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Verbruggen, Paul

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Past Performance and Future Promises

Paul Verbruggen[*]

Abstract

The promotion of private regulation is frequently part of better regulation programmes. Also the Better Regulation programme of the European Union (EU) initiated in 2002 advocated forms of private regulation as important means to improve EU law-making activities. However, for various reasons the ambition to encourage private regulation as a genuine governance response to policy issues has remained a paper reality. This contribution asks whether and to what extent the 2015 EU Agenda on Better Regulation provides renewed guidance on how private regulation might be integrated in EU law-making processes. To that end, it builds on previous (empirical) research conducted on European private regulation and reviews the principal policy documents constituting the new EU agenda on better regulation. It is argued that while the new agenda addresses a number of the shortcomings of the old programme concerning the conceptualization and practice of private regulation in the EU, it still falls short of providing principled guidance on how private regulation can be combined and integrated in EU law-making.

Keywords: Better Regulation, private regulation, self-regulation, co-regulation, impact assessment.

A Introduction

The promotion of private, non-state forms of business regulation is often part of government-driven better regulation programmes. In 2001, also the European Commission advocated in its White Paper on European Governance that the European legislative institutions "must renew the Community method by following a less top-down approach and complementing its policy tools more effectively with non-legislative instruments".[1] It thus suggested that the legislature should combine formal rules with private regulatory capacity in its legislative policies by using 'self-regulation' and, under certain circumstances, frameworks of 'co-regulation'. In 2015, the Commission again encourages the use of 'well-designed non-

* Tilburg University, The Netherlands, Assistant Professor of Global and Comparative Private Law. I thank the participants to the seminar, the editors of this special issue, and Thomas van Golen for their helpful comments and suggestions. All errors are mine.

1 Commission Communication, 'European Governance – A White Paper', 25 July 2001, COM(2001) 428 final, pp. 4 and 20-21.

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regulatory means' as alternative policy solutions in its new European Union (EU) agenda for Better Regulation.[2] In the Better Regulation Guidelines linked to this new agenda, it is held that such solutions include "non-regulatory alternatives; self- or co-regulation; market-based solutions, regulatory alternatives; international standards, and their mix".[3] These solutions, the guidelines stress, should always be considered when designing policy options for EU regulatory intervention.

This contribution seeks to ascertain how the new EU agenda for Better Regulation conceptualizes private regulation and positions this form of regulation along other EU policy instruments. More specifically, it assesses to what extent the new agenda is responsive to the poor results that were achieved in the promotion of European 'co- and self-regulation' under the previous Better Regulation programme (2002-2015). Empirical evidence in relation to this programme supports the view that the ambition to encourage private regulation as genuine EU governance response to policy issues has remained a paper reality in practice. Several reasons have been identified in academic and policy literature that explain these poor achievements. To what extent is the new EU agenda for Better Regulation responsive to these causes? Does it provide renewed guidance on the integration of private regulation in EU law-making?

The article answers these questions by first analysing the way in which the old EU Better Regulation programme presented and conceptualized private regulation in EU law-making (Section B). Subsequently, it assesses to what extent the ambitious goal to use private regulation as full-fledged alternative to EU legislative action materialized in practice (Section C). As will become clear, private regulation has not been frequently adopted as the preferred policy option. Section C discusses a number of explanatory factors for this practice. Reflecting the central theme of this special issue about the politicization of the Better Regulation programme, this section also provides some evidence suggesting that EU inter-institutional politics and a lack of trust in industry self-regulatory capacity have contributed to the sidelining of private regulation in the new Better Regulation programme. Section D then assesses the way in which private regulation is conceived and presented in the new agenda. It is argued that although the new agenda addresses some of the shortcomings of the old programme, it still falls short of providing principled guidance on how private regulation should be integrated in EU law-making policies. Finally, Section E concludes.

B Private Regulation in the Old Better Regulation Programme

How did the EU Better Regulation programme launched in the early 2000s present and conceptualize private regulation? The term 'private regulation' is not used as such in the programme, but it is closely linked to the alternative regula-

2 Commission Communication, 'Better regulation for better results – An EU agenda', 19 May 2015, COM(2015) 215 final, p. 6.

3 Commission Staff Working Document, 'Better Regulation Guidelines', 19 May 2015, SWD, 2015, 111 final, p. 23 (references omitted/PV).

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tory instruments promoted by it. Private regulation can be defined as comprising sustained activities undertaken by private, non-state actors to influence the conduct of themselves or other business actors following a set of pre-defined norms and objectives.[4] These activities involve standard setting, monitoring and enforcement, and may be administered not only by firms, company consortia or industry associations but also by consumer groups, non-governmental organizations (NGOs) and other public interest groups.[5] Private regulation is therefore a wider concept than 'self-regulation', which essentially concerns normative rules adopted to guide the conduct of one*self*.[6] The term 'private' in private regulation thus principally refers to a sense of ownership; the regulatory regime is private when it is primarily created and administered by non-state, private actors. This does not exclude the possibility that public actors can rely on, endorse or can be otherwise involved in the operation of private regulatory regimes. Furthermore, the object of private regulation does not necessarily have to be private entities. Also, public actors, such as government and public agencies, can be subject to private regulation.[7]

Private regulation featured prominently in the debate on how to improve and diversify the regulatory governance of the EU, which was initially sparked by the Conclusions of the European Council of Edinburgh in December 1992 on the principles of subsidiarity and proportionality.[8] Centrepiece of this debate is the 2001 White Paper on European Governance, in which the European Commission advocated that the European legislature "must renew the Community method by following a less top-down approach and complementing its policy tools more effectively with non-legislative instruments".[9] Scott and Trubek have famously argued that the distinctive feature of these new modes of governance is that they do not fully conform to the so-called 'Classical Community Method' of law-making, which they explain as being the adoption of a legislative instrument by the Council of Ministers or the European Parliament following the exercise by the Commission of its exclusive right of initiative, resulting in a uniform binding rule of EU law which is subject to the jurisdiction of the Court of Justice of the EU.[10] The 2001 White Paper suggests that the EU should combine formal rules with private regulatory capacities in its legislative policies by using 'self-regulation' and,

4 *Cf*. J. Black, 'Critical Reflection on Regulation', *Australian Journal of Legal Philosophy*, Vol. 27, No. 1, 2002, p. 26.

5 F. Cafaggi, 'New Foundations in Transnational Private Regulation', *Journal of Legal Studies*, Vol. 38, No. 1, 2011, pp. 20-49.

6 J. Black, 'Constitutionalising Self-Regulation', *Modern Law Review*, Vol. 59, No. 1, 1996, pp. 24-55, at 26.

7 *See* on this topic: C. Scott, 'Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance', *Journal of Law and Society*, Vol. 29, No. 1, 2002, pp. 56-76.

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

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

10 J. Scott & D.M. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', *European Law Journal*, Vol. 8, No. 1, 2002, p. 1.

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under certain circumstances, frameworks of 'co-regulation'.[11] This intention represents a shift away from the image of a hierarchical, centralized and legalistic method of EU law-making by insisting on the involvement of private, non-state actors (NGOs, trade bodies, consumer representatives, etc.) and different levels of formality and enforceability in policy-making and regulation.[12]

Building on the responses on the Commission's White Paper and the findings of several expert reports,[13] the Commission launched its 'Better Regulation' programme in 2002 through a Communication entitled 'Action Plan "Simplifying and improving the regulatory environment"'.[14] The Action Plan sets out to enhance the regulatory policies of the EU based on two interlinked pillars of reform: deregulation and diversification of modes of regulation.[15] While the first pillar focused on a reduction of the existing body of EU legislation and improvement in legislative quality, the second promoted the use of other regulatory techniques than just secondary legislation (*i.e.*, Regulations, Directives, Decisions and Recommendations). As such, the plan sets out the ambition to employ ex ante impact assessments (IAs), programmes for the simplification of regulatory environments, ex post reviews of legislation and alternative regulatory instruments to strengthen the regulatory policy of the EU.[16]

11 Commission Communication of 25 July 2001, COM (2001) 428 final, pp. 20-21.

12 *See also*: B. Eberlein & D. Kerwer, 'New Governance in the European Union: A Theoretical Perspective', *Journal of Common Market Studies*, Vol. 42, No. 1, 2004, pp. 121-142; C. Knill & A. Lenschow, 'Modes of Regulation in the Governance of the European Union: Towards a Comprehensive Evaluation', *in* J. Jacint & D. Levi-Faur (Eds.), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*, Cheltenham, Edward Elgar, 2004, pp. 218-244; and A. Héritier, 'New Modes of Governance in Europe. Policy Making without Legislating?', *in* A. Héritier (Ed.), *Common Goods. Reinventing European and International Governance*, Oxford, Rowan & Littlefield, 2002.

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

14 Commission Communication, 'Action Plan "Simplifying and Improving the Regulatory Environment"', 5 June 2002, COM(2002) 278 final.

15 *See* for a description of these pillars L. Senden, 'Soft Law, Self-Regulation, Co-Regulation in European Law: Where Do They Meet?', *Electronic journal of Comparative Law*, Vol. 9, No. 1, 2005, pp. 1-27. *See* for critical contemporary discussions of the programme: J.B. Wiener, 'Better Regulation in Europe', *Current Legal Problems*, Vol. 59, No. 1, 2006, pp. 447-518; C. Radaelli, 'Whither Better Regulation for the Lisbon Agenda?', *Journal of European Public Policy*, Vol. 14, No. 2, 2007, pp. 190-207 and C. Radaelli & A. Meuwese, 'Better Regulation in Europe: Between Public Management and Regulatory Reform', *Public Administration*, Vol. 87, No. 3, 2009, pp. 639-654.

16 The original 2002 Action Plan has been revised, updated and tweaked a number of times over the years. The main revisions concern the following documents: Commission Communication, 'Better Regulation for Growth and Jobs in the European Union', 16 March 2005, COM(2005) 97 final; Commission Communication, 'Implementing the Community Lisbon Programme: A Strategy for the Simplification of the Regulatory Environment', 25 October 2005, COM(2005) 535 final; Commission Communication, 'Action Programme for Reducing Administrative Burdens in the European Union', 24 January 2007, COM(2007) 23 final; Commission Communication, 'Smart Regulation in the European Union', 8 October 2010, COM(2010)543 final; and Commission Communication, 'EU Regulatory Fitness', 12 December 2012, COM(2012) 746 final. *See also* <http://ec.europa.eu/info/law/law-making-process/better-regulation-why-and-how_en>.

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To complement the Commission's Better Regulation programme, clarify the intentions of the agenda and ensure uniformity among the European legislative institutions, the European Parliament, Council and Commission adopted an Inter-institutional Agreement (IIA) on better law-making in 2003.[17] One section concerns the use of 'alternative methods of regulation', which are taken to be 'co-regulation' and 'self-regulation'. Co-regulation is defined as a:

> (…) mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations).[18]

Defined in these terms, the strategy seems to presuppose the prior involvement of a European legislative authority, which identifies the objectives that should be implemented and secured by relevant private actors in the field concerned. This is a rather particular conception of co-regulation, namely one of co-regulation as an 'implementation mechanism'.[19] Arguably, this is still a rather hierarchical approach. It was suggested that this concept of co-regulation was modelled after the so-called 'New Approach' to harmonization that the Commission launched in the 1980s as a strategy to boost the development of the internal market.[20] In brief, the New Approach promotes the use of standards in order to remove 'technical barriers to trade', and as a result, the EU legislator only stipulated the 'essential requirements' in its legislation, while leaving the implementation of these requirements to private standard-setting bodies.[21] This notion does not reflect on how co-regulation has been understood elsewhere, however.[22]

> The second alternative method to EU legislative action, 'self-regulation', is defined as: (…) the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements).[23]

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

18 *Ibid*., para. 18.

19 P. Verbruggen, 'Does Co-regulation Strengthen EU Legitimacy?', *European Law Journal*, Vol. 15, No. 4, 2009, p. 429.

20 'Technical Harmonisation and Standardisation: A New Approach', COM(1985)19 (not published in the Official Journal). The New Approach was remodelled in 2012 by Regulation 1025/2012 of the European Parliament and of the Council on European Standardisation, [2012] OJ L 316/12. *See* on this development: H. Schepel, 'The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law', *Maastricht Journal of European and Comparative Law*, Vol. 20, No. 4, 2013, pp. 521-533.

21 *See* for earlier discussions: G. Majone, 'Regulation and its Modes', *in* G. Majone (Ed.), *Regulating Europe*, London, Routledge, 1996, pp. 9-28 and H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, Oxford, Hart Publishing, 2005, Ch. 4.

22 *See* in detail Verbruggen, 2009, p. 429.

23 Inter-institutional Agreement on better law-making, para. 22.

It is further clarified that these private standard-setting activities do not generally imply that the EU institutions have taken a particular position, in particular whether primary EU law does not cover the area at issue or whether the EU has not yet taken up legislative action in such area. Self-regulation is thus perceived as a voluntary initiative that operates at the European level, is adopted by private actors themselves and for themselves, and is not preceded by a particular stance of the EU institutions.

While this gives rise to the question of whether there is any form of EU governance at stake at all,[24] self-regulation understood in these terms does not rule out a role for the EU and its institutions. As the IIA 2003 explains, the Commission monitors pan-European self-regulatory processes and assesses their compatibility with EU law, in particular competition law.[25] Where self-regulation is undertaken in an area that is subject to EU competences, the Commission will also report to the Parliament and Council on the contribution the initiative can have for the attainment of general EU objectives, the level of representativeness of the parties concerned, the sectoral and geographical coverage of the initiative, and, lastly, the general added value of the commitments made by industry under the initiative.[26]

C Results of the EU Better Regulation (2002-2015)

What results did the Better Regulation programme initiated in 2002 yield in terms of private regulation (including the notions of self- and co-regulation) promoted or encouraged as a viable policy alternative by the EU? While there is convincing empirical evidence that forms of private regulation were increasingly considered as alternatives for EU legislative intervention in the context of ex ante IAs, there is no such evidence suggesting an increase in the actual use of private regulation as an alternative to EU law. Commentators have noted that only very few initiatives fitting the descriptions of co- and self-regulation under the IIA 2003 have manifested.

I Private Regulation as Part of EU IA

Very soon after the Better Regulation programme was initiated, its focus shifted towards simplification of the EU law acquis and IA. As a result, discussions on private regulation became subordinate to those on proper methods of simplification, regulatory burden relief for businesses and IA. Whereas the diversification of modes of regulation was initially discussed as a separate, self-standing track of the Better Regulation programme,[27] it soon was presented as a means to achieve

24 *Cf*. P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials*, 6th edn, Oxford, Oxford University Press, 2015, p. 176.

25 Inter-institutional Agreement on better law-making, paras. 22 and 17.

26 *Ibid*., para. 23.

27 COM(2002) 278 final, pp. 11-13.

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regulatory simplification.[28] In a later amendment to the programme, in which the Commission re-branded Better Regulation to 'Smart Regulation', alternative means of regulation were no longer mentioned as part of the strategy.[29] However, the most important way in which private regulation has surfaced in the EU law-making process is in the context of IA. Since the adoption of the Better Regulation programme, the 'Impact Assessment guidelines' have required that co- and self-regulation be considered as alternative policy options as part of any ex ante IA.[30]

The insistence of the EU on private regulation to be considered as proper alternatives to legislative intervention in ex ante IAs raises the empirical question of whether this standpoint has indeed triggered an increased use of such alternative regulatory means. An examination of the IA practice for proposals of EU legislative or regulatory action learns that although co- and self-regulation are increasingly being considered as alternative options for EU legislation, they are in fact rarely adopted as a regulatory instrument. Renda's studies provide important insights here. In his 2006 study, Renda analysed the first 70 ex ante IAs completed by Commission Directorates-General (DG) in the years 2003, 2004 and 2005. His findings suggest that in six cases (9%) the lead DG considered co-regulation and in five cases (7%) self-regulation was considered as a possible alternative. These figures do not tell us whether the alternatives were eventually endorsed, however.[31]

In 2007, Renda, together with three other scholars, published a follow-up study, which demonstrated that the consideration of alternatives became a more integrated and structural part of IA.[32] The study highlights that in the period 2005-2007, all IAs considered at least one alternative to legislative intervention (*i.e.*, co-regulation, self-regulation, soft law or no regulation).[33] However, it also concludes that the policy alternative employed was 'usually the alternative of not regulating'.[34] Furthermore, the study points out that in presenting these alternatives, the considerations surrounding them are still limited in their assessment of

28 COM(2005) 535 final, p. 8 ("The Commission will promote a simpler legislative method and will increase its support for standardisation that has proved its worth in the context of the free movement of goods.") The Regulatory Fitness and Performance (REFIT) Programme confirmed the perception of co- and self-regulation as instruments of regulatory simplification. This programme was launched in 2012 to reduce regulatory burdens and simplify the EU law acquis. *See* Commission Communication, COM(2012) 746 final.

29 *See* Commission Communication, COM(2010) 543 final.

30 European Commission, 'Impact Assessment Guidelines', SEC(2005) 791, p. 24 and European Commission, 'Impact Assessment Guidelines', SEC(2009) 92, pp. 29-31 and Ann. 7.

31 A. Renda, *Impact Assessment in the EU. State of the Art and Art of the State*, Brussels, Centre for European Policy Studies, 2006, p. 65.

32 C. Cecot *et al.*, 'An Evaluation of the Quality of Impact Assessment in the European Union with Lessons for the US and the EU', *AEI-Brookings Joint Center Working Paper*, December 2007, available at: <http://ssrn.com/abstract=984473>.

33 *Ibid.*, p. 20.

34 *Ibid.*, p. 9.

the actual costs and benefits of the alternatives.[35] In a study of 2010, Renda confirms the practice that alternative modes of EU governance are commonly considered as part of the policy options in ex ante IAs since 2006.[36] Between 2006 and 2009, the percentage of IA considering self-regulation increased from 12% (2006), to 22% (2007), to 34% (2008) and to drop again to 22% (2009). In the same period, the percentage for co-regulation evolved from 13% in 2006 and 2007 to 21% in 2008 and 2009.[37] Again, however, these numbers do not tell us whether, in the end, the policy options were opted for by the legislature.

Along similar lines Meuwese and Senden conclude that "there is little evidence of a structured approach towards the consideration of alternative regulatory instruments in the framework of EU IA".[38] As they note, the framework on the use of co- and self-regulation as set out in the IIA 2003, however unclear, was not integrated in the IA guidelines. Moreover, IAs tended to treat the use of these instruments as unproblematic, whereas in practice they usually are not. It thus appeared that the Commission, in the words of Meuwese and Senden, struggled to "give hands and feet in practice to the theoretical starting point of the EU's legislative and regulatory policy"[39] by not clearly spelling out "when and under what conditions alternative regulatory mechanisms are actually (to be) preferred over legislative instruments".[40] Meuwese and Senden attribute this to the "absence of a clear vision and consensus on the part of the Commission when alternatives are a) allowed and b) desirable",[41] the potential loss of 'room to manoeuvre' in sensitive policy areas that detailed guidance would imply,[42] and the potential risk of 'juridification of Better Regulation'.[43]

II Private Regulation as a Policy Alternative to EU Legislation

So while private regulation was increasingly considered in ex ante IAs as a policy alternative to EU legislative intervention, it remains unclear whether this practice has actually led to an increased adoption of such alternatives. Circumstantial evidence suggests that this is not the case. Cecot *et al*. already noted that in the IAs

35 *Ibid*., p. 9 and 20. These findings are supported by the report of the European Court of Auditors in 2010 on the use of IA between 2003 and 2008. It notes "the number of alternative options presented in the IA reports increased" (p. 19), but that in one-third of the IA reports examined "it was difficult to compare alternative options because of a lack of quantified impact analysis, insufficient use of methods to compare and present qualitative evidence and an asymmetry in the depth of analysis between different options" (p. 36). *See*: European Court of Auditors, 'Impact Assessments in the EU institutions: Do they support decision making?' Special report N° 3/2010 (Luxembourg).

36 A. Renda, 'Effectiveness of Public and Private Regulation', Presentation at the European University Institute, Florence, Italy, 2010, p. 10 (on file with author).

37 *Ibid*.

38 A. Meuwese & L. Senden, 'European Impact Assessment and the Choice of Alternative Regulatory Instruments', *in* J. Verschuuren (Ed.), *The Impact of Legislation. A Critical Analysis of Ex Ante Evaluation*, Leiden, Martinus Nijhoff Publishers, 2009, p. 170.

39 *Ibid*., p. 162.

40 *Ibid*., p. 151.

41 *Ibid*., p. 170. *See also* Verbruggen, 2009.

42 *Ibid*., p. 171.

43 *Ibid*., pp. 171-172.

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conducted in the period 2005-2007 the policy alternative opted for was typically the option of not regulating at all, rather than endorsing a form of private regulation.[44] More generally, an empirical study by Van den Hoogen and Nowak published in 2010 provides insights into the use of co- and self-regulation at the EU level between 1990 and 2008.[45] Analysing the entries into the co- and self-regulation database administered by the European Social and Economic Committee,[46] the authors show that while the number of such private regulatory initiatives gained momentum between 2001 and 2005, it came to a sudden halt afterwards. When compared to the average number of traditional legislative measures adopted by the EU on a yearly basis, they observe that the use of co- and self-regulation in Europe is only very marginal, at least in quantitative terms.[47] The promotion of private regulation in the Better Regulation programme, as Van den Hoogen and Nowak conclude on the basis of their (limited) empirical sample, has not challenged the dominance of legislative intervention as a policy option in the EU law-making practice.[48]

Beyond these quantitative observations, qualitative studies in specific policy domains on the use of private regulation report the difficulties on the part of the European legislature to employ co- and self-regulation as defined by the IIA 2003 as genuine policy alternatives to EU legislation. In the field of environmental protection, for example, the Commission vowed to use co-regulation as a regulatory instrument and explicitly adopted the framework of the Better Regulation programme and IIA as regards co-regulation. In a 2002 communication, it noted:

> Under coregulation arrangements, the European Parliament and the Council would adopt, upon a Proposal from the Commission, a Directive. This legal act would stipulate that a precise, well-defined environmental objective must be reached on a given target date. It would also set the conditions for monitoring compliance and introduce enforcement and appeal mechanisms. It need not contain detailed provisions on how to reach the objective. The legislator determines to what extent defining and implementing the measures can be left to the parties concerned because of the experience they are acknowledged to have gained in the field.[49]

44 Cecot *et al.*, 2007, p. 9.

45 Th. Van den Hoogen & T. Nowak, 'The Emergence and Use of Self-regulation in the European Decision-making Process: Does it Make a Difference?', *Legisprudence*, Vol. 4, No. 3, 2010, pp. 343-383.

46 European Social and Economic Committee, 'Database on Self- and Co-regulatory Initiatives', available at <www.eesc.europa.eu/?i=portal.en.smo-database>.

47 Van den Hoogen & Nowak, 2010, p. 359.

48 *Ibid.*, p. 360.

49 Commission Communication, 'Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment', 17 July 2002, COM (2002) 412 final.

In 2008, however, Edward Best writes that "[n]ot one environmental agreement of the kind proposed in the 2002 Communication has been adopted".[50] Also, other co-regulatory initiatives undertaken by the European Commission in the field of environmental protection, as Best holds, have turned out not sustainable.[51]

In other fields, however, the encouragement of private regulation by the EU has had an important impact. Such involvement does not fit the restrictive definitions of co- and self-regulation of the IIA; these definitions failed to capture the interplay that was actually going on between the EU and the private sector. A key example here is private regulation by the European advertising industry, which benefited greatly from the support offered by the European Commission.[52] Private regulation in this area was and continues to be organized nationally, based on different local codes and regimes. This diversity triggered a response by the Commission in the early 1990s as it was concerned that these national systems would constitute obstacles to the creation of the Single Market. It thus challenged the European advertising industry to better coordinate these national systems and ensure their effectiveness in cross-border cases. The alternative would be intervention by the European legislature, adopting detailed legislation on the matter.

Heeding this threat, the European advertising industry created the European Advertising Standards Alliance (EASA). Established in 1992, EASA was given the specific task to oversee the coordination of private regulation in the ad industry throughout the European Single Market. Over a decade or so, EASA became the driving force for coordination and integration of national regimes of private regulation in Europe, amongst others by providing a forum to share experiences and benchmark national regimes along industry best practices. In 2005, this approach was discussed during the 'Advertising Self-Regulation Roundtable' organized by the Commission. The concluding report of the Roundtable, the Madelin Report (named after the then Director-General of SANCO Robert Madelin), strongly validated the approach of EASA as a common European road map to enhance the effectiveness of private regulation in the advertising industry.[53] The backing of its efforts by the Commission has implicitly mandated EASA to drive further the integration of the different national approaches to private regulation not only in the European ad industry but also in new arenas such as online behavioural advertising and data protection.

50 E. Best, 'Alternative Methods and EU Policy-Making: What Does "Co-Regulation" Really Mean?', *Eipascope*, Vol. 2, 2008, p. 14.

51 These initiatives concerned the regulation of CO_2 emission in passenger vehicles and energy efficiency for household appliances. *Ibid*., pp. 15-16.

52 This builds on: P. Verbruggen, 'Transnational Private Regulation in the Advertising Industry', Case Study Report for the HiiL Research Project on 'Constitutional Foundations of Transnational Private Regulation', 2011, pp. 24-27 and p. 71 *et seq*., available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256043>.

53 European Commission, 'Self-Regulation and the Advertising Sector: A Report of Some Discussion among Interested Parties' (DG SANCO) (Brussels, 2006). Available at: <https://ec.europa.eu/digital-single-market/en/content/dg-sanco-self-regulation-eu-advertising-sector-report-some-discussion-among-interested-0>.

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Also in the general academic EU literature reflecting on the impact of the Better Regulation programme, the image that emerges is that co- and self-regulation as described in the IIA 2003 have not been deployed widely. In 2007, Haythornthwaite, then chairman of the Better Regulation Commission in the United Kingdom, observed that the actual use of these instruments in EU legislative policy is 'still sporadic at best'.[54] Also, Craig and De Búrca note that 'no extensive use' has been made of co- and self-regulation.[55]

What can explain this practice? Two tentative answers emerge. The first relates to the politics of EU law-making.[56] The shift away from the traditional, centralized method of EU law-making challenges the role of its constitutive actors. Although the Commission might prove, at least on paper, very ambitious in having certain policy issues resolved by reference to co- or self-regulation, the European Parliament and the Council of Ministers may not want to leave this to the private sector for political reasons, despite their commitment to the use of these alternatives under the IIA. It has indeed been noted that the European Parliament and Council are wary of private regulation as it could undermine their role in EU law-making and regulatory policy.[57]

Moreover, the political climate in the EU at the time the Better Regulation programme was being implemented may not have been very responsive to private regulation. In 2007-2008, the global financial crisis unfolded. Soon after its outbreak, influential politicians in and outside Europe drew attention to the failures of private regulation in the banking sector. In September 2008, for example, it was the then French President Sarkozy who noted in a speech that: "Self-regulation, to fix all problems, is over. Laissez-faire is over."[58] This firm stance of Mr. Sarkozy is considered to have had a negative impact on the policy choice to use of co- or self-regulation in EU legislative policy. As recounted by several participants at a Workshop on 'Co-Regulation in Europe' hosted by the European Social and Economic Committee in February 2013, co- or self-regulation have since the global financial crisis not been politically feasible in the European political arena.[59] The cited study by Renda in 2010 seems to provide some evidence of this stance (albeit limited) in the practice of EU IA. As he quantified, there was a drop in the number of times self-regulation is considered as policy alternative in EU IA after 2008 (12% in 2006, 22% in 2007 and 34% in 2008, against 22% in 2009). That drop did not appear as regards co-regulatory arrangements, however.[60]

54 R. Haythornthwaite, 'Better Regulation in Europe', *in* S. Weatherill (Ed.), *Better Regulation*, Oxford, Hart Publishing, 2007, p. 24.

55 Craig & De Búrca, 2015, p. 176.

56 *See* in general H. Lelieveldt & S. Princen, *The Politics of the European Union*, 2nd edn, Cambridge, Cambridge University Press, 2015.

57 Haythornthwaite, 2007, pp. 24-25.

58 *See* S. Erlanger, 'Sarkozy Stresses Global Financial Overhaul', *New York Times*, 25 September 2005, available at <www.nytimes.com/2008/09/26/business/worldbusiness/26france.html?_r=0>.

59 Workshop on 'Co-Regulation in Europe: New Findings on Factors for Failure and Success' hosted by the European Social and Economic Committee, 17 January 2013, Brussels (personal observations).

60 Renda, 2010, p. 10.

Another account of why co- and self-regulation have not been regularly adopted as policy alternatives to EU legislation relates to the way in which the IIA on Better Law-making of 2003 and related policy documents have conceptualized private regulation. The definitions of co- and self-regulation that were employed did not meet the demands of practice. Co-regulation was particularly hard to work with the way in which the IIA 2003 had framed it. Although the understanding of co-regulation as an implementation mechanism for broadly defined objectives by a European legislative authority proved successful in relation to technical standardization under the 'New Approach', its roll-out in other EU policy domains proved to be very difficult, as the example of co-regulation in the field of environmental protection discussed above shows.

The example of private regulation in the European advertising industry challenges also in various ways the notion of co- and self-regulation as set out within the context of the EU Better Regulation programme. First, this example shows that private regulation in Europe is a multilevel game, in which European standards are the result of painstaking negotiations for which the input is provided by national actors, who after adoption by a European body are responsible for the implementation and enforcement at (again) the national level, subject to some form of oversight and coordination by that European body. The IIA 2003 on Better Law-making is only concerned with 'common guidelines at European level' and disregards this multilevel dimension.

Second, the IIA 2003 suggests that EU institutions stay aloof from self-regulatory initiatives.[61] The example of private regulation in the European advertising industry already discussed at some length above shows quite the contrary, namely that the Commission has played a forceful and active, yet very informal role in promoting and harnessing the self-regulatory capacity of the European advertising industry by supporting its initiatives that flank core areas of EU regulatory policy, including the areas of consumer protection, fair competition and privacy rights. Arguably, the explicit and implicit support EASA has received from the Commission in driving chance in the governance and practice of advertising self-regulation may even lead one to claim that this practice amounts to a form of co-regulation. These subtleties are not recognized in the IIA 2003. The conceptualization of co- and self-regulation in this agreement constitutes a straightjacket that fails to capture the dynamics, informalities and complexity between private and public regulatory actors and the interests that are involved in the adoption, implementation and enforcement of private regulation. The IIA presents co- and

61 "As a general rule, this type of voluntary initiative does not imply that the Institutions have adopted any particular stance, in particular where such initiatives are undertaken in areas that are not covered by the Treaties or in which the Union has not hitherto legislated." Inter-institutional Agreement on better law-making, para. 22.

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self-regulation as clear-cut alternatives to legislative action, whereas the practice is much richer.[62]

III Private Regulation as a Policy Alternative in EU Legislation

The Better Regulation programme has presented co- and self-regulation as policy alternatives *to* legislative action by EU institutions at EU level. To overcome the rigidity of these concepts, it has been suggested that much more attention should be paid to using private regulation as an alternative *in* legislative action by the EU. This has indeed been the way in which forms of private regulation have predominantly been integrated in legislative policies. Meuwese and Senden had suggested in their analysis of the IA practice on co- and self-regulation that:

> (…) there should be more attention for the fact that putting in place regulation can still be done in such a way as to incorporate 'alternative' elements. This can be done by focusing less on the legal form of the measure (Regulation, Directive etc.) and more on the (combination of) regulatory techniques used.[63]

In this way, smarter and more sophisticated forms of EU law integrating private regulation in EU legislative measures (as well as soft law) can be developed.

There are two reasons that make the argument of incorporating private regulation *in* EU legislative action particularly compelling. First, it would consider private regulation as a *complement* to EU action, rather than as alternative that excludes or limits the use of EU legislation or policy positions. The presentation of co- and self-regulation in the Better Regulation programme suggested that these modes of regulation and governance would substitute traditional EU legislation. It encourages legislative officials to think about regulatory options as *either* private regulation *or* EU legislation.[64] As noted earlier, it is wrong to suggest that private regulation and legislation are mutually exclusive alternatives. Often, they coexist, and a clear framework provided by legislation may help to bolster the capacity of private, non-state actors to achieve policy goals.[65] It is, therefore, suggested by scholars of regulation that it is not fruitful to draw distinctions too

62 The Commission, by way of DG SANCO, recognizes that the distinction between co- and self-regulation in practice is not as clear-cut as the IIA 2003 suggests. It criticizes the definitions used in the IIA and leave out "a grey area of self-regulation that is not quite as purely autonomous as this wording implies and yet has none of the characteristics required for a system to qualify as Co-Regulation" (emphasis as in original). European Commission, 2006, p. 9.

63 Meuwese & Senden, 2009, p. 174.

64 *Ibid*., p. 173.

65 *See* for a discussion of several examples: R. Baldwin, M. Cave & M. Lodge, *Understanding Regulation: Theory, Strategy, and Practice*, Oxford, Oxford University Press, 2013, Ch. 8. As they conclude: "As with many other regulatory distinctions, the contrast between regulation and self-regulation can be portrayed in ways that are too stark. Nearly all regulatory mechanisms incorporate some elements of self-regulation (…) Nearly all self-regulatory mechanisms are subject to some degree of governmental regulation. The trick (…) is to make use of that mix of regulation and self-regulation that best serves legitimate governmental purposes and so merits the strongest claims to support." p. 164.

strong between public and private regulation. The real challenge for policymakers is to devise frameworks that allow for the mixing and matching of different regulatory approaches to involve the most capable actors in the regulatory regime in the smart pursuit of policy goals.[66]

Second, the use of private regulation as part of EU legislative action also brings in the multilevel dimension that private regulation in the EU often has. As was highlighted by the example of private regulation in advertising, European private regulatory initiatives depend for their success on the proper implementation and enforcement of their norms and procedures by national actors or chapters at local level. By incorporating private regulation in EU Directives or Regulations as an instrument to complement the implementation of (parts of) the secondary EU legislation, EU-level private regulation may guide, coordinate and harmonize the way in which the private sector may supplement national implementing laws.[67] In fact, in many EU Directives and Regulation, such a complementary role is already attributed to private regulation.[68]

D Assessing the New Agenda for Better Regulation

It follows from the foregoing that under the old Better Regulation programme, there was first of all little guidance as regards the question of when and under what conditions private regulation was to be preferred over legislative means in the context of ex ante IAs. Furthermore, the definitions of co- and self-regulation in the 2003 IIA proved to be conceptual straightjackets that do not match regulatory practices. EU institutions, and in particular the Commission, may be key drivers, facilitators or orchestrators of private regulation in a way that is not captured by the definitions of co- and self-regulation. Indeed, the distinction drawn between these two forms of private regulation frequently does not fit regulatory practice. Third, co- and self-regulation are presented as alternatives *to* rather than

66 *Cf*. the theory of smart regulation. *See* N. Gunningham & P. Grabosky, *Smart Regulation: Designing Environmental Policy*, Oxford, Oxford University Press, 1998.

67 This is very much the way in which EASA in the advertising industry has operated in the context of EU Directives on advertising practices: Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11 June 2005, p. 22, Arts. 10 and 11; Directive 2006/114/EC of European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376, 27 December 2006, p. 21, Art. 6; Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15 April 2010, Art. 4(7), p. 1.

68 In addition to the Directives referred to in *supra* note 67 examples concern accounting standards (Reg. 1606/2002/EC), e-commerce (Directive 2000/31/EC), food safety and hygiene (Reg. 852/2004/EC and Regulation 882/2004/EC), services (Directive 2006/123/EC), payments (Directive 2015/2366/EU) and timber imports (Reg. 995/2010/EU).

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alternatives *in* EU legislative action, as if the choice between these forms of were a binary one. Typically, public and private regulation frequently coexist and convolute in practice.[69]

To what extent does the new EU agenda for Better Regulation (New Agenda) take these criticisms on board? Is it responsive to the reasons underpinning the poor achievements of the old programme and, if so, how? Does it provide better guidance on the ways in which private regulation can be integrated in EU lawmaking processes? To answer these questions, this section analyses the constitutive policy documents of the New Agenda.

I Better Regulation for Better Results – An EU Agenda

When reading the opening paragraph of the Commission's policy document presenting the New Agenda, one gets the feeling of a fresh start, a breakaway from the old Better Regulation programme, one that is commanded by the newly installed Juncker Commission. The Commission underlines its determination 'to change', and as such it "will take a fresh look across all policy areas to see whether existing measures need to be improved".[70]

As regards private regulation, indeed much has changed. While co- and self-regulation held a prominent position in the original version of the old Better Regulation programme, the New Agenda no longer speaks of them. As noted by Renda in a position paper on the New Agenda, co- and self-regulation are the "elephant in the room".[71] What the Commission does is mentioned in the following: "When considering policy solutions, we will consider both regulatory and *well-designed non-regulatory means* as well as improvements in the implementation and enforcement of existing legislation".[72] It leaves one to guess what 'non-regulatory means' exactly are (private regulation certainly is a regulatory means!), how and when they are considered appropriate, and what their relationship with 'regulatory means' is. A hint is found in a footnote after the word 'well-designed', in which reference is made to "the principles for better self- and co-regulation and

69 These points are echoed in a study by the European Economic and Social Committee titled 'Self-regulation and co-regulation in the Community legislative framework'. In this study, the Committee suggests that these two forms of private regulation "should be viewed as important instruments for complementing or supplementing hard law, but not as an alternative to it unless there are 'fundamental rules' providing a sufficient enabling basis" (para 1.2). It also called for a review of the 2003 IIA in order, inter alia, to: "redefine basic concepts in line with the most recent guidance in the field, which distinguishes self-regulation and co-regulation and recognises intermediate forms such as those promoted by EU recommendations and communications" (para. 1.8.c). Finally, the Committee reminded that "the legal framework that should govern the operation of these instruments at EU level" is still lacking and proposed to amend the 2003 IIA to provide a clear and binding legal framework for the use of self- and co-regulation (paras. 2.4 and 5.18-5.23). *See* European Economic and Social Committee, 'Self-regulation and co-regulation in the Community legislative framework' (April 2015), OJ C 291, 4 September 2015.

70 Commission Communication, COM(2015) 215 final, p. 3.

71 A. Renda, 'Too good to be true? A quick assessment of the European Commission's new Better Regulation Package', CEPS Special Report No. 108, May 2015, p. 12, available at: <https://www.ceps.eu/system/files/SR108AR_BetterRegulation.pdf>.

72 Commission Communication, COM(2015) 215 final, p. 5 (emphasis added, reference omitted PV).

the Community practice thereof".[73] These principles were drafted by a forum of stakeholders called 'The Community of Practice for better self- and co-regulation' supported by the Commission's initiative called 'Digital Agenda for Europe'.[74] The principles concern a number of conditions for the adoption, governance and implementation of self- and co-regulation, including matters of participation, transparency, (legal) compliance, IA and funding.

These conditions may be taken as parameters for answering the policy question of when and under what conditions private regulation may be deployed as a policy alternative. In that sense, they offer a clearer and more comprehensive framework than the 2003 IIA did. Yet, many pertinent questions remain. First of all, what is the legal status of these principles? Can the EU legislature still incorporate co- or self-regulation if these principles are not complied with? Moreover, do the principles apply to only EU-level initiatives or also to national forms of co- and self-regulation undertaken in the implementation of EU law? The principles appear to equally concern co- and self-regulation. Therefore, no guidance is provided as regards the important policy question of when one of these two policy alternatives (assuming for the moment that they do constitute two separate regulatory strategies) is preferred over the other one and when they might be preferred over legislative action. Finally, co- and self-regulation are not defined in this document. Does the definition of the IIA 2003 still apply?

II IIA on Better Law-Making 2016

Answers to these questions cannot be found in the revised IIA on Better Law-making adopted in 2016.[75] In this revised IIA, which replaces the IIA of 2003, co- and self-regulation are no longer mentioned as such. No definitions are given therefore. Indirect reference to co- and self-regulation is made where it is noted that the Work Programme of the Commission will include both "major legislative and non-legislative proposals"[76] for the following year and that it "will carry out impact assessments of its legislative and non-legislative initiatives, delegated acts and implementing measures which are expected to have significant economic, environmental or social impacts".[77] No guidance is thus provided as to when and under what conditions private regulation was to be preferred over legislative means.

III IA Guidelines 2015

The new IA Guidelines also fall short of answering the pertinent questions identified above.[78] In general, the Guidelines require Commission officials to always

73 European Commission, 'Principles for Better Self- and Co-Regulation' (December 2013), available at: <https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/CoP%20-%20Principles%20for%20better%20self-%20and%20co-regulation.pdf>.

74 European Commission, 'Genealogy of the CoP', available at: <https://ec.europa.eu/digital-agenda/genealogy-cop>.

75 Inter-institutional Agreement on better law-making [2016] OJ L 123, 12 May 2016, p. 1.

76 *Ibid*., para. 8.

77 *Ibid*., para. 13.

78 European Commission, 'Better Regulation Guidelines', SWD, 2015, 111 final.

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consider alternative policy instruments when designing policy options in ex ante IAs. These instruments include "non-regulatory alternatives; self- or co-regulation; market-based solutions, regulatory alternatives; international standards, and their mix".[79] Here, quite logically, co- and self-regulation are again something different than 'non-regulatory' instruments.[80] As 'alternative' policy options, they are obviously also something else than EU legislative means. It thus appears that also in the new IA Guidelines the predominant paradigm continues to be the need to consider co- and self-regulation as 'alternatives to' EU legislative action, rather than the need to design a clever mix of regulatory instruments in which private regulation complements the standard setting, implementation, monitoring or enforcement of EU legislation or other pre-existing legal frameworks. While the Guidelines address a 'mix', this seems to be only the mix among the policy alternatives, rather than a mix of EU legislative measures and forms of private regulation advocated above.[81] The new IA Guidelines thus fall short of providing guidance as regards the important policy question of how to combine alternative policy instruments or combine EU legislative measures and such alternatives. The Guidelines simply offer a general framework based on the principles of effectiveness, efficiency, coherence, proportionality and subsidiarity to compare and choose between different policy options.[82] Guidance on how to construe a mix among them is absent, however.

The new IA Guidelines are supported by a Better Regulation 'Toolbox', which is a document of over 400 pages that provides additional guidance to these guidelines.[83] It contains amongst others the so-called 'Principles of Better Regulation', and advice on how to perform ex ante IAs, ex post evaluations and the so-called 'Fitness Checks'. However, such guidance and advice is "not binding unless expressly stated to be so".[84] The Toolbox, unlike the new Guidelines, does refer to the mix between policy options, potentially combining EU legislative intervention, self- and co-regulation, technical standardization, information disclosure and market-based mechanisms.[85] As regards the question of how to combine these options, the Toolbox remains very abstract. It is noted that some instruments are naturally complementary to each other, whereas other combinations are counterproductive. Therefore, combinations "should aim to be mutually supportive and carefully calibrated to achieve policy goals in the most effective and efficient way".[86] How to actually do so remains unclear.

79 *Ibid*., p. 23.

80 *See* at *supra* note 72, where co- and self-regulation are implied as 'non-regulatory alternatives' through a reference to the Principles for better self- and co-regulation.

81 *See* text at *supra* note 64-66.

82 European Commission, SWD, 2015, 111 final, p. 29.

83 European Commission, 'Better Regulation "Toolbox"', 2015, available at: <http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf>. This document is also available as an interactive web tool at <http://ec.europa.eu/smart-regulation/guidelines/toc_tool_en.htm>.

84 European Commission, SWD, 2015, 111 final, p. 4.

85 Better Regulation Toolbox, 2015, p. 94.

86 *Ibid*.

The Toolbox also discusses co- and self-regulation as an alternative policy instrument. Here, it refers to the "principles for better self- and co-regulation" and holds that these "should be reflected in all self and co-regulation initiatives".[87] The Toolbox also defines the two. Co-regulation is defined in a very similar way as in the IIA 2003.[88] The Toolbox adds that co-regulation is to be considered a 'light' regulatory approach that allows for the combination of binding legislation and more flexible self-regulation as a strategy to implement EU law. Self-regulation is considered to be in place "where business or industry sectors formulate codes of conduct or operating constraints on their own initiative for which they are responsible for enforcing".[89] Self-regulation is thus meant to concern industry self-regulation, whereas the definition of the IIA 2003 also included regulatory initiatives taken by NGOs, social partners and other non-industry groupings. Importantly, the Toolbox adds to the definition that "pure self-regulation is uncommon and at the EU level it generally involves the Commission in instigating or facilitating the drawing up of the voluntary agreement".[90] In this regard, the definition of self-regulation applied under the new Better Regulation agenda, and its Toolbox, more accurately reflects regulatory practice.

While this may be important to concede, the question emerges of what legal significance these definitions actually have. While the IIA 2003 was considered by some to have binding legal force among the committing EU institutions,[91] the Toolbox provides non-binding guidance to Commission officials only. As the 2003 IIA was replaced by the 2016 IIA and the latter does no longer define co- and self-regulation, no official definitions exists. It should thus be held that the definitions of these two alternative policy instruments are simply working definitions that may be used to categorize the different policy options in the context of ex ante IAs. Given their current phrasing, however, they allow for a much needed level of nuance between these categories and their relationship with EU law.

E Conclusion

To what extent does the new EU agenda for Better Regulation provide renewed guidance on the integration of private regulation in EU law-making? The analysis conducted in this article suggests that there is little new guidance. The main response by the New Agenda to the criticism directed at the way in which the EU legislature had presented private regulation in the old Better Regulation programme appears to have been the complete removal of private regulation as a central pillar to better EU regulation. Co- and self-regulation are no longer men-

87 *Ibid*., p. 89.

88 Co-regulation is defined as "a mechanism whereby the Union legislator entrusts the attainment of specific policy objectives set out in legislation or other policy documents to parties which are recognized in the field (such as economic operators, social partners, non-governmental organizations, or associations)". *Ibid*., p. 89.

89 *Ibid*.

90 *Ibid*.

91 Senden, 2005, p. 22.

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tioned as viable policy alternatives in the New Agenda and the revised IIA on Better Law-making. Private regulation has thus fallen centre stage. Arguably, this stance can be seen as the result of a longer development initiated by earlier amendments to the Better Regulation programme, in particular the Smart Regulation strategy and REFIT programme.

The guidance that is uttered on the use of forms of private regulation in EU law-making policy is to be found in the IA Guidelines and adjacent Better Regulation Toolbox as supporting policy documents to the New Agenda for Better Regulation. Can these documents tackle some of the criticism on the old programme? This critique concerned (i) the lack of guidance as regards the question of when and under what conditions private regulation was to be preferred over legislative means in the context of ex ante IAs; (ii) the presentation of co- and self-regulation as alternatives *to* rather than alternatives *in* EU legislative action; and (iii) the restrictive definitions of these alternatives. As regards the first point, the IA Guidelines and Better Regulation Toolbox refer to 'the principles for better self- and co-regulation' as a condition for the use of co- and self-regulation in EU law-making policy. Although these principles offer a clearer and more comprehensive framework for the use of these forms of private regulation than the 2003 IIA did, they only make clear when these forms may be accepted as effective policy alternatives. The principles do not make clear when private regulation is the preferred policy option over legislative means. On this point, the new IA Guidelines suggest that Commission officials should deploy a broadly termed proportionality test and see how the policy options compare.[92]

As regards the second critique, in the new IA Guidelines, the predominant paradigm continues to be the need to consider co- and self-regulation as 'alternatives to' EU legislative action, rather than the need to design a clever mix of regulatory instruments in which private regulation complements EU legislation. Although this is somewhat nuanced in the Better Regulation Toolbox, which speaks of the possibility to combine the full range of policy options, guidance is yet to be offered as regards the question of how to combine alternative policy instruments, or how to combine EU legislative measures with such alternatives. As regards the final point, the Better Regulation Toolbox has provided more constructive definitions that are responsive to existing practices, in particular that of self-regulation. These definitions are not binding. This should be welcomed because every other definition, in particular if it is binding, would be arbitrary and trigger the kind of critical responses that have been discussed in this article. Without binding definitions, however, the question arises as to how rigid Commission officials will use these definitions and categories, in particular when considering policy alternatives and the ways in which they might be combined. It is recommended that the given definitions are used functionally, as working definitions that follow existing practices.

In conclusion, it must be held that the New Agenda offers little guidance on how and when private regulation might be combined and integrated in EU law and law-making. It makes one wonder, to speak with Renda, "[w]hat will happen

92 *See* at *supra* note 81.

to self- and co-regulation in the European Union?"[93] Evidently, private regulation plays a key role in delivering public goods across many EU policy fields. In the absence of a clear vision of how the Commission and the EU legislature at large consider private regulation and its relationship to EU law and policy-making, private actors such as trade associations, NGOs and other public interest groups might be put off to engage with the EU legislature or Member States to construe clear, integrated and 'mixed' approaches to regulation. Such an outlook, also in the light of the ambition of the EU to promote private sector engagement with EU policy and law-making through public consultations, would not be a good prospect.

93 Renda, 2015, p. 12.

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