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**SELF REGULATION AND THE PROFESSIONS:  
A PERSPECTIVE FROM REGULATORY COMPETITION THEORY<sup>1</sup>**

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This paper endeavours to analyse self regulation through the prism of the regulatory competition theorists. At first glance, self regulation and regulatory competition appear to be separate issues, each aimed at different objectives. Regulatory competition theory mainly deals with the issue of the level of regulation in a multilevel system of government; the self regulation debate is more concerned with the qualities and shortcomings of self regulation in comparison with public regulation. However, despite these differences, both debates purport to identify what is 'good' regulation. Both are concerned, albeit in different ways, with finding the most efficient level of regulation.

These reasons explain why the idea of competing self regulations (re)surfaces in European debates. The idea emerges in particular in the areas where self regulation is governed by professional bodies (lawyers, doctors, architects, accountants etc.). During a conference devoted to modernising the regulation of professional services in Europe in October 2003, Commissioner Mario Monti encouraged the various professional bodies to re-examine their rules. « My intention », he said, « is not that the current regulatory framework should be changed overnight in a lump exercise. I am in favour of

competition between legal systems (...) I am not aiming at harmonisation of all regulations, not at generalised deregulation.»<sup>2</sup>

If we take the idea that professional self regulation could/should compete into consideration, it is of particular interest to turn to regulatory competition theory and transpose the terms of a debate that traditionally deals with public regulations, to self regulations. This paper purports to determine the extent to which regulatory competition theory provides useful insights for the analysis of self regulation. It also aims, on a more pragmatic level, to determine if the development of (the conditions of) competition amongst self regulatory bodies<sup>3</sup> is a/the solution to curb the shortcomings of self regulation.

Let us start with some definitions. Self regulation is taken here to mean the regulatory process whereby an organisation (industry, professional body) sets and enforces rules and standards relating to the conduct of firms in the industry or body. Of course, some kind of governmental regulation can co-exist alongside self regulation, but the definition implies that the primary responsibility for formulation and enforcement of the regulatory standards rests with the self regulatory body rather than the government or some agency.

The definition<sup>4</sup> of regulatory competition adopted for the purposes of this paper draws from the American debate which emerged as a consequence of the success enjoyed by the state of Delaware in attracting corporations. On the basis of Tiebout's seminal analysis<sup>5</sup>, and with the example of the Delaware, American scholars have indeed attempted to explain the process whereby regulators deliberately set out to provide a more favourable regulatory environment in order either to promote the competitiveness of domestic industries or to attract more business activity from outside the state or

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<sup>1</sup> The author wants to thank Edwige Helmer and Alexandre de Streel for their helpful comments and suggestions on an earlier version of the paper. Comments from participants to the 'Self Regulation' workshop at the EUI in November 2003 were also valued. Usual disclaimers apply.

<sup>2</sup> Comments and concluding remarks of Commissioner Monti at the Conference on Professional Regulation, European Commission, Brussels, 28 October 2003, available at [www.europa.eu.int/comm/competition/liberalization/conference/speeches/mario\\_monti.pdf](http://www.europa.eu.int/comm/competition/liberalization/conference/speeches/mario_monti.pdf)

<sup>3</sup> The paper uses the terms 'competition among self regulators', 'competition among self regulation' and 'competition among self regulatory bodies' (or systems) as equivalent.

<sup>4</sup> For reasons of clarity, the paper assumes the existence of one definition and one model of regulatory competition. For a more 'pluralist' approach, I recommend Claudio Radaelli's article, 'The Puzzle of Regulatory Competition, in the special issue on Regulatory Competition, Journal of Public Policy 2004, Vol. 24 (1), pp. 1-23.

<sup>5</sup> Tiebout C. (1956), A Pure Theory of Local Expenditure, Journal of Political Economy, 64(5), 416-424.

abroad<sup>6</sup>. The model assumes that economic factors can choose between different regulations<sup>7</sup>, i.e. they can select the best regulation across various market opportunities. This so-called ‘regulatory arbitrage’, or ‘forum shopping’ provides regulators with incentives to set national regulations in response to the actual or expected impact of the regulation on internationally mobile goods, services or factors on national economic activity.

The American debate concerning competition between national regulators has been marked by ongoing controversy in which the opposing logics of ‘race to the top’ and ‘race to the bottom’ have been raised. A race to the bottom is said to occur, in corporate law, when States are penalising the less mobile factors of production, such as workers, by reducing, for instance, employment protection legislation in order to remain attractive to the more mobile factors such as capital<sup>8</sup>. In contrast, a race to the top is said to occur when the jurisdiction produces more efficient laws<sup>9</sup>. Indeed, the jurisdiction that provides the most efficient law concerning contract between management and shareholders will be selected. The race to the top argument is therefore rooted in the conviction that shareholders are a countervailing force against managements’ interests in laxity<sup>10</sup>.

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<sup>6</sup> Woolcock, S. (1994) *The Single European Market: Centralization or Competition Among National Rules?* London: Royal Institute of International Affairs.

<sup>7</sup> Sun, J. and Pelkmans, J. (1995) *Regulatory Competition in the Single Market*, *Journal of Common Market Studies*, 33(1), 67-89.

<sup>8</sup> For one of the more critical analysts of the Delaware model, Cary, competition is not efficient because managers will choose to incorporate in the State where the corporation laws are efficient but only from their point of view: they disregard shareholders’ interests. A race to the bottom is therefore assumed when business moves in response to negative deregulation designed to attract by lowering in particular social protection. The competition creates a spiral of restrictions and of deregulation from which, in the long run, no State can emerge victorious. See Cary, W. (1974), *Federalism and Corporate Law: Reflections upon Delaware*, 83 *Yale Law Journal* 663, 701. This critique has met with much support in Europe with scholars and politicians fearing that competition among national rules would lead to a race towards lax standards in environmental, social tax and company law. For an examination of the race to the bottom rhetoric in social law, See Barnard, C. (2000) *Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware?* 25 *European Law Review*, 57-78.

<sup>9</sup> See Romano, R. (1985) *Law as a Product: Some Pieces of the Incorporation Puzzle*, *Journal of Law, Economics, and Organization*, 1(2), 225-283. See also Charny, D. (1991), *Competition among Jurisdiction in Formulating Corporate Law Rules: An American Perspective on the ‘Race to the bottom’ in the European Communities*, *Harvard International Law Journal*, 422-440. Both authors argue that competition among corporate laws produces optimal and innovative legislation: it ensures the production of laws that are distinguishable by their capacity to enhance shareholder welfare. See also Trachtman, J. (1993), *International Regulatory Competition, Externalization and Jurisdiction*, *Harvard International Law Journal*, Vol. 34, 47; Winter, R. (1997), *State, Law, Shareholder Protection and the Theory of Corporation*, *Journal of Legal Studies*, 251.

<sup>10</sup> Because shareholders are able to identify the costs being allocated to them by virtue of applicable State corporation law and to coalesce into effective action to avoid these costs, shareholders may lobby States legislatures against «lax» corporate laws. Alternatively, they may seek to influence corporations directly, encouraging them not to incorporate or reincorporate in States with lax corporate laws.

In the 1980s, the regulatory competition model was largely ‘europeanised’. The idea developed that competition among national regulators would be an efficient alternative to harmonisation<sup>11</sup>. A debate has thus emerged over the last twenty years with a special focus on the evolution of social, environmental, tax or company law. Scholars have endeavoured to understand when and why competition emerges within the EU<sup>12</sup>, and what are the outcomes of the competitive game<sup>13</sup>. This paper proposes to extend this analysis by applying the regulatory competition analytical framework to self regulation.

The issues that the paper proposes to address are the following: To what extent, if at all, could/would competition develop amongst self regulatory bodies and under what conditions? What could be the outcome?<sup>14</sup> For the sake of clarity and simplicity, the analysis draws from the example of regulation enacted by and for professional bodies. However, despite this limitation in scope, it will not always be possible to provide clear-cut answers to these questions. Rather, the paper proposes an overview of what a system where self regulatory systems compete might look like. It sets the stage for ensuing discussion and empirical investigations.

The paper is divided into two parts. Part 1 investigates how and why the idea of applying regulatory competition to self regulation has arisen. It addresses the benefits of exposing self regulatory bodies to competitive pressure. In so doing, some ‘virtues’ of regulatory competition, as praised by competition theorists, are identified and ‘injected’ into the debate that deals with the shortcomings of self regulation. The issues discussed in the paper are mainly two-fold, namely, the legitimacy of self regulation, and its actual responsiveness to technical developments and consumers’ needs.

Part 2 attempts to grasp the limits of the application of regulatory competition theory to self regulation. It identifies situations where the intervention of the public regulator is necessary both for competition to emerge and to develop efficiently. It tries to

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<sup>11</sup> Reich, N. (1992) Competition Between Legal Orders: A New Paradigm of EC Law? *Common Market Law Review*, 29 ; Van den Bergh, R. (1998) Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law, *Maastricht Journal of European Comparative Law*.

<sup>12</sup> See for company law, Deakin, S. (2002) Regulatory Competition versus Harmonization in European Company Law, in Esty, D. and Gerardin, D. (2001) *Regulatory Competition and Economic Integration, Comparative Perspectives*, OUP, 190-217; for social law, Barnard, C. (2000), *op. cit.*

<sup>13</sup> For analysis of regulatory competition in the field of financial services, environmental law, labour law, company law, tax law and securities regulation, See the collection of articles edited by Esty, D. and Gerardin, D. (2001) *Regulatory Competition and Economic Integration, Comparative Perspectives*, OUP.

<sup>14</sup> The perspective proposed here is mainly that of law and economics in the sense that the paper assumes rationality of the economic actors involved in the process and looks for conclusions via the criterion of economic efficiency.

distinguish cases where competition *per se* is unlikely to sufficiently address any of the problems met by self regulation. Finally, the paper underlines the limits of using regulatory competition theory. It shows that competition among self regulatory systems is not the copy of competition between public national regulators. It suggests that competition (between self regulators) must be defined in a broad meaning that encompasses not only processes of regulatory competition triggered by regulatory arbitrage, but also different forms of rivalry between self regulators that incites them to enhance the quality of self- regulation.

## **1. TWO ARGUMENTS IN FAVOUR OF EXPOSING SELF REGULATORY BODIES TO COMPETITION.**

### **1-1. The problems with self regulation. The example of professions.**

In the majority of EU States, the provision of professional services is regulated and the existing (self)regulations are justified by the necessity of avoiding market failures. Indeed, it is generally admitted that unregulated markets of services, where the provision of services is governed solely by contracts between suppliers of services and consumers, would give rise to serious welfare losses<sup>15</sup>. This is essentially due to two factors. First, markets for professional services are characterised by asymmetric information. Consumers cannot evaluate the value of the good, neither *ex ante* nor *ex post*<sup>16</sup>, and, as a consequence, trust in the professional that provides the service is the only possibility of economising on information costs. Therefore, there is a risk of adverse selection and moral hazard. In addition, as a result of asymmetric information, producers are unable to signal differences in their relative quality to consumers. The result is that professionals who compromise quality are not adversely affected by the market mechanism. The market price will reflect only the average quality level and thus attract average quality sellers. This in turn might lead to a reduction in the average level of quality perceived by consumers, a further reduction of the market price and another dilution of quality. This

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<sup>15</sup> See Van den Bergh, R. (1997), Self-Regulation of the Medical and Legal Professions: Remaining Barriers to Competition and EC Law, Fondazione Mattei Working Paper, 31/97, 1-67.

<sup>16</sup> This is likely to be particularly important with services that are experience goods and thus are not regularly purchased (no learning through the repeat-purchase mechanism) and with services whose properties can be assessed only with the help of highly technical standards. These goods typically create the conditions for the development of the so-called ‘market for lemons’.

is the ‘market for lemons’ problem<sup>17</sup>. A second problem with the market of professional services is that externalities might result from poor quality of service. The quality of the service provided may affect third parties as well as the clients (one is reminded of the consequences of the failure of a doctor to treat a contagious disease, or of the architect in the construction of a building). These two market failures help to explain why, in the majority of EU Member States, the provision of professional services is regulated.

The provision of professional services is customarily based on a model of self regulation. The choice of this mode of regulation is justified by its advantages over public regulation<sup>18</sup>. First, self regulation is preferable to governmental regulation because it allows individuals more freedom to conduct their own affairs. Secondly, self regulatory bodies have a greater degree of expertise and technical knowledge of practices and innovative possibilities within the relevant area than government or independent agency. Therefore, the costs of formulation, interpretation and modification of standards are lower. Another assumed advantage of self regulation is that of better enforcement since there is a coincidence between the regulator and the regulated. Thirdly, while establishing regulatory machinery and drafting regulatory codes is expensive and time consuming, these costs are internalised in the trade or activity which is subject to self-regulation. This is an advantage in comparison with regulation enacted by public agency or government where the costs are borne by taxpayers.

These assumed qualities explain why States have delegated to professional bodies the task to regulate the professions. The resulting self regulatory systems adopted in Europe are usually a combination of access and conduct rules. The former control entry into the profession through registration requirements, the requirement of diplomas and university degrees to use professional titles and (compulsory) membership of the professional body. The latter, so-called ‘ethical’ rules, range from the adherence to fee scales to restrictions on advertising, and business structures. Despite their frequent anticompetitive effects, the benefits to society of these rules are assumed to outweigh any negative effects. That is why the professions are not generally exempted from the provisions of competition

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<sup>17</sup> As demonstrated by Akerloff, G. (1970), *The market for Lemons: Quality Uncertainty and the Market Mechanism*, *Quarterly Journal of Economics* 84. ; See for the application to professional services Barry R. Weingast, *Physicians, DNA Research Scientists and the Market for Lemons*, in Blair, D. and Rubin, S. (eds.) *Regulating the Professions*, Lexington Books, 1980, pp. 81-96.

<sup>18</sup> Summarised in Peter Cane (1987), *Self Regulation and Judicial Review*, *Civil Justice Quarterly*, 1987, 324-347. See also the arguments of Miller, the leading advocate of self regulation in Miller, J.C. (1985) *The FTC and Voluntary Standards: Maximizing the Net benefits of Self-regulation*, 4 *The Cato Journal*, 897-903.

law, but their restrictive practices may escape the supervisory jurisdiction of antitrust authorities. This is particularly apt when they are mandated by government or promulgated by a professional association under the supervision of the government and said to contribute to the general good (quality of the services offered)<sup>19</sup>.

Yet despite the need to regulate professional services, and despite the advantages of self regulation over public regulation, the limits of self regulation are now publicly voiced. The central concern, from an economist's perspective, relates to the issue of rent seeking. It is shown that, not only policies of self regulation would tend to maintain the market imperfections, but they would also permit professional bodies to behave as cartels that exploit monopolistic power, among which the power to raise prices and the power to control entry into the market. As Horowitz puts it, « self regulation in the professions is self serving. Its ultimate aim and realised effect is to increase professionals' incomes beyond the levels that they would obtain in perfectly competitive professional service markets »<sup>20</sup>.

A strong critique is that the comprehensive self regulation (in particular in the field of professions) is not fully justified by market failures<sup>21</sup>. Professional ethics offer many examples of rules which go further than necessary to correct market failure i.e. to grant quality to consumers. In some countries ethical rules are used mainly to discipline members for offences unrelated to the quality of their services. A salient example is that of rules that prohibit professionals from advertising or from providing consumers with information on their speciality. Instead of reducing the problem of information asymmetry, these rules further inhibit the free flow of information. Therefore, the information asymmetry problem that self regulation was supposed to resolve is not actually achieved<sup>22</sup>.

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<sup>19</sup> The European Court of Justice has indeed endorsed the view, namely, that some values, which self regulation aim to protect are outside the realm of competition. In the Wouters case (309/99), the Court has considered that there are values relating to the administration and justice and the defense of the rule of law that must be exempted from competition. Therefore when the Dutch Bar was regulating to protect the core values of the lawyers-described as independence, confidentiality and the avoidance of conflict of interest, they would not be subject to competition law.

<sup>20</sup> See for details Ira Horowitz, (1980) *The Economic Foundations of Self-Regulation in the Professions*, in Blair, D. and Rubin, S. (Eds.) *Regulating the Professions*, Lexington Books, 1980, pp. 3-28:16. See also Kenneth G. Elzinga *The Compass of Competition for Professional Services*, in Blair and Rubin, op. cit., 107-123.

<sup>21</sup> Van den Bergh, R. (1997), op. cit.

<sup>22</sup> See also Van den Bergh, R. and Faure, M. (1991) *Self-Regulation of the Professions in Belgium*, *International Review of Law and Economics*, Vol. 11, 165-182. Domberger, S. and Sherr, A. (1989), *The Impact of Competition on pricing and Quality of Legal Services*, *International Review of Law and*



Because politicians and the general public have become increasingly aware that excessive self regulation of the professions promotes the interests of professionals instead of benefiting the general public, in recent years a deregulation movement for the professions has emerged. The market for professional services has been partly liberalised by reducing the monopoly powers of some professions<sup>23</sup>. Some Member States have also decided to apply the complete body of rules of competition law to the professions<sup>24</sup>, but this application remains very incomplete<sup>25</sup>. Therefore, scholars and politicians have become engaged in searching for alternatives to the current regulation of professional bodies<sup>26</sup>.

Among possible alternatives, there is the solution that self regulatory bodies would compete. Scholars such as Ogus argue that, if the principal objection to self regulatory agencies is that they are able to exploit their monopolistic control of supply so as to enable practitioners to earn rents, then why not force them to compete with one another, so that the rents will be eliminated?<sup>27</sup> As Mario Monti's speech tends to demonstrate, the idea of competing self regulations is gaining force in the EU political arena. Hence the importance of determining which shortcomings – if any - could be overcome by putting self regulations in competition. To this aim, I propose to evaluate which 'virtues' of competition, as praised by regulatory competition theorists, could be used to curb self regulation imperfections. In a way, the hypothesis to test is whether an 'injection' of competition in the creation and development of self regulatory systems would be an efficient remedy for the problems mentioned above.

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Economics, Vol. 9, 41-56. See also Scarpa, C. (2001), The anticompetitive effects of minimum quality standards: the role of self-regulation, in Amato, G. and Laudati, L. (eds.) (2001), *The Anticompetitive Impact of Regulation*, Edward Elgar, 29-49; Fumagalli, C. and Motta, M. (2001), Advertising restrictions in professional services, in Amato, G. and Laudati, L. (eds.) (2001), *The Anticompetitive Impact of Regulation*, Edward Elgar, 49-71. Finally see Jenny, F. (2001), Regulation, competition and the professions, in Amato, G. and Laudati, L. (eds.) (2001), *The Anticompetitive Impact of Regulation*, Edward Elgar, 116-128.

<sup>23</sup> As regards the introduction of competition in the market of legal services in the UK, Domberger, S. and Sherr, A. (1989), *The Impact of Competition on pricing and Quality of legal Services*, *International Review of Law and Economics*, Vol. 9, 41-56.

<sup>24</sup> Prohibition of cartel agreements and abuse of dominant position in particular have been applied to professions; regulation of fees by self regulatory professional bodies has been held to violate competition laws of EU member States.

<sup>25</sup> That is why authors promote the removal of these exemptions. See Fumagalli and Motta, *op. cit.*, who show that advertising restrictions, that have anticompetitive effects and are welfare detrimental, should be removed.

<sup>26</sup> In some countries the preference of the legislator is shifting towards other instruments of control, See Van den Bergh (1997) p. 3. See also Jenny (2001), *op. cit.*

<sup>27</sup> Ogus, A. (1994) *Rethinking Self-Regulation*, *Oxford Journal of Legal Studies*, Vol. 15: 97-107, 103.

## 1-2. The legitimacy input

### *Regulatory pluralism and exit option*

Self regulation raises an important number of legal critiques. It is said to be an example of modern corporatism because power is in the hands of groups which are not accountable to the body politic through the conventional constitutional channels<sup>28</sup>. It is generally considered that the self regulatory bodies make rules governing the activities of an association or profession without any democratic legitimacy, which is extremely problematic when the rules adopted affect third parties<sup>29</sup>. Therefore, the problem of how to legitimise self regulation is crucial assuming that self regulation can hardly derive legitimacy from the traditional channels that legitimate public regulation.

The introduction of competition into the process of ‘production’ of self regulation has thus to be considered. The literature emphasises the democratic character and the legitimacy of competition among regulators. Because competition assumes and requires the existence of a plurality of rules, it facilitates the satisfaction of a greater number of citizens’ preferences. In addition, because citizens select the rules that they prefer, competition incites regulators to enact rules that are matched to citizens’ preferences. Accordingly, these characteristics give rise to a situation whereby competition among rules is a more democratic rule making system than the situation where one regulator enacts from above a single body of rules that is the result of a political bargaining on a common low denominator<sup>30</sup>. These characteristics must be taken into account when we address the lack of democratic legitimacy of self regulation. Under competitive pressure, self regulatory agencies could be constrained to formulate standards which meet consumer preferences, and consumers would be allowed to choose the combination of price and self regulatory standards which most closely corresponds to their preferences.

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<sup>28</sup> Schmitter, P. (1985), Neo-Corporatism and the State, in Grant, W. (ed.) *The Political Economy of Corporatism*, 32-62.

<sup>29</sup> Another source of concern is the possible breach of the separation of powers doctrine when a same self regulatory body is entitled the function to enact rules, to interpret them, enforce them and imposes sanctions. Scholars have also raised the issue of their accountability. Cane, who describes several kinds of accountability, concludes that they are all weak forms of accountability, Cane (1987), *op.cit.*, p. 163.

<sup>30</sup> Reich (1992), *op. cit.*

We immediately perceive the advantages of the regulatory pluralism that regulatory competition entails.

The introduction of competition in the production of self regulation is a way to ‘inoculate a dose’ of legitimacy for another reason. In the model of competition, legitimisation comes from the activity of the regulated. Regulatory competition is indeed the only rule-making system to offer the possibility of choosing between several regulations. Therefore, it offers the regulated professionals a combination of exit and voice option that does not exist in a monopoly situation. The system governed by competition gives the regulated the possibility, due to a concrete exercise of its capacity of arbitrage, to validate the selected regulation *ex post*<sup>31</sup>, which contributes to provide self regulations with the legitimacy that they are lacking.

#### *Competition, costs and the public interest*

Following economic analysis, another problem with self regulation is its relation with the general interest. Kay and Vickers insist on the fact that the public interest is not the objective of many regulators organisations, especially self regulatory organisations. They may claim that their objectives are in line with the public interest, but whether or not this is so will depend on the frameworks in which they operate<sup>32</sup>. In reality, the problem is not that self regulation may lead to self serving practices. Society permits these practices to persist, in exchange for a guarantee of a certain minimal level of competence on the part of the professionals that serve it<sup>33</sup>. However, self regulation that grants rents to self regulators is acceptable as long as private interest does not dominate over the public interest. This is a question of rule of reason, of proportionality, that can be approached through the perspective of regulatory competition theory.

If regulatory competition theory holds true, competition should prevent self regulatory bodies from granting themselves the possibility of extracting excessive rents because a

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<sup>31</sup> This can be related to Siebert’s analysis that “the arbitrage of consumers and firms will show which national regulatory system is best in the eyes of the consumer (...) national regulation has to pass a litmus test of private agents voting with their purses and their feet.”, Siebert (1990), *The Harmonization Issue in Europe: Prior Agreement or a Competitive Process?* In Siebert (ed.) *The Completion of the Internal Market* (1990), 53-75, 68.

<sup>32</sup> Kay, J. and Vickers, J. (1990), *Regulatory Reform: An Appraisal*, in Majone, G. (ed.) (1990), *Deregulation or Re-regulation? Regulatory Reform in Europe and the United States*, Pinter Publishers, p. 239.

<sup>33</sup> Horowitz, op. cit., p. 9

regulation granting excessive rents to regulators would be too costly and not competitive. As a consequence, self regulation would ensure an optimal balance between consumers' interests and self regulators' interests. It should also be the case that competition avoids the situation where the scope of self regulation is not related to the scope of the market failure that it was supposed to solve. Following that line of argument, Kay and Vickers<sup>34</sup> argue that the creation of regulation by firms in a competitive environment can often be an effective mechanism for overriding information asymmetry and similar opportunities exist for competition between the regulations of different countries. Such competition raises the standard of all regulation, and drives out superfluous rules that offer protection which consumers do not, in fact, require. Accordingly, Van den Bergh argues that competition among self regulatory systems is an appropriate vehicle for ensuring that the costs and benefits of regulation are properly assessed<sup>35</sup>. He demonstrates that economic analysis may be helpful in pulling down (self)regulations which harm the public interest. He proposes a system where, to prevent abuses of self regulation, compulsory membership of privileged self regulatory bodies might be replaced by optional membership in competing organizations which would generate competition between self regulatory systems.

### **1-3. A dynamic that frames the formation of self regulation**

#### *Increased responsiveness to economic actors' needs*

Another advantage of combining self regulation and regulatory competition concerns legal evolution. A quality of self regulation which is often ascribed to it, particularly when compared with public regulation, is its greater flexibility. Because professionals are best informed about technical changes, because they know the efficacy of various potential solutions, they are also better informed of the necessity of changing the rule when it is obsolete. In addition, self regulatory bodies are assumed to be more prone to remove inefficient rules.

However, this contention is rarely acknowledged. Van den Bergh indicates that as far as self regulatory measures cause efficiency losses, they may be hard to change<sup>36</sup>. He relies

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<sup>34</sup> Kay and Vickers, op. cit., p. 244.

<sup>35</sup> Van den Bergh, R. (1997) op.cit.

<sup>36</sup> Van den Bergh, R. (1997), op. cit.

in particular on what Tullock calls a «transitional gains trap», i.e. there is no politically acceptable way to abolish a policy that is inefficient both from the standpoint of consumers, who pay artificially high prices, and from the standpoint of the privileged, who no longer make exceptional profits. Accordingly, Cane<sup>37</sup> argues that bodies tend to become more and more committed to the ethos of regulation as a means of disarming external critics. Therefore, they are unlikely to be able to consider and argue the merits of deregulation or limited regulation. Cane argues that resistance to changes may be more effective when the rules are promulgated by self regulation than by governmental regulation.

Because the resistance to change is higher when the professions are allowed to escape the application of competition law, the introduction of regulatory competition arguably has much to offer. Regulatory competition theorists tend to argue that when regulators (States) realise that companies or investors are changing jurisdictions, they will decide to change their laws. Regulatory competition comes into play precisely when States amend their law in an effort to increase or maintain their attractiveness. The Delaware won the race because it was highly responsive to the need for legal innovation insofar as it quickly reacted to legal controversies by adopting new precedent, and new rules<sup>38</sup>. Assuming the validity of this argument, competition should therefore prevent self regulators from opposing necessary legal changes.

#### *Competition as a discovery procedure.*

The competitive process is not only the guarantee that self regulatory bodies are responsive to the market's needs. It is also a discovery procedure<sup>39</sup> because regulators are asked to be innovative and to propose new and attractive legal products. Indeed, a regulator must adapt its legal products not only to consumers' needs but also to competitors' products, hence its efforts to invent new products. This is a key argument in the European debate that opposes regulatory competition and harmonisation. While harmonisation (i.e. monopolistic regulation) is static, competition is fuel for legal evolution: it promotes change, and experimentation, through the so-called 'trial and error

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<sup>37</sup> Cane (1987), op. cit. p. 331

<sup>38</sup> Romano, R. (1985) Law as a Product: Some Pieces of the Incorporation Puzzle, *Journal of Law, Economics, and Organization*, 1(2), 225-283.

<sup>39</sup> Van den Bergh speaks about a "learning process", Van den Bergh (1998), p. 134

process'.<sup>40</sup> Thus, if we agree with the idea that self regulation is a responsive and flexible form of regulation, the conclusion is that competition amongst self regulators should amplify these effects. If by contrast it is demonstrated that self regulators try to oppose change and innovation, competition should constrain them to be responsive to change. In addition, the very nature of regulatory competition is designed to be a cognitive process<sup>41</sup>. In so far as it constrains regulators to change periodically their rules, competition obliges these regulators to ask themselves what are their preferences. Therefore, competition influences both the content of the regulations and the definition of regulatory objectives.

These are the many theoretical advantages that can be expected from exposing self regulations to regulatory competition. They range from gains of efficiency and legitimacy to improvement in the formation of the rules, change in the content of the rule, better enforcement and higher effectiveness. However, if some conditions are not met, such improvements ought not to be expected. Efficient competition amongst self regulatory bodies cannot always be anticipated: there are some conditions and limits to the hypothesis of self regulatory bodies competing in the way predicted by the regulatory competition model.

## **2. CONDITIONS AND LIMITS OF COMPETITION AMONGST SELF REGULATORY SYSTEMS.**

The paper does not assume that competition is a panacea, nor that it should emerge and develop efficiently under any circumstances. Rather, it will show that there are limits in applying regulatory competition to a situation where regulators and regulated are the same entity. In so doing, it is useful to begin by assessing when and how competition develops amongst regulatory bodies.

### **2-1 Conditions for regulatory competition to emerge and develop efficiently: the link with public intervention**

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<sup>40</sup> Sun and Pelkmans 1995), op. cit. emphasise the dynamic character of regulatory competition. It triggers an iterative process.

<sup>41</sup> See Easterbrock, F. (1994, Federalism and European Business Law, International Review of Law and Economics, 14, 125-132, who asks a very simple question : as we know so little about the effects of law, why not employ market forces to assemble knowledge, just as we use competition to assemble information into prices.

The conventional explanation of regulatory competition is that, given an effective threat of exit, spontaneous forces would discipline States against enacting laws which set an inappropriately high or low level of regulation<sup>42</sup>. However, this vision can be challenged because competition between legal rules is not a spontaneous process<sup>43</sup>. Regulatory arbitrage and regulators' response to market force condition the development of competition. I propose to identify which factors are likely to influence and/or facilitate regulatory arbitrage between self regulatory bodies and the factors that have an impact on self regulators' decision to compete. This identification shows, first, that competition among self regulatory systems is not always possible. Secondly, competition among self regulatory bodies and public regulation are not alternative modes of regulation. Instead, public regulation is a frequent pre-requisite for the (efficient) development of regulatory competition.

### **2-1-1. Conditions for the emergence of competition**

First, regulatory arbitrage must be possible. This is crucial since, in the absence of regulatory arbitrage, legal rules can coexist and never compete<sup>44</sup>. Therefore, the first condition to be met is the existence of a 'market for self regulations', i.e. the professionals must have the opportunity to choose among alternative and substitutable self regulatory systems<sup>45</sup>.

This remark leads first to the conclusion that regulatory competition among self regulators cannot develop where a self(regulator) is in a monopolistic situation. Although it might be seen as a very trivial conclusion, it must not be underestimated because

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<sup>42</sup> See Barnard, C. and Deakin, S. (2000) Market Access and Regulatory Competition, Working Paper of the Jean Monnet Program, New York University School of Law, No 9/01.

<sup>43</sup> See Barbou des Places, S. (2004) Taking rules into consideration. EU Asylum Policy and Regulatory Competition, 75-98.

<sup>44</sup> As it is illustrated in the context of company law in Europe. Scholars indeed consider that regulatory competition does not emerge among the 15 company laws because the so-called *siège réel* condition limits the degree to which companies can choose its applicable law. See Deakin, S. (2002) Regulatory Competition versus Harmonization in European Company Law, in Esty, D. and Gerardin, D. (2001), Regulatory Competition and Economic Integration, Comparative Perspectives, OUP, 190-217; and also Woolcock, S. (1996) Competition among Rules in the Single European Market, in Bratton, W., Mc Cahery, J., Picciotto, S. and Scott, C. International Regulatory Competition and Coordination, Perspectives on Economic Regulation in Europe and the United States, Clarendon Press, Oxford.

<sup>45</sup> Alternative and substitutable products mean that models of self regulation must respond to some distinguishable consumer's preferences while at the same time they constitute real alternatives. The substitutability is not determined *ex ante* but is determined by the consumer i.e. the professional here.

professional bodies frequently have a monopoly of regulation in their country. Therefore, before considering the possible effects of competing self regulations, it is necessary to evaluate whether it is possible to put an end to the situation of monopoly, either by obliging one profession to compete with another profession in the same country<sup>46</sup> (intraprofessional regulatory competition), or by creating the conditions whereby the professionals can access self regulatory systems of other countries.

If there is a market of self regulations, additional conditions must then be met. First, self regulation consumers (i.e. the professionals) must be granted the legal capacity<sup>47</sup> to move and change jurisdiction, whether it is physical mobility or the capacity to choose a foreign rule. Public intervention can thus be needed to guarantee intra-European mobility. Let us consider for instance the capacity for a professional to choose between a German and a Spanish self regulation: it largely depends upon the existence of mutual recognition rules and/or choice of law rule<sup>48</sup>. Accordingly, it can be the role of the public regulator to ensure that exit costs are not too high and that information is provided so that the professionals can exercise its arbitrage.

A problem thus arises when the competing models of self regulation are composed by entry barrier rules<sup>49</sup>, because they hinder mobility and regulatory arbitrage capacity. I do not share Ogus' optimism when he considers that «competition would obviously prevent self regulatory agencies from creating barriers to entry». If a professional is not allowed to access a professional body and its regulation, this self regulation risks simply being insulated from competition with other self regulations. Therefore, the development of competition among self regulatory systems is to a large extent a non realistic hypothesis in the presence of entry barriers rules<sup>50</sup> and public intervention can be necessary to prevent self regulatory bodies from adopting entry rules. A conclusion is that not all rules composing a self regulation are *per se* compatible with the idea of competing self regulatory systems. Hence the importance, when addressing self regulation through the

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<sup>46</sup> A good example is the introduction of competition between barristers and solicitors in the UK.

<sup>47</sup>Of course, the obstacles to mobility are not only legal: other barriers to movement exist such as linguistic, cultural, and practical barriers. It might be that these barriers are particularly relevant in the case of self regulations. Yet I assume here that they are not sufficient to impede mobility and the exercise of regulatory arbitrage.

<sup>48</sup> See Spamann, H. (2001), Choice of Law in a Federal System and an Internal Market, Working Paper of the Jean Monnet Program, Harvard Law School, No 8/01, 1-44.

<sup>49</sup> Such as certificate or diploma requirement to access the organisation.

<sup>50</sup> To be sure, it may be sufficient for a few, marginal consumers to make (or be prepared to make) the move in order for a disciplinary effect to arise.



perspective of competition, to consider the self regulation aspect (the form) but to also seriously examine the substance i.e. the content of self regulation. And in any case, these examples confirm that public intervention and regulatory competition are intertwined.

Finally, regulatory competition will start only if regulators are responsive to the threat that the regulated comprise a changing 'jurisdiction'. This presupposes that self regulators have both incentives to compete to attract or hold membership and the capacity to respond to market forces<sup>51</sup>. Incentives are of a different nature: reputation, gain where the newcomer pays an entrance fee, strength in negotiation with other groups, etc. The capacity is, however, tied to, and closely connected with, public intervention. When government delegates a professional body the task to self regulate a sector, the scope of the public delegation delineates the capacity of response given to the self regulator. This delegation shall be sufficient to allow the self regulatory body to act as a competitor, i.e. to be in a position to design rules with a view to attract new members to the class of the regulated. This also raises the question of the right to create a self regulation. Since competition requires several competing regulators, the public regulator must guarantee newcomers the possibility to enter the market of regulation, like the right for professionals to create a regulatory body that is likely to enter in competition with the "historical" self regulator, either in its country or in another.

It ensues from all of the above that public regulation is a frequent pre-condition for competition. The next subsection shows that public intervention should not be limited to ensuring the conditions of emergence of competition. It is also required to avoid a negative outcome of the competitive game.

### **2-1-2 Conditions for efficient regulatory competition.**

As mentioned in the introduction, regulatory competition scholars are divided on the result of competition among rules. Whilst a race to the bottom has been predicted by some, others describe a race to the top, namely, the so-called 'California effect'<sup>52</sup>. A third

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<sup>51</sup> For the purposes of simplicity, it is assumed some degree of rational behaviour of the self regulatory bodies. They are assumed to be systems responding to opportunities and threat posed by their external environment. Yet a comprehensive view would require to consider that the self regulator is not a monolithic and rational decision making body. A problem of collective action might arise also for self regulations that influences the capacity to respond to market forces and to compete.

<sup>52</sup> Vogel, D. (1995) *Trading Up: Consumer and Environmental Regulation in a Global Economy*, Harvard University Press. He explains that competition may at times push the level of regulation upwards. Strict

generation proposes an intermediate vision<sup>53</sup>. It accepts the presumptive benefits of competition but has defined conditions under which competition would fail to produce the socially optimal outcome<sup>54</sup>. In this vein, it must be agreed that a prediction of the outcome of competition among self regulation is impossible. Nevertheless, this paper proposes to identify some variables that may have an influence on the result of competition.

*The many variables that can influence the outcome of the game*

Let us now imagine a situation in which several self regulatory bodies are competing in order to attract new members to the same regulated profession. A race to the bottom will occur if, as a result of the competitive game, self regulators « harmonise » their regulation at a level that is not pareto-efficient, i.e. if they start a deregulation race designed to attract professionals by granting them the possibility to extract rents to the detriment of the standards of quality. Such an outcome is predictable if professionals opt for a regulatory regime that minimises their net regulatory burden, i.e. select self regulation that does not constrain them to grant too high a level of quality or that maintains a situation of information asymmetry with their clients. To be sure, one could argue that only 'bad' professionals have an interest in selecting lax regulation. Therefore, 'good' professionals, who want to have good reputation (and to be able to charge substantial prices for their services) will opt for more stringent self regulation that provides the consumers with more information and more guarantees of quality. Therefore, because good professionals chose stringent self regulation and bad professionals choose law self regulations, no race to the bottom shall be predicted.

However, this conclusion is valid only under the assumption that consumers are able to identify the differential impact of competing regulatory regimes, i.e. if they are able to identify the price and the quality of services provided. Where the assumption is not justified, price variance will prevail over quality variance in determining consumer choice,

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regulation need not be a competitive disadvantage. High standards may even favour domestic producers, because it is often easier for them to comply than for foreign competitors. Hence industry may occasionally lobby for higher levels of protection. It is dubbed the 'California effect' because environmentally conscious Californians demanded progressively higher levels of protection regarding car emissions and other fields and the Californian market was large enough to pull other States along.

<sup>53</sup> In the line of Bebchuk, L. (1992), Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law, 105 Harvard Law Review, 1435.

in conformity with the market of lemons' prediction. In this case, 'a race to the bottom' may ensue leaving predominantly low cost/lax standards combinations.

This very simple description demonstrates that the outcome of the game cannot be anticipated. However, it also suggests that efficient competition amongst self regulators is predicated on the efficiency of the second tier of competition, i.e. competition whereby suppliers of services compete to attract consumers of services. In a way, this is a disappointing conclusion because the analysis of competition among self regulation is very circular. Indeed, self regulation is adopted in response to inefficient competition for the provision of services. To compensate for the shortcomings of self regulation, it is then suggested to introduce competition among self regulatory bodies. With a conclusion such as the outcome of this competition depends on the efficiency of the first tier of competition, we come back to the starting point.

Nevertheless, this description permits one to conclude that regulatory competition is unlikely to have the potential to correct failures. Regulatory competition theorists know that competition is unable to curb the externality problem. Here it can be added that regulatory competition is unlikely to address some frequent criticisms of self regulation. Therefore, in the absence of certain conditions, and in particular, in the absence of measures of public intervention, it cannot be assumed that the competition among self regulatory bodies is - alone - a consistent project for better regulation.

*Tamed and assisted competition<sup>55</sup> among self regulators.*

Let us consider the problem of asymmetrical information in the provision of professional services. As mentioned earlier, self regulation is set out to solve this information problem. Yet self regulation does not suppress the problem; it compensates the asymmetry by imposing rules that will ensure a given result, which is in the interest of consumers (namely the quality of the services provided). Therefore, if self regulatory bodies start competing, the problem of information asymmetry is in theory still present. The problem comes with the idea that efficient competition among self regulators pre-

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<sup>54</sup> See also Revesz (1992), R. Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation, *New York University Law Review*, 67(6), 1210-1254.

<sup>55</sup> I draw here from Anthony Ogus' idea of 'Agency assisted competition' Ogus (1995), *op. cit.*, pp. 103-105

supposes efficient competition between professionals, because this in turn assumes that the information asymmetry problem is solved.

As a consequence, where the problem is information asymmetry, some public institutional intervention may be desirable to remedy the race to the bottom. A public agency or government should serve as a referee: its job would be to prevent self regulatory bodies from discouraging competition within the industry or the profession. Ogus<sup>56</sup> suggests a system whereby self regulatory agencies are required to submit their regulatory regime for approval by independent, public agencies that, thus, constitute a second tier of regulation<sup>57</sup>. Ideally speaking, the role of the public agency would be two-fold. On the one hand, it would promote competition between self regulatory agencies by searching for evidence of, and if necessary eliminating, cartelisation. On the other hand, it would address the race to the bottom problem by itself laying down minimum quality standards which the self regulatory agencies regimes must presumably satisfy. As such it would act as a proxy for insufficiently informed consumers.

This observation leads us to the following conclusion: whilst according to the economic theory of regulation, public intervention is an alternative to competition (i.e. it is the solution that arises when competition has failed to produce optimal outcome), public intervention is a condition of regulatory competition. This holds true for competition among public national regulators and is crucial when competitors are self regulatory bodies. This also suggests that there are some limits in the use of the “pure” regulatory competition scenario.

## **2-2. Limits of using the regulatory competition model**

From the beginning, the paper has assumed that the regulatory competition model can be fully transposed to the self regulation debate. The following sub-section proposes to discuss this assumption.

### **2-2-1 Competition among self regulatory bodies: a complex case of regulatory competition**

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<sup>56</sup> Ogus, *ibidem*.

<sup>57</sup> He gives the example of the Financial Services Act 1986 in which a general public agency overviews the regimes operated by five self regulatory agencies.

Competition amongst self regulatory systems is more difficult to portray than ‘traditional’ regulatory competition because it is more complex.

### *Composite self regulation*

Self regulation has a composite character. Self regulation that organises professions is a clear example of a complex set of rules, covering rules relating to access, conduct, price and so forth. In the selection of the optimal regulatory burden, the professional tries to maximise its interest. Its task is therefore complex because the optimal regulatory burden is a balance between the different rules that compose the self regulatory system. In addition, it is frequently the case that the rules which form a given body of self regulation purport to (and do) achieve contradictory objectives. For instance, the regulation of fees in combination with limitations on entry is dysfunctional in view of improving quality, since it is precisely the facilitation of market entry that raises the chances of a successful quality-enforcing policy. Therefore, entry rules and fees rules can conflict with quality standards enacted by the self regulators. In such conditions, efficient regulatory arbitrage is the result of a very complex analysis. To be true, in traditional regulatory competition, firms also choose a regulatory burden which is a combination of company law, tax law and social or environmental law provisions and their arbitrage is the result of a complex comparison. However, the hypothesis of a regulation composed by rules that purport to achieve different result is a characteristic of self regulation, since self regulation is precisely a balance between the public and the private interests, while public regulation are assumed to be enacted only in the public interest.

### *A same actor for different roles*

Another original feature of competition among self regulatory bodies concerns the actors involved in the competitive process. If we bear regulatory competition vocabulary in mind, there has to be a ‘regulation provider’ and a ‘regulation consumer’. According to this model, regulation providers are States, and consumers are firms. Competition is a one-level process, between regulators that compete to attract consumers. The situation is different with competition among self regulators because a professional is at the same time a ‘regulation provider’ and a ‘regulation consumer’, so to speak. As a consequence,

competition is a more complex game to predict than traditional regulatory competition. Competition among self regulatory bodies is indeed a two-level process whereby regulators compete to attract consumers, i.e. professional bodies try to attract professionals. However, in addition, professionals try to attract clients to sell their service. Because the regulator is also the regulated, the professional's need to be attractive (in order to sell its services) influences its arbitrage between different self regulations, which in turn influences the elaboration of self regulation.

These two features explain why the hypothesis of competition among self regulators does not always correspond with the model. It is therefore unsurprising that the outcome of the game is hard to anticipate.

*What is the alternative to inefficient competition?*

Finally, a question comes when competition among self regulators is inefficient: what should be done? The American model of regulatory competition has been successfully imported or 'transplanted' into Europe because it proposes the simple following equation. When competition turns out to be negative (race to the bottom), there is a strong argument for co-operation and centralised action at the federal level.

By contrast, no such clear-cut conclusion is available where competition among self regulators turns out to be negative. Let us imagine the competition among self regulatory bodies that organise the legal profession in the EU. If competition turns out to be negative, there is not a simple alternative but a set of different possibilities. A first conclusion is that self regulation must be replaced by public regulation at the national level. The question will follow that concerns the degree of public intervention: should we replace self regulation by comprehensive public regulation? A second conclusion is that public regulation should be enacted at the European level, but the question will arise: Which kind of European regulation? And how shall it be enacted? Thirdly, it is arguable that self regulation need not be replaced by public regulation. Instead, public intervention is required to ensure better development of the competitive process. One can imagine public intervention to ensure that conditions for efficient competition (information, mobility) are met, or to introduce minimum standards that will impede a race to the bottom. The latter solution prevents self regulators from downgrading their standards

below a certain level. This guarantees that the competitive race develops towards the top.<sup>58</sup> A last approach, more in line with the current European good governance debate would imagine a rule making system that combines mechanisms of competition among self regulatory bodies with mechanisms that emphasise the role of a widely representative stakeholder body<sup>59</sup>. The system would give an important role to consumers' participation and develop countervailing power<sup>60</sup>, which is central for competition among self regulatory bodies insofar as it is a two-tier regulatory competition.

Finally, it is clear that regulatory competition is unlikely to provide comprehensive answers and solutions. This does not militate against analysing self regulation from the perspective of competition theory but suggests that competition is perceived broadly in a meaning that is not constrained by the assumptions and categories of regulatory competition theory.

### **2-2-2 Competition as a process of justification by comparison**

Regulatory competition theory is a useful analytical framework because it permits to imagine a world where professional services are self regulated and compete. Yet this vision of competition as a process driven by the professionals' regulatory arbitrage is just one but many visions of competition. I suggest that the idea of exposing self regulatory bodies to competition should not be limited to this market driven vision.

Because the critiques raised about professional self regulations mainly relate to the fact that they alter competition and serve private interest, it was shown that the crux is to find a means to force self regulators to enact legitimate and efficient rules. Regulatory competition is a dynamic force that can play this role but it is not always the solution, in particular when regulatory arbitrage is impeded by various legal or economic obstacles or when there is a risk of race to the bottom that a public intervention is unlikely to curb.

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<sup>58</sup> Reich (1992), *op. cit.*, and Van den Bergh (1997), *op. cit.*

<sup>59</sup> See Gupta, A. and Lad, L. (1983), *Industry Self Regulation: An Economic Organizational, and Political Analysis*, *Academy of Management Review*, 8(3), 416-425.

<sup>60</sup> Van den Bergh indicates that the Netherlands and the UK have taken the first step. In the Netherlands there are more than 250 organisation of patients. In the UK, a new body has been created, the Lord Chancellor's Advisory Committee on Legal Education, the majority of whose members are not practising lawyers. Professional bodies will have to submit regulations to the Advisory Committee for its endorsement.

In such a situation, it is suggested that instead of regulatory competition theory, other models of competition can be applied. An alternative one is the model of yardstick competition<sup>61</sup>. It is used when a regulator (a principal, here it can be the public national or European regulator) has several agents (firms, here it could be self regulators) under its control and the regulator is relatively uninformed about industry conditions, and especially if the regulated firm has a virtual monopoly of relevant information. Therefore, the regulatory system is liable to become insensitive to costs and demands conditions (here the problem arises when the regulator ignores if the self regulation offers an optimal combination between public interest and the interests of the self regulator). Yardstick competition attempts to resolve the dilemma by bringing regulated firms in distinct markets indirectly into competition with each other in respect of cost reduction. It involves the reward of each agent being contingent upon the performance of the other agents as well as his own. The best regulatory mechanisms will exploit information from comparative performance.

This approach is relevant for the reform of professional regulation in the EU because it is frequently the case that the professional bodies have a national monopoly in regulation. Accordingly, entry and exit costs are often too high for regulatory arbitrage to exist, and national self regulators are *de facto* insulated from regulatory competition pressure. In such circumstances, yardstick competition theory appears as a useful complementary measure to regulatory competition because it was elaborated to provide answers to the problems met when regulating natural monopolies.

It is suggested that the model could inspire the European regulator. It could try and apply the model and/or borrow from it the idea of comparing the efficiency and costs of the rules enacted by self regulatory bodies. This seems to be consistent with the general view, as regards professional self regulations, that professional bodies should be asked to justify their rules. Indeed the argument recently raised is that each self regulation ought to be justified<sup>62</sup>. In particular when they entail some restrictions to competition, self regulations may be accepted but there must be a clear and convincing justification for them – and not a mere assertion of some vague consumer or public interest. The yardstick competition model would suggest that self regulatory bodies could be forced or

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<sup>61</sup> See Shleifer, A. (1985) A Theory of Yardstick Competition, *Rand Journal of Economics*, 16(3), 319-327.



encouraged to justify their rule by comparison with the rules adopted by their rivals. When self regulators express similar preferences (such as granting a certain quality standard), the comparison between two self regulatory bodies would indeed help identify the rules that deviate from this common aim (i.e. that grant excessive rents to professionals). Similar to regulatory competition, yet following a different procedure, the process of performance comparison and justification by self regulatory bodies can reveal cases where the regulatory framework hinders innovation and modernisation of professional services.

To be true, comparison is a very specific type of competition. It is more ahead of rivalry than competition in its pure economic definition. Competition here is not triggered by the professionals that select the less costly rules. Instead, the process is initiated by a public regulator that sets the stage for a discursive process whereby self regulators are asked to justify their regulatory choices. However, I suggest here that an analysis of self regulation through the lenses of competition theory is all the more productive that it takes as a starting point a broad view of what competing self regulatory bodies might mean.

## **Conclusion.**

The purpose of this paper has been to examine the hypothesis of competition among self regulatory systems. It has explained what could be the theoretical benefits of exposing self regulatory bodies to competitive pressure, in particular with regards to the legitimacy of self regulation, its compatibility with the public interest and its responsiveness to technical evolution. The picture has identified and revealed situations where regulatory competition is not an optimal solution, and cases where the intervention of the public regulator is desirable, both to favour the emergence of competition and to guarantee that it does lead to a race to the bottom. In addition, the paper has explained why the outcome of competition is hard to predict: this mostly comes from the original features of competition among self regulatory systems in comparison with ‘traditional’ regulatory competition. It seems that regulatory competition is, *per se*, unlikely to comprehensively address the problems met by self regulation. However, competition amongst self

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<sup>62</sup> In his discourse mentioned earlier, Mario Monti welcomes the fact that the International league of Competition Law has adopted a resolution which calls for the codes of conduct to specify the objective that a rule is designed to pursue, something which clearly helps to assess its justification.

regulatory systems is a process which accelerates the evolution of self regulation and in so doing, amplifies its effects. This characteristic is stressed by the last developments of the paper. It has been shown that competition is not only the market driven process that regulatory competition theory suggests. Competition between self regulatory systems can be conceived of in a broader sense that is more akin to a political process and in line with discursive theories. Other economic models that regulatory competition, like yardstick competition merit further exploration.

When conceived of in this wider sense, competition provides very interesting elements of reflexion for the debate that aims to find solutions to curb self regulation's shortcomings. However, whatever the competition theory used, the answer depends on the central question: Why do we want to promote competition between self regulatory bodies? The idea of competition among self regulatory systems can indeed be rooted in different normative aspirations.

It can first be part of the argument that assumes the superiority of market driven modes of regulation. Self regulation is assumed to be a preferable solution to public regulation and competition is assumed to be more efficient than public intervention. Accordingly, the main questions to be answered are: Under what conditions competition will develop among self regulatory bodies and what degree of public intervention is needed to ensure the development of competition? A second approach of competition and self regulation is more analytical. Its aim is mainly to answer the following questions: When does competition develop? What can be its result? Can we elaborate a model that can help anticipate the development of regulatory competition, its result and to grasp the factors that influence the development and result? Finally, a more critical approach consists in asking if regulatory competition theory is the appropriate analytical framework to address the questions raised by self regulation. The question is as follows: When dealing with self regulation, to what extent do we have to consider regulatory competition theory and how do we combine it with other models and theories on competition? To be sure, these three perspectives are not antagonist and can be combined. Be that as it may, the three approaches go some way towards recomposing the puzzle of self regulation.