II. General Approaches for a Legal Framework

A. Introduction

When considering the legal framework of the Internet of Things (IoT), it has to be determined which model of regulation should be applied. Thereby, no regulation, traditional government regulation, international agreements, and self-regulation are possible approaches.

No regulation cannot actually be considered a legal framework: the IoT will be too important not to be regulated; therefore, no regulation at all is not an option. State law, as a second method, is not appropriate for a global system such as the IoT due to its territorial limitations.

Consequently, self-regulation and international agreements are to be considered as tools to govern the IoT. For that reason, these two methods of regulation are discussed in more detail in the following.

B. Self-Regulation

1. Background

Self-regulation refers to rules considered by the “governed” people to be adequate guidelines. The legitimacy of self-regulation is based on the fact that private incentives lead to a need-driven rule-setting process.\(^{125}\)

Traditionally, self-regulation (self-government)\(^ {126}\) follows the principle of subsidiarity, meaning that governmental intervention should only take place if the participants of a specific community are not able to find suitable solutions (structures, behaviors) themselves. Since, however, public law defines the contours of private law it also affects the role of self-regulatory mechanisms.\(^ {127}\)

In principle, self-regulation is justified if it is more efficient than State law and if compliance with rules of the community is less likely than compliance with self-regulation.\(^ {128}\) Seen from a broader perspective, self-regulation is “law” which is

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\(^{125}\) On the notion of self-regulation in more detail see WEBER, Regulatory Models, 79–89; see also WEBER WEBER, ordre public, 57–59; CAMPBELL, 758–768; BLACK, 32–37.

\(^{126}\) See GIBBONS, 483–484 and 509–510; GREWICH, Governance, 139–40; WEBER, Selbstregulierung und Selbstorganisation, 211–214.

\(^{127}\) PERRITT, Internet, 892.

\(^{128}\) GIBBONS, 509.
responsive to changes in the “environment”, and which develops and establishes rules independent of the principle of territoriality. The legal doctrine increasingly acknowledges the merits of self-regulation.

2. **Self-regulation as Soft Law**

The theoretical approaches to the self-regulatory model show a multi-faceted picture: In many cases, self-regulation is not only a concept of a private group, but a concept occurring within a framework that is set by the government (directed self-regulation or audited self-regulation). This approach has gained importance during the last decade: If the government provides for a general framework which can be substantiated by the private sector, often the term “co-regulation” is used. The State legislator does not only set the legal yardsticks or some general pillars of the legal framework, but eventually the government remains involved in the self-regulatory initiatives at least in a monitoring function supervising the progress and the effectiveness of the initiatives in meeting the perceived objectives.

In this context, the legal doctrine has developed the notion of “soft law” for private commitments expressing more than just policy statements, but less than law in its strict sense, also possessing a certain proximity to law and a certain legal relevance. Nevertheless, the term “soft law” does not yet have a clear scope or reliable content. Particularly in respect to the enforceability of rules, law is either in force (“hard law”) or not in force (“no law”), meaning that it is difficult to distinguish between various degrees of legal force. Generally, it can only be said that soft law is a social notion close to law and that it usually covers certain forms of expected and acceptable codes of conduct.

3. **Self-regulation as a Social Control Model**

Self-regulation can also be understood as a social control model. Such a system of control consists of rules of normatively appropriate human behavior. Socially accepted rules are enforced through reputational sanctions. The social control

129 Johnson/Post, 1370.
131 For further detail see Weber, Internet Governance, 18–19, with further references.
132 Weber, Internet Governance, 20; for the notion of „soft law“ see also Thürer, 159–178.
133 Weber, Internet Governance, 20, with further references.