: who is entitled to constitutional rights? Under

13 On this classification, see F. Cafaggi, 'Le rôle des acteurs privés dans le processus de regulation: participation, autorégulation et regulation privée', 2004 *Revue française d'administration publique*, no. 1, pp. 9 *et seq.* On the distinction, see also below.

14 After the Constitution comes ordinary legislation, the codes being the main sources thereof. Inferior to legislation, and incapable of modifying or abrogating it, are administrative acts. See below.

Article 2 of the Italian Constitution, ‘the Republic recognizes and guarantees the inviolable rights of man, both as an individual and as a member of the social groups in which one’s personality finds expression’. It is thus clear that not only the individual, but also the ‘social groups’ are entitled to constitutional rights.

The typical example of such a social group is the family, which is defined in Article 29 as a ‘natural association founded on marriage’, but local governments (Article 5), linguistic minorities (Article 6), trade unions (Article 39),¹⁵ and political parties (Article 49) are all mentioned as well. Constitutional rights do not only involve relationships between the individual and the State. There is also an intermediate tier (the social group) through which the individual realizes his or her constitutionally protected liberty.

Nevertheless, it is fundamental – for the purpose of this study – to understand who is bound by rights afforded under the Constitution. Is it only the State (in the broad sense of all the public bodies), or does this responsibility also extend to private corporations, where such corporations represent the so-called *poteri privati* or ‘private powers’ (*i.e.* large corporations, political parties and, why not, self-regulatory bodies)?

The matter is highly controversial. With reference to the freedom of speech, for example, the Constitutional Court has held that no entity, public or private, can abridge an individual’s constitutional rights.¹⁶

Within this framework, it is thus clear that ‘social groups mentioned in Article 2 as possible beneficiaries of constitutional rights can also be perceived as potentially threatening to a person’s individual rights, and these groups are thus also bound by them’.¹⁷

1.1.1. Civil rights (negative rights) and welfare rights (positive rights)

Part I of the Constitution is divided into four titles, dealing respectively with civil, ethical-social, economic and political relations.¹⁸

Civil rights – listed in Articles 13 to 28 – are also considered as *diritti negativi* or ‘negative rights’, because they prohibit the State from regulating or intervening in certain areas of private life.

Specifically, according to Article 18 of the Constitution, citizens have the right to associate freely, without any authorisation, for ends which are not forbidden to individuals by criminal law. The principle of freedom of association, closely linked to the concept of private autonomy, can be considered as one of the most important constitutional provisions able to promote and justify self-regulatory mechanisms.¹⁹

Freedom of association, as recognized by Article 18, undoubtedly has to be read in connection with the constitutional regulation of trade unions.²⁰ Agreements and organizations which uphold and regulate labour rights are thus promoted and favoured. Trade unions are free to organize themselves without restriction and without any pre-established legal model.²¹

The constitutional foundation of social (welfare) rights can be traced to Article 3, Paragraph 2, stating that ‘it is the duty of the Republic to remove all economic and social obstacles which,

15 See below.

16 Corte Costituzionale, 9 luglio 1970, n. 122, in www.giurcost.it.

17 See M. Comba, ‘Constitutional law’, in J.S. Lena & U. Mattei, *Introduction to Italian law*, 2002, p. 36.

18 In each case, the relations in question are those between the citizen and the State, thus illustrating the public law nature of these relationships.

19 See Section II.1 of this study.

20 Art. 35, Para. 1: ‘The Republic protects work in all its forms and applications’; Para. 3 of the same article: ‘It [The Republic] promotes and encourages international agreements and organisations whose aim is to assert and regulate labour rights’.

21 As will be remarked below, trade union freedom has been solemnly proclaimed as a fundamental principle of Italian industrial relations by Art. 39 of the Constitution, declaring that ‘labour union organisation is free’.

by limiting the freedom and equality of citizens, prevent the full development of the individual and the effective participation in political, economic and social organizations within the country'. Welfare rights are thus considered to be a necessary instrument for the implementation of civil rights. The Republic is obligated to remove economic and social obstacles that may hinder citizens from fully enjoying civil rights like liberty and equality and the right to participate in those social organizations which are so crucial in the Italian Constitution's idea of what 'rights' are.

In this context, it must be reminded that, under Article 41, Paragraph 1, private economic initiative is free. However, it cannot be exercised in such a manner as to damage safety, liberty and human dignity (Article 41, Paragraph 2). Parliament is entitled to determine appropriate planning and controls so that public and private economic activity is given direction and coordinated with social objectives (Article 41, Paragraph 3).

The freedom of contract might also be taken into account as a fundamental principle able to justify self-regulatory mechanisms and to affect the Italian legal system's capacity to adopt them. Nevertheless, it is not positively recognized as a general principle by the Italian Constitution of 1948. Some scholars argue that it is embodied in Article 2, while others refer to Articles 41 and 42 of the Constitution.²² On the one hand, any restriction on the freedom of contract is regarded as a restriction on private enterprise. On the other hand, constitutional provisions, and the values protected thereby, work to limit the private autonomy to contract.²³

Last but not least, it must be borne in mind that, under Article 3, all citizens have equal social dignity and are equal before the law. Discrimination on grounds of sex, race, language, religion, political opinion, or social and personal condition is not permitted. This means that the rights and duties which are described in Part I of the Constitution cannot be limited to any one or more classes within the community, nor can any class be excluded from their enjoyment.

1.2. Sources of law and self-regulation. The concept of legislative delegation

A brief overview of the Italian system of sources of law is necessary in order to better understand the role and the position of self-regulatory mechanisms in the Italian legal order.²⁴

The Constitution of 1948 is the basic law of the Italian State, occupying the main place in the hierarchy of legal sources, followed by statutes and regulations.²⁵ A statute in conflict with the Constitution is invalid. A regulation in conflict with a statute is similarly invalid.²⁶ The invalidity operates differently in the two hypotheses. In the case of an unconstitutional statute, the Constitution itself gives the Constitutional Court the power to declare that it 'ceases to have effect' (Article 136),²⁷ while for an illegal government administrative regulation, the Constitution

22 See A. Gambaro, 'Freedom of contract and constitutional law in Italy', in M. Rabello & P. Sarcevic (eds.), *Freedom of contract and constitutional law*, 1998, p. 169. Notably, see also B. Grazzini, *Autodisciplina pubblicitaria e ordinamento statale*, 2003, p. 21.

23 See A. Musy & A. Monti, *Contract law*, in J.S. Lena & U. Mattei, *Introduction to Italian law*, 2002, p. 247.

24 For a more encompassing analysis of the Italian system of sources of law, see F. Modugno, *Appunti dalle lezioni sulle fonti del diritto*, 2002; S. M. Cicconetti, *Le fonti del diritto italiano*, 2002; T. Martines, *Fonti del diritto e giustizia costituzionale*, 2000. More recently see F. Modugno & P. Carnevale (eds.), *Rilevanti novità in tema di fonti del diritto dopo la riforma del Titolo V della seconda parte della Costituzione*, 2003.

25 See Art. 2 of the Provisions on the law in general ('*Disposizioni sulla legge in generale*'): 'The enactment of statutes and the issuing of governmental acts having the force of statutes are governed by constitutional laws'; Art. 3, Para. 1: 'The regulatory power of the Government is governed by constitutional laws'. See Art. 87 of the Italian Constitution, which lists, among the several Presidential duties, the power to promulgate laws and issue decrees having the force of law, as well as regulations.

26 See also Art. 4 of the Provisions on the law in general ('*Disposizioni sulla legge in generale*'): 'Regulations cannot contain rules contrary to the provisions of statutes'.

27 Under Art. 136 Cost.: 'When the court declares a law or an act with the force of law unconstitutional, the norm ceases to have effect from the day following the publication of the decision. The decision of the court is published and reported to parliament and to the regional councils involved for them to take appropriate measures in constitutional forms where necessary'.

is silent, and a determination of the rule's validity is found in the machinery of judicial control over administrative activity.²⁸

The Italian Constitution describes the organization of the Republic as being centred on Parliament, which is the only body empowered to legislate (Article 70: 'The legislative function is exercised collectively by both Houses').²⁹ Nevertheless, the legislator (Parliament) can entrust some of its normative powers to the Government, within expressly specified limits.³⁰ Under Article 76 of the Constitution, in fact, legislative power may not be delegated to the government unless Parliament specifies principles and criteria for guidance, and only for a limited time and in well-specified subjects. Again, by virtue of Article 77, the government may not, without delegation from the Houses, issue decrees having the force of ordinary law.³¹

The model of the sources of law rooted in the Italian Constitution, as mentioned above, is typically positivistic and centred on the pivotal role of Parliament.

For the purposes of this study, it will be interesting to analyse to what extent the self-regulatory phenomenon is compatible with Parliament's sovereignty and with the linked principle of the rule of law (*principio di legalità*).³² According to this brief overview (but the matter will be better discussed in the sectorial analysis), it should be clear that rules made by private actors (*i.e.* self-regulatory rules) that pretend to have external effects (binding *erga omnes*) can be considered as law (and, as such, as sources of law), as long as they can be 'incorporated' into some of the formal sources of Italian law.³³

In this context, we can briefly recall some theories by certain authors, such as Santi Romano,³⁴ supporting pluralistic approaches of the law (*teoria della pluralità degli ordinamenti giuridici*) and arguing that spontaneous organisations could create private legal orders in

28 See Comba 2002, *supra* note 17, p. 47.

29 See, however, Art. 117 Cost., as modified by Constitutional law no. 3/2001: 'Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European Union law and international obligations'. The constitutional reform in 2001 modified Art. 117 Cost., introducing the rule of residual legislative power to the Regions: it now lists the seventeen fields in which the State has exclusive legislative authority and another list of eighteen fields in which the State and Regions have concurrent authority. Any other field is subject to the exclusive legislative power of the Regions.

30 For an exhaustive overview of the Constitutional Court's judgments on the limits laid down by Art. 76 Cost., see E. Malfatti, *Rapporti tra deleghe legislative e delegificazione*, 1999, p. 35. Some authors argue that there are no constitutional provisions which prohibit the legislator from delegating normative functions to bodies other than the Government. See G. De Minico, *Regole – Comando e consenso*, 2004, p. 17. In the author's opinion, independent administrative authorities would be entitled to exercise secondary normative powers (through regulations).

31 In addition to the above form of delegated legislation, statutes increasingly provide for 'codes of practice' (this is thus the so-called *delegated self-regulation*) which will have legal effect within the limits expressly specified by Parliament. This is the case, for instance, concerning Law No. 146 of 12 June 1990 which foresees that where a strike takes place in public essential services, minimum services shall be guaranteed, as agreed upon by the administration (or the enterprise that administers the essential service) and the union's representation at the enterprise level (or the workers' representatives where appropriate), through self-regulation codes (*codici di autoregolamentazione*). This is the case, again, with the Law of 27 June 1991, No. 220, which delegated the *Consiglio Nazionale del notariato* – National Council of Public Notaries – to adopt notarial deontological rules. On 29 July 1998, the *Garante per la protezione dei dati personali* (Privacy Authority) approved a code of conduct in the exercise of the power expressly delegated by Art. 25, Law of 31 December 1996, No. 675 (now Legislative Decree No. 196/2003).

32 On the '*principio di legalità*', see, among others, G.U. Rescigno, 'Sul principio di legalità', 1995 *Diritto pubblico*, pp. 247 *et seq.*; F. Sorrentino, *Lezioni sul principio di legalità*, 2002. Recently see A. Ali, *Il principio di legalità nell'ordinamento comunitario*, 2005.

33 Cafaggi 2001, *supra* note 7, p. 576, who states that there are two different kinds of self-regulatory codes: those that pretend to be generally binding and those that, being the product of private autonomy, only have an impact on the regulatees. The author argues that the self-regulatory codes which pretend to be binding *erga omnes*, necessarily need a formal legitimacy through the law. See, on this matter, the case of self-regulation in labour law. As we will see, Law No. 146 of 12 June 1990, as amended in 2000 (Law No. 83 of 11 April) and regulating the right to strike in public essential services, foresees that where a strike occurs in such services, a minimum service shall be guaranteed, the modalities of which shall be agreed upon by the administration (or the enterprise that administers the essential service) and the union's representation at the enterprise level (or the workers' representatives where appropriate), not only by collective agreements but also through self-regulation codes (*codici di autoregolamentazione*). Some Italian authors argue that Act No. 146/1990 represents a radical transformation in the law-making process towards a sort of delegated self-regulation. In this case, since the legislator mandates the industry to adopt a code of self-regulation, collective agreements and more generally self-regulatory codes can thus be considered as sources of law which are valid *erga omnes*.

34 S. Romano, *L'ordinamento giuridico*, 1917. For a concrete application of the theory of '*pluralità degli ordinamenti giuridici*', see Cass. Civ., 2 dicembre 1932, noted by W. Cesarini Sforza, 'La teoria degli ordinamenti giuridici e il diritto sportivo', 1933 *Foro Italiano* I, p. 1385.

competition with the State.³⁵ This doctrine – as will be seen – has been followed by a consistent part of Italian legal literature in order to explain and justify self-regulatory mechanisms in the most relevant sectors in which they are applied.³⁶

II. Sector analysis. Introductory remarks

Italian legal scholarship rarely pays attention to self-regulatory mechanisms as a general issue. The debate usually focuses on specific sectors where self-regulation is typically applied. Self-regulation in the Italian legal order can thus be considered as a sector-oriented concept.

As it is impossible to give an exhaustive overview of all self-regulatory mechanisms in the Italian legal order, in part II of this study special attention will be given to the most relevant sectors in which the self-regulatory technique is applied.

II.1. Advertising self-regulation

Advertising can be considered as the most important sector in which there has been academic discussions on the role of self-regulation in the Italian legal order.³⁷

In a broad sense, the term *advertising regulation* includes ‘all controls or regulations from all sources, including self-discipline by individuals and by organisations involved in advertising’.³⁸

In a strict sense, advertising regulation can be considered as the control of commercial behaviour through mandatory rules, laid down by statutes, often implementing European Directives,³⁹ and enforced through the intervention of statutory Authorities and State courts.

The Italian advertising self-regulatory system is the responsibility of a non-profit organisation (the so-called *Istituto dell’Autodisciplina Pubblicitaria*)⁴⁰ set up by the business organisation of all constituent parts of the advertising industry.⁴¹ Within the I.A.P. system, responsible for the practical interpretation and application of the self-regulatory code, there are two different bodies. Firstly, the Supervisory Committee – *Comitato di Controllo* – entitled to investigate and to

35 On this point, see P. Rescigno, ‘L’autonomia dei privati’, in *Studi in onore di Gioacchino Scaduto*, 1988, pp. 531 *et seq.* See also Tribunal of Milan, 22 January 1976, 1977 *Riv. Dir. Ind.*, p. 91.

36 *Amplius* (with express reference to self-regulation in the sport sector) C. Alvisi, *Autonomia privata e autodisciplina sportiva. Il C.O.N.I. e la regolamentazione dello sport*, 2000, p. 270. On this matter, see also Grazzini 2003, *supra* note 22, who applies Santi Romano’s theory in order to explain the phenomenon of self-regulation in the advertising sector. See again Cafaggi 2001, *supra* note 7, p. 568. The author has underlined that the theory of ‘*pluralità degli ordinamenti*’ can be admitted whenever it is compatible with the Italian constitutional order and whenever the sources that do not find their legitimacy in statutes do not pretend to have external effects.

37 In general, for the Italian literature, see L.C. Ubertazzi, *La giurisprudenza completa dell’autodisciplina pubblicitaria, 1966-2006: la raccolta integrale delle decisioni autodisciplinari*, 2006; B. Grazzini, *Autodisciplina pubblicitaria e ordinamento statale*, 2003; B. Grazzini, ‘Autodisciplina pubblicitaria e profili di diritto concorrenziale’, 2001 *Resp. Comunicazione e impresa*, p. 419; C. Alvisi, ‘Advertising regulation: the basic elements of a self-regulatory system’, 2000 *Resp. comunicazione e impresa*, p. 187; P. Autieri, ‘Il codice di autodisciplina pubblicitaria’, in P. Zatti (ed.), *Le fonti di autodisciplina. Tutela del consumatore, del risparmiatore, dell’utente*, 1996; N. Zorzi, ‘Autodisciplina pubblicitaria’, 1985 *Contratto e Impresa*, p. 549.

38 See C. Alvisi, ‘Advertising regulation: the basic elements of a self-regulatory system’, 2000 *Resp. comunicazione e impresa*, p. 182, who refers to the definition by G.E. Miracle & T.R. Nevett, *Voluntary regulation of advertising. A comparative analysis of the United Kingdom and the United States*, 1987.

39 See Art. 5 of Directive 84/450/EEC on Misleading Advertising, as modified by Directive 97/55: ‘This Directive does not exclude the voluntary control, which Member States may encourage, of misleading or comparative advertising by self-regulatory bodies and recourse to such bodies by the persons or organizations referred to in Article 4 if proceedings before such bodies are in addition to the court or administrative proceedings referred to in that Article’. The Directive on Misleading Advertising was implemented by the Italian Legislative Decree No. 74/1992, as modified by Legislative Decree No. 67/2000.

40 As laid down in its own Statute, it is a non-profit organisation. Amongst its main tasks are the formulation and updating of the rules of the Code of Self-Regulation (C.A.P.), the appointment of members to the Jury and the Review Board. For more details about the *Istituto dell’Autodisciplina Pubblicitaria*, see A. Pedriali, ‘Profili soggettivi dell’autodisciplina pubblicitaria’, 1992 *Riv. dir. ind.* I, p. 136.

41 The Italian self-regulatory advertising system can be considered as a typical case of purely private self-regulation *ex post* recognized by the State. It was established, in fact, in order to compensate the lack of public law rules (Legislative Decree No. 74/1992 was only adopted in 1992) and aiming to create an autonomous, separate system.

prosecute those responsible for breaching the advertising code, in order ‘to protect the general interests of consumers’.⁴² Secondly, the Jury – *Giuri* –, which works as a domestic tribunal,⁴³ with the task of interpreting and applying the code of practice. The Jury considers cases in which there seems to be a breach of the code, and which can arise as a result of complaints. According to Article 36 Italian C.A.P., in fact: ‘anyone⁴⁴ who believes that he/she has suffered prejudice from advertising activities contrary to the Code may request the intervention of the Jury against those who, having accepted the Code in one of the forms set out in the preliminary and general rules,⁴⁵ have undertaken the activities alleged to have caused damage to the petitioner’. If the Jury decides that a complaint is justified, it will then decide upon the appropriate action to take. More in particular, when the decision establishes that the advertising in question does not comply with the rules of the Code and its Regulations, the Jury may order the interested parties to refrain from such activity. It has to be remarked that there is no appeal against the Jury’s decisions (Article 38 C.A.P.).⁴⁶

II.2. Self-regulation and labour law

Trade union freedom has been solemnly proclaimed as a fundamental principle of Italian industrial relations by Article 39 of the Constitution, declaring that ‘labour union organisation is free’.⁴⁷ This latter norm regulates trade unions and specifies that only *registered* unions can obtain legal status and make collective agreements which are valid *erga omnes* (for all employers and employees).⁴⁸ This provision, however, has not been enforced because a bill regulating the registration of unions has never been adopted.⁴⁹ Therefore, in Italy unions do not need any recognition and can organize themselves without any pre-established legal model. They can conclude collective agreements (*contratti collettivi di diritto commune*) which are legally enforceable under civil law rules, *i.e.* on the assumption that the parties to a collective agreement have stipulated their respective membership.

Article 39 of the Constitution is, first of all, a confirmation of the more general principle of freedom of association sanctioned by Article 18 of the same Constitution;⁵⁰ the confirmation being necessary to mark beyond any doubt the distinction between the present practice and that of the fascist regime.

42 By virtue of Art. 30 of the Italian Code of Advertising Self-Regulation, ‘the Supervisory Committee, aimed at protecting the general interests of consumers, is made up of between ten to fifteen members appointed by the *Istituto dell’Autodisciplina pubblicitaria* and selected among experts in consumer problems, advertising techniques, communication, media and legal matters’.

43 According to Art. 32 of Italian C.A.P.: ‘The Jury examines the advertising submitted to it and judges it according to the Code of Advertising Self-Regulation. In disputes where the interests of consumers are not involved, the Jury, at the mutually agreed request of the parties, can constitute itself as a court of arbitration and decide the dispute by making an award’.

44 This means that any consumer and, more in general, any citizen may request the intervention of the Jury.

45 The Italian C.A.P. is binding for advertisers, agencies, consultants, all advertising media, and for anyone who has accepted the Code directly or through membership in an association, or by underwriting an advertising contract (the clause of acceptance – *clausola di accettazione*). On this point, see Grazzini 2003, *supra* note 22, p. 1.

46 While a self-regulation organisation (S.R.O.) may also comprise an appeal body, which acts as a court of appeal in the event of either the complainant or the adjudicated advertiser wishing to challenge the decisions issued by the code-applying body, the Italian advertising self-regulatory system does not have a separate appeals board. Consequently, a decision can be reinterpreted and amended by the Jury itself. As remarked above, by virtue of art. 38 C.A.P., last paragraph, the Jury’s decisions are final and binding.

47 See Art. 39, Para. 1 of the Italian Constitution: ‘*L’organizzazione sindacale è libera*’.

48 On this issue, see for example Pretura of Brindisi, 23 September 1999, 1999 *Orient. Giur. Lav.* I, p. 884; Cass. civ., Sez. lav., 7 June 1999, n.5584, 1999 *Mass. Giur. It.*

49 Since Art. 39, Paras. 2, 3, 4 has not been enforced, trade unions are generally thus considered as ‘*associazioni non riconosciute, prive di personalità giuridica*’ (unicorporated associations). Consequently, they are regulated by Art. 36 ss. of the Civil Code. See E. Galantini, *Diritto sindacale*, 2003, p. 11.

50 Art. 18, Para. 1: ‘*I cittadini hanno diritto di associarsi liberamente, senza autorizzazione, per fini che non siano vietati ai singoli dalla legge penale*’.

Trade union freedom has traditionally been held to imply the right of individuals to organise, to join a union without any condition required by law, to resign from the union, to choose among different unions and to refuse to belong to any union (*negative freedom*).⁵¹ But it implies, moreover, a constitutional prohibition on the State from interfering in internal union affairs: *i.e.* predetermining by law their aims and models of organisation and defining the areas of union jurisdiction.⁵² The only condition required by Article 39 is that union constitutions and by-laws be inspired by the principle of democracy.⁵³ Nonetheless other conditions, such as a minimum number of members, have been, more or less legitimately, derived from the second part of Article 39 as conditions for recognition and are required to acquire the status of the ‘most representative union’.

The Italian Constitution also recognises the right to strike, which must be exercised within the limits determined by the law (Article 40).⁵⁴ However, the only statute concerning the right to strike is Law No. 146 of 12 June 1990, as amended in 2000 (Law No. 83 of 11 April), which regulates the right to strike in public essential services. Under Act No. 146/1990, the notion of *public essential services* (*servizi pubblici essenziali*) relates to certain rights protected by the Constitution referring to life, health, freedom, safety, freedom to circulate, social assistance and provident funds (*previdenza*), instruction and freedom of communication of the persons in question.⁵⁵ This Act regulates strikes in essential public services, through a complex procedure based on a network of different sources (codes of practice unilaterally adopted by trade unions, collective bargaining, unilateral regulations and instructions issued by employers). More in detail, it foresees that where a strike takes place in such services, minimum services shall be guaranteed, as agreed upon by the administration (or the enterprise that administers the essential service) and the union’s representation at the enterprise level (or the workers’ representatives where appropriate), not only by collective agreements but also through self-regulatory codes (*codici di autoregolamentazione*).⁵⁶ Some Italian authors⁵⁷ argue that Act No. 146/1990 represents a radical transformation in the law-making process towards a sort of delegated self-regulation (a so-called ‘*legificazione degli atti dell’autonomia privato-collettiva*’).⁵⁸

In this case, since the legislator mandates the industry to adopt a code of self-regulation, collective agreements and, more in general, self-regulatory codes can thus be considered as sources of law (*fonti di ius singulare*)⁵⁹ which are valid *erga omnes*.

The Commission regulating strikes in sectors providing essential services to the public (*Commissione di garanzia in materia di sciopero nei servizi pubblici essenziali*) – the first body to be created as an independent administrative authority – evaluates the rules regarding minimum levels of service set by collective agreements, by codes of practice, or by employers, and this evaluation constitutes the ground for the special sanctions provided under Law No. 146/1990.

51 It has to be remarked that trade union freedoms such as the right to strike cannot be exercised without limits, and specifically, cannot limit other fundamental rights equally protected and guaranteed by the Constitution. On this issue, see recently Cass. civ., Sez. lav., 15 March 2002, n.3852, 2002 *Mass. Giur. It.*

52 Tribunal of Rome, 5 November 1999, 2000 *Lav. nella p.a.*, p. 321, noted by P. Campanella, *Rappresentanza e rappresentatività sindacale nel lavoro pubblico: primi interrogativi sulla costituzionalità delle nuove regole*.

53 Art. 39, Para. 3: ‘E’ condizione per la registrazione che gli statuti dei sindacati sanciscano un ordinamento interno a base democratica’.

54 See Art. 40: ‘Il diritto di sciopero si esercita nell’ambito delle leggi che lo regolano’.

55 Art. 1 of Act. No. 146/1990. On this issue, see Cass. civ., Sez. lav., 14 settembre 2000, n.12150, 2000 *Mass. Giur. It.*; Cass. civ., Sez. lav., 5 ottobre 1998, n. 9876, 1998 *Mass. Giur. It.*; Pret. Milano, 31 gennaio 1996, 1996 *Orient. Giur. Lav.*, p. 349.

56 Art. 2, Para. 2, Law No. 146/1990.

57 Notably, Alvisi 1999, *supra* note 9, p. 482. See also T. Treu, ‘La legge sullo sciopero: il ruolo del contratto’, 1990 *Dir. e prat. del lavoro*, p. 2741.

58 For this expression, see U. Romagnoli, ‘Le fonti regolative dello sciopero nei servizi essenziali’, 1991 *Lav. Dir.*, p. 558.

59 Again see Alvisi, *supra* note 9, p. 482.

II.3. Financial sector. Introductory remarks

The regulation of the financial and banking system can be viewed as a very relevant case of public control over the economy. This can be considered as a sector in which Italian policy makers have traditionally opted for a high degree of public regulation.⁶⁰

The major changes in the financial and banking sectors in the past three decades have come about under pressure from both European directives and increasing cross-border financial market integration. Such changes have been grafted on to a regulatory system characterized by a three-way division of the financial market into banking, securities and insurance sectors and a corresponding division of the regulatory authorities: the Bank of Italy; the Financial Markets and Stock Exchange Commission, usually known under the acronym of CONSOB (*Commissione Nazionale per le Società e la Borsa*);⁶¹ and the *Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo* (the insurance sector regulator), known under the acronym of ISVAP. The final outcome is a structure of controls which is quite difficult to classify into any one of the typical supervisory models.⁶²

II.3.1. Self-regulation in the financial sector

As mentioned above, the financial sector can be considered as a field in which Italian policy makers have traditionally opted for a high degree of public regulation. Nevertheless, since the so-called '*Decreto Eurosim*' (D.lgs. 23 luglio 1996, n. 415), a remarkable transformation can be seen in the law-making process, which is moving towards a form of co-regulation and delegated self-regulation.⁶³

Under Article 46 Eurosim Decree, the activities of the organization and management of regulated markets of financial products are carried out by joint stock companies⁶⁴ (*'l'attività di organizzazione e gestione di mercati regolamentati di strumenti finanziari ... è esercitata da società per azioni'*), which, according to the prevailing doctrine, can indeed be considered as self-regulatory associations.⁶⁵ The same has been repeated in Article 61, Paragraph 1 of the Finance Consolidation Act – T.U.F. - (Legislative Decree No. 58 of 24 February 1998, *Testo unico delle disposizioni in materia di intermediazione finanziaria*).

The assignment of roles and responsibilities among the private joint stock companies – then called '*società di gestione*' by Article 61, Paragraph 1 of the T.U.F. or '*società mercato*' by Italian doctrine⁶⁶ – and the Consob (*Commissione Nazionale per le Società e la Borsa*) has been redefined by assigning to the latter the task of determining the minimum paid in capital (*'capitale minimo delle società di gestione'*) and all the activities connected to the organisation and

60 On this issue, F. Belli & F. Mazzini, *Argomenti di diritto bancario*, 1998, p. 231, who underline the preference for public regulation in the financial and banking sectors. On the relations between self-regulation and public regulation in financial services, see G. Ferrarini, 'Novità e problemi del decreto Eurosim', 1996 *Banca, Borsa, Titoli di credito* I, p. 887. More in general, see F. Giorgianni & C.M. Tardivo, *Manuale di diritto bancario*, 2005.

61 See E. Cardì & P. Valentino, *L'istituzione CONSOB*, 1993; S. Cassese, 'La Commissione Nazionale per le Società e la Borsa – Consob e i poteri indipendenti', 1994 *Riv. soc.* I, p. 412; N. Marzona, 'Il regolamento sull'organizzazione e sul funzionamento della CONSOB', 1995 *Giorn. dir. amm.*, p. 522.

62 See Di Giorgio *et al.*, *Financial market regulation: the case of Italy and a proposal for the Euro area*, Working Paper Series Wharton School, University of Pennsylvania, June 2000. The Italian model of supervision is in fact characterised by a 'mixed approach'. On the other hand, the English system of supervision has recently moved to a single regulator model. The Financial Services Authority (the FSA) is now the body which supervises all the financial markets. See the Financial Services and Markets Act 2000, which unified the supervision of financial services providers in the hands of the Financial Service Authority.

63 Notably F. Vella, 'L'autoregolamentazione nella disciplina dei mercati mobiliari: il modello italiano', in G. Ferrarini & P. Marchetti, *La riforma dei mercati finanziari dal decreto Eurosim al Testo Unico della Finanza*, 1998, p. 481, who underlines the importance of the Eurosim Decree.

64 More specifically see Art. 47, Para. 1 of the Eurosim Decree (now Art. 62 of T.U.F.).

65 See again Vella 1998, *supra* note 63, p. 481.

66 *Ibid.*, p. 492.

management of financial markets carried out by the ‘*società di gestione*’ according to Article 61, Paragraph 1 T.U.F.

However, under Article 74 T.U.F., ‘the Commission has to supervise the financial markets in order to ensure the transparency, the fairness of the transactions and the protection of the investors’; all (wide) powers conferred to the Consob often involve technical decisions in which it enjoys a wide discretion (see, in fact, Article 62, Paragraph 2 and Article 63, Paragraph 1 T.U.F.): some Italian authors have doubts as to the future of self-regulation in the financial sector.⁶⁷

II.3.2. The Italian Banking Association and the Banking Ombudsman

In the banking and financial sector, some self-regulatory associations play a fundamental role. We only have to recall, among others,⁶⁸ the Italian Banking Association (ABI), a voluntary non-profit organization with the purpose of representing, defending and promoting the interests of its member banks and financial intermediaries. In pursuit of these purposes, the Association develops codes of conduct and works for their adoption by members,⁶⁹ also collaborating in relevant initiatives undertaken by other national and international bodies.

In the area of the initiatives aimed at creating better relationships with customers, special attention has to be given to the ‘Code of conduct for the banking and financial sector’ (*Codice di comportamento del settore bancario e finanziario*), which is based upon the initiatives undertaken by the A.B.I. The document constitutes a tangible call for a system of ethics and a code of behaviour for the sector, identifying self-regulatory guidelines which prescribe regulations that should be observed by the associated members. It contains the rules and obligations already laid down in the banking legislation (on transparency,⁷⁰ credit installments, and operations on the stockmarket). Nevertheless, as a whole it is permeated by a series of general principles not completely governed by legislative or administrative law such as a commitment to offer credit, a better understanding of services, better financial conditions, security, and access to services.⁷¹

Also relevant are the Interbank Agreement of 15th April 1993 and the linked ‘A.B.I. Regulations of the bank-complaint office and the Banking Ombudsman’.⁷² Section II of the A.B.I. Regulations provides for a Banking Ombudsman,⁷³ a collective body whose task is to settle any dispute concerning banking or financial transactions by credit institutions up to the value of 10,000 Euros. Specifically, only consumers having the characteristics reported in Decree No. 385

67 See again Ferrarini 1996, *supra* note 60, p. 887, who emphasizes the difficulties in differentiating public regulation and self-regulation in the financial and banking sector.

68 See, for example, ASSORETI, the Italian association of Italian securities brokerage companies (SIM) and the Italian banks that distribute financial products and investment services through financial advisors. The main objectives of ASSORETI are to represent the interests of its members, to promote research activities and initiatives, and to provide data on the trends shaping the distribution of financial products through financial advisors. See also the ASSORETI Code of Conduct adopted in 1993 and representing a form of self-regulation undertaken to implement legislation (Act No. 1/1991).

69 See, for example, the ‘Codice di comportamento tra banche per affrontare i processi di ristrutturazione atti a superare le crisi di impresa’, 2000 *Banca, Borsa e Titoli di Credito* III, p. 423.

70 See, for example, L. 17 febbraio 1992, n. 154, on the transparency of banking and financial operations.

71 This can thus be considered as a typical case of co-regulation, undertaken to implement or supplement legislation.

72 Specifically, see the Agreement in the ‘*Circolare Serie Tecnica*’ no. 3 of February 1st 1993. Notably Pratis, ‘L’accordo interbancario del 1993 per l’istituzione dell’Ufficio reclami degli enti creditizi e dell’Ombudsman bancario nell’ambito della tutela del consumatore. Raffronto con analoghi sistemi di altri paesi della Cee’, 1994 *Banca, Borsa e Titoli di Credito* I, p. 216.

73 On the Italian Banking Ombudsman, see G. Carriero, ‘Crisi del processo civile e giustizia stragiudiziale: l’ombudsman bancario’, 2002 *Foro Italiano* V, p. 249; E. Gabrielli, ‘L’incompetenza dell’Ombudsman bancario (il ‘non liquet’ dell’organismo di garanzia)’, 1999 *Giustizia Civile* I, p. 1523; E. Gianfelici, ‘L’ombudsman bancario’, 1993 *Impresa*, p. 1400; F. Novelli, ‘L’ufficio reclami della clientela e l’ombudsman bancario’, 1993 *Impresa*, p. 1557; S. Maccarone, ‘Le esperienze europee di Ombudsman bancario’, in F. Riolo (ed.), *La banca e l’arbitrato*, 1994, p. 33.

of September 1st 1993, Article 121 (now Article 121 of TUB – *Testo Unico Bancario*), Paragraph 1, can have recourse to the Ombudsman for disputes linked to services offered or transactions made by their bank or intermediaries (Article 7). The controversy must not yet have been referred to a Judicial Authority or a committee of arbitrators (Article 7, a).

It is also important to point out that, while the decision of the Ombudsman is binding on both the banks and intermediaries,⁷⁴ ‘the customer can nevertheless apply to the State courts, as well as to the Committee of Arbitrators, at any time’ (Article 14).⁷⁵

II.4. Sport sector

Sport is one of the most significant fields to observe the functioning of self-regulatory mechanisms in Italy. It has been one of the few sectors where there has been academic discussion concerning the role of self-regulation.⁷⁶

The exercise of sporting activities – now expressly recognized by Article 117, III Paragraph 3, Constitution, as modified by Law No. 3/2001⁷⁷ – undoubtedly involves constitutional rights and freedoms such as freedom of association (Article 18 Constitution) and the right to health (Article 32 Constitution).⁷⁸ This is why the Italian legislator has delegated the functions of the promotion, regulation and organization of sporting activities to a public entity, such as the National Olympic Committee, known under the acronym C.O.N.I. – *Comitato Olimpico Nazionale Italiano*. It was set up by the Act of 16 February 1942, n. 426⁷⁹ (*legge di costituzione e funzionamento del Comitato Olimpico nazionale italiano*) as a public law entity (*ente associativo pubblico*), with independent legal status⁸⁰ but under the control and supervision of the government, with the express duty to act in the general interest.⁸¹

For the purpose of this study, C.O.N.I. can thus be considered as a public self-regulatory body⁸² with delegated public powers.⁸³ It carries out its activities under the control and supervision of the government. The government plays a pivotal role in the appointment procedure of the certified public account committee (*collegio dei revisori dei conti*).⁸⁴ Because it enjoys indirect public funding, C.O.N.I.’s activities are also under the control (*controllo contabile*) of the Court of Auditors (*Corte dei conti*).⁸⁵

74 If the bank or intermediaries do not abide by the decision, the Ombudsman will impose a period of time within which the bank must settle the problem. If the Ombudsman’s instructions are not carried out within the prescribed time-limits, the non-fulfilment will be published in the press and the bank or the intermediary will have to bear the costs.

75 See Art. 14, Para. 2. The Italian Banking Ombudsman, as introduced by the 1993 Agreement, is thus not a judiciary body. It can only be considered as a sort of guardian for the transparency of banking operations. See E. Inchingolo, ‘L’Ombudsman bancario’, 1994 *Dir. banc.* II, p. 36.

76 Notably C. Alvisi, *Autonomia privata e autodisciplina sportiva. Il C.O.N.I. e la regolamentazione dello sport*, 2000. More in general, see V. Frattarolo, *L’ordinamento sportivo nella giurisprudenza*, 2005; L. Di Nella, *Il fenomeno sportivo nell’ordinamento giuridico*, 1999, p. 62.

77 Art. 117, Para. 3, Cost.: ‘The following matters are subject to concurrent legislation of both the state and regions: (...) sports regulations’.

78 See recently E. Picozza, ‘I rapporti generali tra ordinamenti’, in C. Franchini (ed.), *Gli effetti delle decisioni dei giudici sportivi*, 2004, p. 2, who also refers to Art. 9 Cost. (research and culture) and Art. 33 Cost. (Freedom of Arts, Science and Teaching).

79 Now see the Legislative Decree of 23 July 1999, n. 242 and the Legislative Decree of 8 January 2004, n. 15, *Modifiche ed integrazioni al decreto legislativo 23 luglio 1999, n. 242, recante ‘Riordino del Comitato olimpico nazionale italiano - CONI’*, ai sensi dell’articolo 1 della legge 6 luglio 2002, n. 137.

80 In general, on C.O.N.I., see L. Ghia, ‘Il C.O.N.I. e la legge 31 gennaio 1992, n. 138’, 1993 *Riv. dir. sport.*, p. 172; G. Morbidelli, ‘Gli enti dell’ordinamento sportivo’, 1993 *Dir. amm.*, p. 5; G. Alpa, *L’ordinamento sportivo*, in *Nuova giur. Civ. comm.*, 1986, p. 50; L. Rigo, ‘Storia della normativa del C.O.N.I. dalle sue origini alla legge istitutiva del 1942’, 1986 *Riv. dir. sport.*, p. 1. Notably, F. P. Luiso, *La giustizia sportiva*, 1975, p. 201.

81 Art. 1, Legislative Decree No.242/1999, by virtue of which the Committee is a public body under the control of the Ministry of cultural heritage. See also Art. 157, Para. 1, Legislative Decree No. 112/1998: ‘*resta riservata allo Stato la vigilanza sul C.O.N.I. di cui alla legge 16 febbraio 1942, n. 426 e successive modificazioni*’.

82 This is thus a typical case of self-regulation performed by a public entity.

83 This can be considered as a hypothesis of delegated self-regulation. Again Alvisi 2000, *supra* note 76, 43.

84 The Ministry of cultural heritage can also revoke the President of C.O.N.I. under the circumstances specified in Art. 13, co. 1, Legislative Decree No. 242/1999.

85 See Art. 103, Para. 2 Cost.: ‘The Court of Auditors has jurisdiction in matters of public accounts and in other matters laid down by law’.

The public powers or tasks entrusted to C.O.N.I. include the organisation and strengthening of national sports, as well as the orientation towards athletic improvement. Only the C.O.N.I. (as well as the other National Olympic Committees – NOCs) can select teams and competitors for participation in the Olympic Games. On the other hand, C.O.N.I. may delegate many of these tasks to other private subjects, known as the *Federazioni Sportive Nazionali*.

The National Sports Federations are expressly recognized *ex lege* as associations of a private nature⁸⁶ and, as such, they are generally governed by private law. However, they quite often carry out activities in the public interest, operating under the strict supervision of C.O.N.I.⁸⁷ More in particular, according to the prevailing Italian doctrine,⁸⁸ general interest activities can be considered to be: physical inspections of athletes; the control and supervision of professional sport companies (*società sportive professionistiche*);⁸⁹ all powers relating to the insurance and social security protection of athletes; the prevention and repression of doping; the use and management of public sport installations; all activities related to the Olympic training of athletes; and the use of public funds.⁹⁰

Some authors argue that, since the legislator mandates the National Olympic Committee to undertake activities in the general interest and since C.O.N.I. may delegate its regulatory powers to other private associations, this can be considered as a relevant case of delegated self-regulation (a so-called ‘*legificazione degli atti dell’autonomia privato-collettiva*’).⁹¹ According to the Italian legal literature, acts adopted by the national federations in the public interest are to be considered as sources of law (‘*fonti di ius singulare*’) and, as such, are subject to a judicial review by the Administrative Courts.⁹²

Again, by virtue of Article 16, Legislative Decree No. 242/1999, National sports Federations have to observe the ‘principle of internal democracy’ (*principio di democrazia interna*), the principle of equal treatment, as well as the principle of participation. It can thus be pointed out that the private nature of a self-regulatory body does not necessarily imply a total respect of private autonomy, so that the self-regulatory body may freely make, interpret and apply its own rules and determine its membership. In the case of national sports federations, in fact there are public law restraints on their freedom, expressly laid down by law, in respect of the principle of democracy, equality of treatment, transparency and participation.

86 See Art. 15, Para. 2, Legislative Decree No. 242/1999, as modified by Legislative Decree No. 15/2004, under which the national sport federations are private associations and their activities are governed by the civil code. It must be stressed that there has been an important academic discussion on the nature (private or public) of the national federations. On this matter, see T.A.R. Calabria Catanzaro Sez. II, 14 novembre 2006, n. 1321, in www.giustizia-amministrativa.it; T.A.R. Calabria Catanzaro Sez. II, 18 settembre 2006, n. 984, in www.giustizia-amministrativa.it; Cass. civ. Sez. Unite, 20 giugno 2006, n. 14103, 2006 *Mass. Giur. It.*; Cons. Stato Sez. VI, 9 febbraio 2006, n. 527, in www.giustizia-amministrativa.it. For the doctrine on this point, see G. Vidiri, ‘Natura giuridica e potere regolamentare delle federazioni sportive nazionali’, 1994 *Foro Italiano* I, p. 137; A. De Silvestri, ‘Le qualificazioni giuridiche dello sport e nello sport’, 1992 *Riv. dir. sport.*, p. 296. Some authors have argued that the national sports federations have a mixed nature, private and public. See R. Caprioli, ‘Le federazioni sportive nazionali tra diritto pubblico e privato’, 1989 *Dir. e giur.*, pp. 1 *et seq.*

87 See Art. 7, e), Legislative Decree No. 242/1999.

88 See G. Morbidelli, ‘Gli enti dell’ordinamento sportivo’, 1993 *Dir. amm.*, p. 5; Alvisi 2000, *supra* note 76, p. 58.

89 That is to say, for example, the powers of affiliation and the recognition of professional sport companies. See Art. 5, Para. 2, e), which delegates to the C.O.N.I. National Council the power of establishing the criteria and the modalities for exercising control over national sport federations, as well as control over professional sport companies carried out by the national sport federations.

90 See the new C.O.N.I. statute, approved by Ministerial Decree 23 June 2004.

91 See again Alvisi 2000, *supra* note 76, p. 58.

92 *Ibid.*

II.5. Professional orders

Like the National Olympic Committee, professional orders can be considered as entities constituted under public law, better known as ‘*enti pubblici associativi*’,⁹³ with the right to regulate their members through codes of conduct,⁹⁴ whose violations they can sanction,⁹⁵ and with functions of strict control over those regulated.⁹⁶

The Italian Constitution does not directly deal with professional orders. Nevertheless, their constitutional basis can be indirectly found in some constitutional provisions such as, for instance, Article 33, Paragraph V (‘exams are defined for admission to various types and grades of schools, as final course exams, and for professional qualification’), as well as, more in general, in the general principle laid down by Article 1 of the Constitution (‘Italy is a democratic republic based on labour’) and in the several provisions recognizing and protecting rights potentially involved in professional orders’ activities.⁹⁷

As for ordinary legislation, under Article 2229 of the Italian Civil Code, ‘the law specifies the intellectual professions for whose exercise registration in special rolls or lists is required. Verification of the requisites for registration in rolls or lists, the keeping of the same and disciplinary power over registered members are vested in professional associations, under the supervision of the State, unless the law provides otherwise. Judicial review of the denial of registration in or cancellation from those rolls or lists and against disciplinary measures which entail loss or suspension of the right to exercise a profession is admitted in the manner and within the terms laid down by special laws’.⁹⁸ This means that, within the Italian legal order, there can be professions or professional activities which do not have a specific legal discipline (the so-called ‘*professioni libere*’, ‘free intellectual professions’) and for which it is not necessary to register in any professional rolls.⁹⁹

On the other hand, the so-called ‘*professioni protette*’ are regulated firstly by national statutes which provide for the compulsory registration in a professional roll and for the institution of a specific professional order;¹⁰⁰ secondly, by regulations and disciplinary rules which implement and integrate ordinary legislation (there is thus a sort of ‘mixed discipline’).¹⁰¹

93 Notably, G. Rossi, *Enti pubblici associativi*, 1979. On the matter, see also C. Gessa, ‘Ordini e collegi professionali’, 1990 *Enc. Giur.* XXII, p. 1; A. Catelani, *Gli ordini e i collegi professionali nel diritto pubblico*, 1976. On this point, see however, C. Pinotti, ‘Il futuro delle professioni liberali tra tutela nazionale e concorrenza’, 2004 *I contratti dello Stato e degli enti pubblici* 3, 365, who indeed underlines a deep contradiction in the nature of a professional order, which can be, at one and the same time, a professional body, a public body, or a private association.

94 Binding on the person who is registered in the professional roll.

95 On the disciplinary proceedings carried out by the professional orders (and, more in particular, by the *Consiglio dell’Ordine degli Avvocati*, the ‘Bar Council’), see Cass. civ. Sez. III, 31 maggio 2006, n. 13004, 2006 *Impresa* 11, p. 1686; Cass. civ. Sez. Unite, 12 marzo 2004, n. 5164, *Mass. Giur. It.*; Cass. civ., Sez. Un., 23 gennaio 2002, n.762, 2002 *Giur. It.*, pp. 1713. See also Cass. civ., Sez. III, 30 luglio 2001, n.10396, 2001 *Mass. Giur. It.*

96 See F. Bassi, *La norma interna, Lineamenti di una teorica*, 1963, p. 2.

97 C. Maviglia, *Professioni e preparazione alle professioni*, 1992.

98 See *The Italian Civil Code and complementary legislation*, translated by M. Beltramo *et al.*, 1991.

99 Cons. Stato, Sez. IV, 14 gennaio 1999, n. 33, 1999 *Giorn. dir. amm.*, p. 351, underlined the existence, in the Italian legal order, of ‘free’ intellectual professions.

100 This can thus be viewed as a direct application of the general principle laid down by Art. 97 Cost.: ‘The organization of public offices is determined by law’. It must be clarified that the interference of the legislator should be limited in respect of the autonomy of professional orders (some authors refer to a sort of ‘*autogoverno*’: see A. Catelani, *Gli ordini e i collegi professionali nel diritto pubblico*, 1976, p. 128). Any interference by the State in internal affairs (either by limiting the labour rights of the professional order’s members, as laid down by Art. 1 Cost., or being prejudicial to the regular functioning of the order) must be considered as intolerable. On this point, see S. Cassese, *Professioni e ordini professionali in Europa. Confronto tra Italia, Francia e Inghilterra*, 1999, p. 34.

101 See Cassese 1999, *supra* note 100, p. 34.

II.5.1. Professional ethical rules

As mentioned above, in the exercise of their self-regulatory functions,¹⁰² professional orders may regulate their members through ethical codes, which generally have a voluntary basis.

The nature of ethical rules has been debated in Italy for a long time. According to the prevailing Italian doctrine¹⁰³ and the recent case law,¹⁰⁴ professional ethical rules find their basis in the professional order's autonomy ('*autogoverno*'). They are thus to be considered as non-legal rules ('*precetti extra-giuridici*', '*norme morali*' '*norme di convenienza sociale*'), as '*norme interne*' ('*internal norms*') and, as such, they cannot be viewed as being part of the formal hierarchy of sources of law.¹⁰⁵

Following Santi Romano's theory,¹⁰⁶ some authors argue that professional orders, as 'derived orders' (*ordinamenti derivati*), are not able to adopt ethical rules in violation of the general principles of the legal order (*ordinamento derivante*). If there is a breach of these latter precepts, a judicial review might thus be admitted.¹⁰⁷

This also emerges from two quite important and recent judgments (Cassazione Civile, 4 giugno 1999, n. 5452¹⁰⁸ and Consiglio di Stato, Sez. IV, 17 febbraio 1997, n. 122¹⁰⁹). In both cases, the Courts held that a judicial review (literally: '*controllo giurisdizionale*') is only possible when the ethical rules are in violation of constitutional principles, as well as the general principles of the legal order, and involve issues which are not related to professional duties ('*Le regole deontologiche poste dagli ordini professionali sono soggette al controllo giurisdizionale solo in quanto violino precetti costituzionali o inderogabili o principi generali dell'ordinamento e in quanto incidano su oggetti estranei alla deontologia professionale*').

III. Final remarks

This study is aimed at giving an overview of the evolution of self-regulatory mechanisms in Italy.

It is clear that self-regulation by itself is not a topic in Italian legal literature. It is even difficult to provide an all-encompassing definition of the phenomenon, self-regulation being a sector-oriented concept. From the research, it has been made clear that Italian legal scholarship rarely takes into account self-regulatory mechanisms as general principles. The debates usually focus on specific sectors in which the self-regulatory technique is applied: advertising, sport and professional orders can be viewed as fields where enthusiasm for self-regulatory solutions has always been apparent.

The sectoral analysis has showed the existence of different kinds of purely private self-regulation, *ex post* recognized by the State, and established in order to compensate the lack of

102 See (with regard to the ethical rules relating to notaries) Cass. civ., Sez. III, 4 dicembre 2002, n.17202, 2002 *Mass. Giur. It.*; (with regard to ethical rules adopted by the Bar Council – *Consiglio dell'Ordine*), Cass. civ., Sez. un., 6 giugno 2002, n. 8225, 2002 *Mass. Giur. It.*, which expressly referred to general self-regulatory powers given to professional orders.

103 Cassese 1999, *supra* note 100, p. 34. See also R. Lombardi, 'Principi di deontologia professionale ed efficacia normativa nell'ordinamento giuridico statale', 1998 *Dir. proc. amm.*, p. 193, who commented Cons. Stato, Sez. IV, 17 febbraio 1997, n. 122. Less recently, A.M. Sandulli, 'Regole di deontologia professionale e sindacato della Corte di cassazione', 1961 *Giustizia Civile* I, p. 619.

104 Cass. Civ., Sez. Un., 10 febbraio 1998, n. 1342, 1999 *Rass. Forense*, p. 475 (s.m.); Cass. Civ., Sez. Un., 12 dicembre 1995, n. 12723, 1996 *Rass. Forense*, p. 362; Cass. Civ., Sez. Un., 23 luglio 1993, n. 8239, 1993 *Giust. Civ. Mass.*, p. 1223; Cass. Civ., Sez. Un., 17 gennaio 1991, n. 401, 1992 *Foro Italiano* I, p. 2243.

105 The situation is quite different in the case of a resolution ('*delibera*') adopted by a professional order in order to bring the ethical rules into effect. In this case, the resolution is to be viewed as an administrative act (with all the consequences stated in part. II of this study). See on this point, Cons. Stato, Sez. IV, 17 febbraio 1997, n. 122, 1998 *Dir. Proc. Amm.* p. 193.

106 S. Romano, *L'ordinamento giuridico*, 1917.

107 Notably, Lombardi 1998, *supra* note 103, p. 193.

108 Cass. civ., Sez. III, 4 giugno 1999, n.5452, 2000 *Giust. Civ.* I, p. 416.

109 Cons. Stato, Sez. IV, 17 febbraio 1997, n. 122, 1998 *Dir. proc. amm.*, p. 193, noted by R. Lombardi, *supra* note 103.

public law rules (this has been the case concerning the advertising sector, where self-regulation has a long and powerful tradition), as well as fields in which there has been a radical transformation in the law-making process towards a sort of delegated self-regulation (this is the case, for instance, in labour law and the sport sector).¹¹⁰

More in general, in order to better understand the role, the position, as well as the aims of self-regulatory mechanisms within the Italian legal order, a brief overview of the Italian system of sources of law has been absolutely necessary.

The research has shown that the model of the sources of law rooted in the Italian constitution is typically positivistic and centred on the pivotal role of Parliament, the only body empowered to legislate, either directly (Article 70, Constitution) or by delegating its normative powers to the Government (Article 77, Constitution), within expressly specified limits.

What room, if any, is there for self-regulatory rules? The study shows that, in addition to delegated legislation (Article 77, Constitution), statutes increasingly provide for the adoption of ‘codes of practice’ (through a form of ‘delegated self-regulation’), which have legal effect within the limits expressly specified by Parliament. This was the case, for instance, concerning Law No. 146 of 12 June 1990: where a strike takes place in public essential services, minimum services shall be guaranteed, as agreed upon by the administration (or the enterprise that administers the essential service) and the union’s representation at the enterprise level (or the workers’ representatives where appropriate), through self-regulatory codes (*codici di autoregolamentazione*). This was the case, again, concerning Law No. 220 of 27 June 1991, which delegated the *Consiglio Nazionale del notariato* – National Council of Public Notaries – to adopt the ethical rules for notaries. Again, on 29 July 1998, the *Garante per la protezione dei dati personali* (Privacy Authority) approved a code of conduct, in the exercise of the power expressly delegated by Article 25, Law of 31 December 1996, No. 675.

If one of the most interesting aims of the research was to analyse to what extent the self-regulatory phenomenon is compatible with Parliament’s undisputed sovereignty and with the linked principle of the rule of law, it should be clear that rules made by private actors (*i.e.* self-regulatory rules), which pretend to have external effects (binding *erga omnes*), can be considered as law and, as such, as sources of law, as long as they can be ‘incorporated’ into and recognized in some of the formal sources of Italian law. This seems the only possible and constitutionally compatible interpretation of a phenomenon (self-regulation) which, instead, could potentially be able to place the formal hierarchy of the sources of law in jeopardy.

More in general, it should be clear that Parliament can no longer be considered as the only body empowered to make rules. The legal order is embarking on a radical transformation towards a sort of ‘reticular system’, able to coexist with plurastic organisations which are increasingly making rules in competition with the State.¹¹¹

On the other hand, the results of the study make clear that, even when Parliament confers its normative powers to any other bodies (*i.e.* either independent administrative authorities or professional orders, or, more in general, any self-regulatory associations), it is unlikely to give up determining the limits within which those normative powers have to be exercised. Some

110 On the other hand, the research has showed that the financial sector can be viewed as the field in which Italian policy makers have opted for the highest degree of public regulation. However, certain forms of self-regulation are increasing in this sector too. To this aim, it is sufficient to remember the fundamental role played by the Italian banking association, as well as the Banking Ombudsman.

111 This is what, in this study, has been called ‘Santi Romano’s theory’ (S. Romano, *L’ordinamento giuridico*, 1917). On this theory see again Cafaggi 2001, *supra* note 7, p. 568. The author underlined that the theory of ‘*pluralità degli ordinamenti*’ can be admitted whenever it is compatible with the Italian constitutional order and whenever the sources that do not find their legitimacy in statutes do not pretend to have external effects (*‘La pluralità degli ordinamenti può essere ammessa quando sia compatibile con l’ordinamento costituzionale e quando le fonti che non trovano legittimazione nella legge non abbiano la pretesa di estendere i propri effetti nei confronti di terzi’*).

authors actually consider this sort of ‘delegated legislation’ as a means for the State to reassert its sovereignty.¹¹²

Anyway, this new pluralistic ‘architecture’ will undoubtedly allow the legislator to retain some exclusive duties: first and foremost, the power to prescribe the institutional conditions underlying the basis of ‘private self-regulatory governance’,¹¹³ as well as the aims of their future normative action; secondly, to intervene in order to correct, if necessary, the new consensual rules.

In the end, the general overview seems to show a promising future for self-regulation, a phenomenon which, in the next few years, will probably attract a great deal of attention. The current constitutional and legislative Italian framework seems to ensure a solid basis for the development of the self-regulatory technique. At the moment, all one has to do is to wait for a more resolute intervention by both the Italian Courts and legal scholarship.

112 G. De Minico, *Regole – comando e consenso*, 2004, p. 127.

113 The expression in inverted commas has been used by G. De Minico, *supra* note 112, p. 127, who expressly refers to ‘*governi privati di autoregolazione*’.