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5. Transnational cooperation over the public-private divide: The challenges of co-regulation

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The dynamics of transnational cooperation between public and private regulators and enforcers

The activities of many organizations cross national borders, as transport and trade go from one country to another. Yet each country has its own regulatory culture and tradition, and countries' regulation and enforcement systems are all different. As a result, business processes now operate on a different – usually larger – scale than inspections. This poses at least two problems. First, national inspection authorities may possess insufficient countervailing power in the face of international businesses (Bartley, 2003; Marx, 2008; Van Waarden, 2009). Second, businesses incur considerable unnecessary costs in complying with different, perhaps contradicting, national regulations.

Cooperation among national inspectorates is a logical answer to this, although cooperation among inspectorates is more difficult than may appear, as demonstrated by Groenleer and Kartner in this volume. The current contribution adopts a broader view on cooperation, as it also takes private regulating bodies into account. Many organizations impose norms on others and also carry out inspections or audits to verify compliance. These entail not only regulators and inspectors in the public sector. Private organizations also regulate and enforce, as expressed by the concept 'self-regulation'. At both the national and international levels numerous self-regulation programmes have been organized by companies, trade organizations and nongovernmental organizations (NGOs). There is an entire industry dedicated to standardization, including organizations like the International Organization for Standardization (ISO), accreditation bodies, certification authorities and private inspection bodies.

The very existence of these private regulatory bodies implies opportunities for solving the two problems mentioned in the opening of this contribution. Indeed, private international standards and inspection activities facilitate public regulation and enforcement in some cases. Moreover, they sometimes act on the same, international scale as large companies. They may also have capacities that public regulators lack, such as information-gathering abilities, knowledge of private norms and greater access to human resources (Gunningham & Grabosky, 1998: 52; Ogus, 2004; Garcia Martinez et al., 2013). These are in fact some of the reasons why cooperation with private regulators has the potential to improve public regulation and oversight.

This contribution looks at some of the complexities of cooperation between public and private regulators, from now on called 'co-regulation'. Co-regulation implies that regulation and inspection activities are carried out by multiple different regulatory authorities, each with its own operational logic and history (Schiff Berman, 2007). Public regulators, broadly stated, apply a legal-hierarchical logic, while private regulators apply the logic of the market. When public and private regulators cooperate, these logics inevitably collide, and that collision introduces a degree of dynamism to co-regulation in practice.

The aim of this contribution is to advance understanding of these dynamics and to draw lessons from such cooperation for public inspectorates. First, a typology is sought of co-regulatory efforts, settling on two major types (section 2). For each type, particular characteristics of the dynamics of co-regulation are described drawing on national and international case studies (sections 3 and 4). The final section exploits knowledge about these dynamics to address the issue of cooperation among national inspectorates.

Our intention is not to advocate or refute the value of co-regulation. Rather, we will take co-regulation as a given, and examine how it works out in practice. The analyses is based on the literature and policy documents on transnational co-regulation, as well as empirical findings from the Netherlands. The empirical findings are derived from three case studies on co-regulation involving a desk study and 63 interviews with public and private regulators and enforcers.[110]

Who is responsible? Two types of co-regulation

Co-regulation can be conceived of as a continuum from public regulation to self-regulation (Bartle & Vass, 2005; Van der Heijden, 2009: 65; Senden et al., 2015). A degree of coordination is involved in typical regulation and inspection activities, which generally involve a 'director' (a norm or a standard), a 'detector' (an indicator or information) and an 'effector' (an instrument for enforcement; Hood et al., 2001). As such, co-regulation may entail harmonization of standards, exchange of information and coordination on sanctioning. The essence of co-regulation is that different regulators care about each other's activities and anticipate on them.
Many different types of co-regulation may exist. They are, in fact, too numerous to analyse in this contribution. Moreover, the key issues raised by co-regulation do not relate to the various types. They centre, implicitly or explicitly, on who is responsible for the consequences of noncompliance. Much of the literature centres on failed or

[110] The casestudies are made for my dissertation (Van der Voort, 2013)

imperfect forms of co-regulation (e.g. Dorbeck-Jung, 2010; Van der Voort, 2015). Many critics take the government's perspective and express scepticism about the ability of private parties to regulate themselves. The government is often seen as bearing ultimate responsibility for any regulatory activities aimed at ensuring compliance with laws and, more broadly, to safeguard public values (Dorbeck-Jung, 2010). If traditional regulatory tasks are delegated to private parties, a relationship of mutual dependencies is created between public and private parties. Public regulators become partly dependent on private regulators' performance of regulatory tasks. Adequate performance, however, is not always guaranteed: many self-regulating companies, trade organizations and certifiers lack motivation or capacity to be sufficiently rigorous (Gunningham & Rees, 1997; Hutter, 2006; Potosky & Prakash, 2009).

With this in mind it would seem more sensible to base our typology of co-regulation on responsibilities for regulatory activities. Van der Heijden (2009: 58–73) distinguishes responsibilities for developing the regulatory oversight framework and responsibilities for the execution of regulatory tasks. This distinction suggests the following rough typology of transnational co-regulation:

- *Private parties executing oversight activities within a public regulatory framework.* This type is in line with EU policy, considering their definition. Co-regulation is defined by the EU 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)' [111]. This suggests that private parties may execute tasks that are predefined within a legislative framework set by national or supra-national government. They operate within a framework that they cannot influence. Their only influence is discretionary freedom in interpreting the tasks they are given.

- *Public and private parties both regulating and executing oversight side by side*. This second type suggests private parties setting a regulatory framework themselves, alongside governments. Public and private regimes are separate and independent entities. Co-regulation then emerges when these regimes begin to recognize each other and operate with consideration of the other's existence. This mutual recognition may be explicit, and formulated in public-private arrangements – again regarding standard-setting, information exchange and intervention – though respecting one another's independence.[112]

Both types of co-regulation imply considerable input from public and from private regulators, and they also imply a dynamic of colliding operational logics. The sections below explore dynamics of co-regulation for each of these types.

Private parties executing oversight within a public regulatory framework

The basic model

When private parties execute oversight within a public regulatory framework the tasks of the public and private regulators and enforcers are predefined. Defining the conditions under which regulatory activities are carried out is entirely the responsibility of the government. In this sense, this mode of cooperation is purely hierarchical: government is superior to the private regulators, and the latter's tasks are confined to execution. Government determines the level of discretionary freedom of self-regulatory institutions, and this freedom may well differ per arrangement. The roles of public and private inspectorates may also be defined in the framework, which promotes uniformity. In an international setting, coordination between public inspectorates, too, is centrally defined with predetermined roles. The framework represents the larger system which sets out how public regulators and inspectorates are to relate to private regulators. A well-known model the Community formulating essential requirements of products or processes in its legislation and assigning private standard-setting bodies (European Committee for Standardisation (CEN) and European Committee for Electrotechnical Standardisation (CENELEC)) to develop and adopt operational standards. There are, however, other versions of this model.

In the EU the model of private parties executing oversight within a public regulatory framework is common. Indeed, the very definition of co-regulation takes this as its starting point. It presupposes the prior involvement of a legislative authority that identifies the objectives that should be secured by private actors. Co-regulation is viewed as an implementation mechanism (Verbruggen, 2015).

A number of experiences with this model have been documented at the national level, as evidenced by our first case description.

[111] European Commission, 2014, 2014 Revision of the European Commission Impact Assessment Guidelines - Public Consultation Document, p.37-38; first mentioned in the Interinstitutional Agreement on Better Law-Making (2003) OJ C-321/01

[112] In theory it is possible that public parties de facto execute oversight within a private regulatory framework (Scott, 2002). This category may also be found empirically, but it will not be considered in this contribution.

Case 1. Oversight in the Dutch poultry sector: A confrontation between public and private regulation

Institution of a predefined framework is an attractive option for governments to mitigate the potential risks posed by private regulation. Having responsibilities already explicitly stipulated on paper facilitates accountability. This premise led former Dutch Ministry of Agriculture to draw up a policy framework entitled Supervision of Controls (TOC, *Toezicht op Controle* in Dutch) in 2005. The framework described a system wherein certifying bodies could take over some public inspection tasks and set out the conditions under which this would be allowed. The framework was applied in a voluntary certifying system in the Netherlands' poultry sector. During the negotiations between government and industry on the system to be implemented, public regulators demanded that the private partners provide extra quality guarantees. First, certifiers were to conduct extra, unannounced inspection visits. Second, a penalty in the form of a fine was to be added to the certifiers' sanctioning toolbox. A third, more widely supported demand was that producers were to obtain accreditation for a product certification system (NEN EN 45011). The extra guarantees evoked much resistance. Neither poultry farmers nor certifiers were eager to go along with the fine. The controversy deepened when the fine was declared incompatible with the product certification system. The Dutch Accreditation Council, upon consulting the European Cooperation for Accreditation (EA), called the fine 'unacceptable' for NEN EN 45011 accreditation. As a consequence, the sector faced two mismatched standards, both backed by regulators. While government backed the TOC system, the Dutch Accreditation Council advocated NEN EN 45011. The industry eventually opted for compliance with the latter, as that accreditation was vital for its export position, unlike the TOC.

The extra, unannounced inspections were controversial too. The costs of these visits were to be distributed over the members of the voluntary system, as an expression of the industry taking responsibility for its own quality control. A first controversial point here was how the European regulations should be interpreted. What did 'unannounced' exactly mean? Did it just mean not being programmed in the regular inspection rounds, or would a call the day before also be forbidden? Government resisted any room for discretion in this regard, while the self-regulating industry demanded more freedom for manoeuvre. The government demanded the stricter interpretation, whereupon the controversy shifted to the required number of inspections. Industry wanted the percentage low, to minimize cost and burden, while government wanted a higher percentage, to provide stronger guarantees and accountability. The controversies eventually resulted in noncompliance and distrust, compromising the TOC's effectiveness (Van der Voort, 2013: 79–116).

This case demonstrates the types of confrontation and issues that arise in regulatory systems involving varies types of agencies. Government wanted to be invulnerable to accountability issues, and undertook to protect itself by defining a strict framework and demanding extra guarantees. Participants in the voluntary system, however, would bear the costs, and they feared for their competitiveness, especially in relation to non-participants. Moreover, demands made by government sometimes proved incompatible with those of the standardization industry, which compelled the industry to make difficult choices. Industry considered its position towards international trade partners more important than its position towards regulators operating on a national scale.

Case 2. Medical devices: More government as a reflexive response to incidents

The model of public regulating frameworks is common at the European level. A well-known system for enabling international trade while still respecting national jurisdictions is the CE (*Conformité Européenne*) marking of products. Under the system products are allowed to be traded within the entire European Union if they are approved by an inspection organization assigned by an EU national government (**90/385/EEC**). The assigned inspectors are usually private actors and are called 'notified bodies'. Notified bodies are designated, monitored and audited by the relevant member states via the national competent authorities, usually ministries, national agencies or inspectorates.

Trade in medical devices is regulated this way, in accordance with three EC Directives (90/385/EEC, 93/42/EEC and 98/79/EC). Though products with a CE marking can circulate freely throughout the EU, there are conditions. According to the regulations, responsibility for gaining approval lies with the manufacturer. They have to prove that their product meets predefined 'essential requirements'. Furthermore, they must, depending on the risks of the device, have their product inspected by a notified body. The notified body writes a conformity assessment. Member states must allow products with a CE mark into their market, unless they can prove that the product fails to comply with the essential demands in the pertinent directives.

Many medical devices are traded within the European Union. Once in a while problems arise, which often imply direct health risks to users. This was the case for the breast implants produced by Silimed. When faulty products are determined, critics typically respond by addressing individual regulators or inspecting bodies, though notified

bodies may be targeted as well. The professionality of notified bodies may be questioned. For instance, the *British Medical Journal* (2012: 345, e7126) published a list of eight notified bodies that would 'likely [be] more interested in repeat business than patient safety'.

A second type of response concerns the system. Media and politicians may raise concerns about the autonomy of the notified bodies. After all, these institutions are selected and paid by manufacturers to conduct their analyses of product safety. Wouldn't there be ample incentive for notified bodies to be lenient to manufacturers? It is difficult for government to brush aside this critique. In 2014, EU authorities considered strengthening controls on medical devices, looking particularly at the role played by the notified bodies, in the context of the foreseen adoption of two new EU regulations on medical devices (2012/0266 (COD) and 2012/0267 (COD)). The following measures were considered, among others:

- extra requirements for notified bodies, for instance, regarding the qualifications of their personnel;
- institutional changes among the notified bodies, for instance, creating a limited elite group of notified bodies for high-risk products;
- reinforcement of public regulation and oversight by establishing an extra assessment committee for medical devices and carrying out extra market surveillance.

These kinds of measures mark a departure from the premise of the manufacturers' responsibility, and a shift towards a greater public grip on manufacturers and the notified bodies. They also imply a tightening of the conditions under which private regulators operate and possibly a loss of their potential capacities.

Case 3. Admittance of the Fyra trains in the Netherlands and Belgium: Interpretation of the inspector's role

The Netherlands and Belgium developed a high-speed rail line called the Fyra to provide rapid service between Amsterdam and Antwerp. The trains to be used were being manufactured by AnsaldoBreda. The trains were completed and admitted to the Dutch and Belgian infrastructure as being in compliance with the pertinent EU regulations (Directives 2007/58/EC, 2007/59/EC, 2008/57/EC and Regulation 13712007). The procedure went as follows:

- The manufacturer was deemed responsible for producing the required quality of trains and thereto was to implement a quality management system.
- The manufacturer was deemed responsible for complying with EU regulations, as published in the Technical Specifications for Interoperability (TSI), and with national regulations, the latter mainly regarding national infrastructure.
- The manufacturer was to hire a notified body to audit its quality management systems and compliance with regulations.
- The national public inspectorates were to check compliance with EU regulations. This was to involve assessments of the plausibility of all documents submitted by the manufacturer and the notified body as well as confirmation that all necessary procedures were followed.

Yet, just five months after admittance of the Fyra trains, they had to be removed from the railway network due to a number of technical failures and insufficient assurance of the manufacturer's ability to solve them.

In the Netherlands the situation was a serious blow, as the state's financial investment in the trains was considerable. To understand how the procedures could have failed, the Dutch parliament held an official inquiry, which is its greatest control instrument. The inquiry included in-depth research on the admittance procedures and hearings under oath. The investigators described their resulting impressions 'appalling'. They criticized the process, and particularly the way the Dutch Human Environment and Transport Inspectorate interpreted its role and the admittance system itself.

In short, the system was said to place inordinate emphasis on paperwork, and the inspectorate department responsible for admittance was said to have conducted too few on-site inspections. Within the inspectorate, various views circulated on whether they were even allowed to carry out physical inspections of the trains. The Belgian inspection service, DVIS, exhibited less constraint in doing so. The Dutch inspectors who were interviewed claimed that they were operating in the spirit of the European regulations by taking trust as their starting point, by being transparent, and by sticking to the roles they had agreed upon with the notified bodies. The Dutch Human Environment and Transport Inspectorate considered its role to be a process one. Yet sticking to this role was eventually at odds with responding to alarming signals about possible deficiencies in the trains. Eventually, the parliamentary inquiry committee concluded that those signals should not have been ignored.

This case suggests that differing expectations may exist of national inspectorates within the European regulatory system. The Dutch Human Environment and Transport Inspectorate claimed to be complying with European regulations overseeing procedures. The parliamentary inquiry commission – which is a political body – expected a more classic inspector. It criticized the Dutch inspection service for placing too much trust in the notified bodies, focusing too much on process audits and a too limited

interpretation of their mandate (Tweede Kamer, vergaderjaar 2015–2016, 33 678, nr. 11: 292–296).

The dynamics of co-regulation in public regulatory frameworks

Several observations on dynamics can be made based on experiences with this form of co-regulation. First, co-regulation is a zero-sum game. Ideal co-regulation for the one is a burden for the other. Conflicts of interest regarding standards are especially apt to arise between public regulators and the self-regulating industry. Public regulators want guarantees of compliance with laws and regulations, even when inspections are done by private bodies. Transaction costs incurred by industry to provide these extra guarantees are often framed as the industry 'taking responsibility'. Self-regulating industries need transaction costs to be low, to retain their competitive position, in relation to both international competitors and competitors that have not joined the self-regulatory initiative.

Second, differences between national public inspectorates remain, even if international regulatory frameworks are very detailed. Arguably, the more detailed the frameworks become, the more room for interpretation they offer. The medical device case pointed to different perceptions of the quality of the notified bodies. The Fyra case is indicative of differences across public and private regulators and inspectorates regarding their interpretation of their own roles and positions.

Third, a centralistic reflex is common following incidents. Political bodies seem at unease with innovative roles for public inspectorates. Can they accept the consequences of manufacturers' responsibility? And, can they continue to do so after incidents as well? In the immediate aftermath of incidents, politicians typically demonstrate little understanding of the new roles of inspectorates. Instead, we invariably see governments pulling responsibilities back into the public sphere, including extra public checks. This means that the accent of end-responsibility continuously shifts from government to industry and back again – and the roles of public inspectorates with it.

Public and private parties both regulating and executing oversight side by side

The model

Our second variation of co-regulation is when public and private parties both regulate and execute oversight side by side. In this model public and private regulators are independent entities. Both carry out regulatory activities based on their own standards. They have no hierarchical relationship. Insofar as they coordinate their activities, they do so based on mutual adjustments. The dynamics of this type of co-regulation are introduced below based on two cases.

Case 1. Dutch coach travel: Co-regulatory experiments and the problem of crossing borders

The Dutch coach travel trade organization established a regulation scheme to improve the quality and image of coach travel operators. It's aim was to create a visible quality mark based on management system norms (ISO 170210) , and to display that hallmark on company buses. The hallmark was to signify a level of safety. However, the Dutch Accreditation Body asserted that a certificate based on management systems represented the quality level of the organization, and not of a bus. A sticker on a bus would suggest otherwise. The problem was solved by using management system certification as just one input among others to determine whether the hallmark should be granted. This evolved into a self-regulatory system encompassing a board, commissions and networks of public and private regulators. The industry didn't mind having government inspectors involved, as they provided a 'reality check', alongside the industry's own management audits. Public inspectorates, in turn, demonstrated interest in the hallmark, even considering giving it a role in their own risk analyses. The former Dutch Inspectorate of Transport and Waterworks suggested that a differentiated inspection system might be used, with a lighter regime for operators shown to have an adequate management system. Public inspectorates like the Dutch department of motor vehicles (Rijksdienst voor het Wegverkeer) and the Inspectorate of Transport and Waterworks have since signed bilateral agreements with the trade organization to exchange information.

The regime will harness important synergies between public and private enforcement. Public and private inspection methods in this case appear to complement each other. Coach travel operators, for example, didn't fear public inspections because of the potential fines involved. Indeed, the fines were not excessive. Information on infringements encountered by public inspectorates is forwarded to the private regulators, and these latter may elect to withdraw a hallmark. This is viewed as a much more serious penalty. A synergy is thus achieved between the sanctioning instruments. However, the relationship with surrounding countries appeared difficult. Travel coaches regularly cross borders, and in such cases operators must comply with regulatory regimes of different countries. Both inspectorates and trade organization feared that foreign regulators would consider the Dutch co-regulatory regime too light and therefore single out Dutch coaches for inspections (Van der Voort, 2013: 129–143)

This case shows that a co-regulatory regime is easily complicated by the inclusion of multiple regulators. Agreements, covenants and networks emerge that must be fit into regimes such as ISO 17021, while fulfilling the expectations of foreign inspectorates. This wouldn't be a problem if expected synergies outweighed potential transaction costs. However, interaction between regulators easily results in unique, even experimental regimes. For a sector that must also work with foreign regimes, any experimental element tends to be a drawback rather than an advantage.

Case 2. NGO-driven self-regulation: Unstructured and intended governmental stimulus

Mutual adjustment is especially relevant in the international context. However, governments have struggled to muster sufficient countervailing power to call out global companies on standards issues (Marx, 2008; Van Waarden, 2009; Bartley, 2011). NGOs may be better placed to do so. Many global NGOs have actively built global regimes based on their ideals. Well-known examples are the Forest Stewardship Council (FSC) for timber, the Marine Stewardship Council (MSC) for fisheries and Fair Trade for food. All formulate norms and may also impose sanctions, for example, withdrawal of their hallmarks or 'naming and shaming'. Regarding sustainability issues, these NGOs have stepped into the vacuum left by governments.

Do public and private regulators act independently? Sometimes they do. Are they *de facto* independent from each other? No. This case description centres on the relationship between national governments, supranational governments and NGO-driven regulatory regimes based on the literature. The description will show that governments play an important role in stimulating these NGO efforts. Moreover, their stimulus role is not restricted to joint supranational efforts.

The case for uniformity. Governments working together have often played an important priming role for NGO-driven regulatory regimes. In 2005, the Food and Agriculture Organization of the United Nations (FAO) published standards for eco-labelling for fisheries. This intergovernmental action was intended as a contribution towards a joint position on quality standards and certification. Such a joint position, it was thought, could then evolve into an authoritative standard. In the FAO fisheries case, this goal was achieved and FAO-initiated standards became the reference point for fisheries and certifiers. Gulbrandsen (2014) called this mechanism 'coercive isomorphism' (after DiMaggio & Powell, 1991). An unintended consequence was that MSC became the 'golden standard', because it was the only initiative that could comply relatively easily to the FAO standards, and it used them in its marketing efforts.

A different example of priming for private regulatory initiatives was described by Hallström and Boström (2010: 74). They observed that some of their interviewees from MSC saw the EU as a potential competitor, because discussions were under way within the EU on erecting its own labelling system. Whether or not this perception is correct, it did incentivize MSC to remain stringent on fisheries.

Both examples suggest that cooperation between national governments can act as a catalyst for global self-regulation initiatives, even if there is no intention to do so.

National governments are hardly able to set authoritative international standards. However, they can play stimulating roles. First, they may operate as clients of hallmarked goods. Gulbrandsen (2014) found that procurement policies and public comparisons enabled benchmarking. Governments developing policies to buy hallmarked products was a signal to other clients that the government took the hallmark system seriously. Governments thus provide legitimacy to self-regulation initiatives. This in turn provides incentives to these initiatives to interact with national governments as clients.

Besides as clients, national governments may serve as data providers for self-regulatory institutions (Gulbrandsen, 2014). MSC auditors, for instance, need reliable data about the fish stock in various areas. Note here that data from government seems to be viewed as reliable and unprejudiced – or in any case, as the best there is. Senden et al. (2015) call these often implicit forms of incentivizing self-regulation 'tacitly-supported self-regulation'. They give the example of government posing a "threat of shifting towards a public regulation". The examples as mentioned here, however, indicate that the array of possible incentives is much wider than that.

National governments may act individually as clients and data providers. However, the legitimacy effect of their involvement may be larger if governments act collectively. In such a case, governments can have a very real influence on a market, as a limited number of initiatives receive visibility as compliant with public procurement policies. This requires coordination at a supranational level regarding preferences and criteria that governments would like to set. This will be a political process to which inspectorates may contribute as experts.

The need for uniformity? Successful interaction between governments and self-regulation initiatives, of course, depends not only on the uniformity of government involvement. Indeed, some diversity among governments is not problematic in itself. Initiatives like MSC, FSC and Fair Trade tend to adapt to local circumstances and

regimes. They also have a relatively flexible governance structure, which enables them to respond to ever-changing economic, ecologic and social forces (Taylor, 2005). MSC has a more hierarchical structure, but has built in flexibility by keeping its number of principles low (Gale & Howard, 2004; Hallström & Boström, 2010: 64–66). Fair Trade has diversified its labels and contracts tailored to the countries in which it is active (Taylor, 2005).

This responsiveness implies that national regimes are important. Cashore, Auld and Newsom (2003) found that FSC membership of suppliers strongly depended on local conditions. Is forestry well organized? Is sustainability of forestry seen as a political problem? If not, either the number of memberships remained relatively low, or membership was motivated by economic calculation. National governments can influence such factors. These observations cast doubt on the suggestion that 'the more cooperation the better'. Self-regulation initiatives may cope quite well with a diversity of national regimes, and national governments may not always need foreign governments to stimulate self-regulation. This mitigates the price of diversity.

The price of uniformity. Uniformity comes at a price, as demonstrated by the global problems experienced in some self-regulatory initiatives. A first issue is democracy. Global self-regulation may have difficulty representing vulnerable values and individuals (Bernstein & Cashore, 2007; Dingwerth, 2008; Marx & Cuypers, 2010). Although economic, ecological and social values are incorporated in their governance, MSC and FSC are often criticized for being too acquiescent to large corporations (Hallström & Boström, 2010: 35). A different global issue concerns implicit trade barriers. Large companies may more easily comply with standards, for example, regarding management systems. Therefore, strict environmental regulations may give them an added advantage over smaller scale, often poorer companies. A possible consequence is a growing divide between rich and poor and between North and South (Marx & Cuijpers, 2010). Like democracy, public values are also at issue, and for solutions one might easily resort to (global) governments. Summarizing, the price of uniformity is this: the more explicitly and uniformly governments reinforce global self-regulatory efforts, the more they also confirm, and even reinforce, its problems.

The dynamics of co-regulation by mutual adjustment

Four observations on dynamics can be made based on our cases of this form of co-regulation. First, national governments support global market mechanisms for private regulation. National governments have acted as clients for hallmarked products and in doing so have legitimized the global, private hallmark systems underlying them. Moreover, government purchasing decisions may stimulate – sometimes globally – suppliers to get hallmarked. As such, national governments support market mechanisms without supranational policies.

Second, private regulators are responsive to national regimes. Mutual adjustment as a principle for co-regulation causes both public and private regulators to be responsive. The Dutch coach travel industry initiated co-regulation, the public inspectorates joined in. FSC and MSC differentiated their regimes per country. MSC is operating in anticipation of a possible EU role as competitor. This implies that co-regulatory initiatives emerge in a sequence of actions and reactions, and take the form of regimes that could hardly have been imagined beforehand.

Third, experiments at the national level are seldom exportable. The Dutch coach travel regime was difficult to imagine beforehand. However, such a regime may be framed as experimental afterwards, and experiments are not always considered acceptable internationally. Indeed, there is no common framework for acceptability, as is the case in the other type of co-regulation. Each country assesses for itself the reliability of private regulation and builds its own regime around it. As Senden et al. (2015) pointed out, the regulatory traditions and legal cultures within the EU vary, as does the reliance on self-and co-regulation.

Fourth, serendipity is important. In supranational reality, independent co-existence of public and private regulation is an illusion. Public and private regulators influence each other, if only by their very existence. The priming role of FAO and MSC's anticipation of possible competition from the European Union are indicative of governments' role in incentivizing self-regulatory efforts, even unintended.

Cooperation between public regulators

What lessons can be drawn from these dynamics for cooperation among public regulators? This contribution began with the claim that cooperation between national public regulators is a logical response to a globalizing world that includes private regulators on a global scale. Cooperation by definition leads to more uniformity. However, the cases indicate that more uniformity should not be a goal in itself. Our cases of co-regulation demonstrate some important limits of uniform public regimes.

First, operational variety is inevitable. At the European level 'co-regulation' is officially interpreted as private parties executing oversight within a public regulatory

framework. This type of co-regulation assumes some central coordination within a predetermined hierarchy. Roles of public regulators may be similarly defined, as in the approval process for medical devices and admittance of the Fyra trains. Such a framework would make national public regulators more uniform. However, it already to some extent exists, and even within a well-elaborated framework, differences between public regulators and inspectorates will remain. Room for interpretation will inevitably provide some discretionary freedom, and interpretation will also influence the roles public regulators play and the extent that they stick to these roles, as shown in the Fyra case.

Second, uniformity may result in too much public centralism. In the aftermath of incidents, central regulators no longer entirely trust private regulators. Central coordination within a framework thus seems to result in central reflexes following incidents, inducing more central rules on private regulators and the industry regulated. This may compromise the very notion of manufacturer's responsibility. Centralism may also compromise the very capacities that give private regulators their advantage.

Third, uniformity may undermine the responsiveness of both public and private regulators. An alternative form of co-regulation is public and private parties both regulating and executing oversight side by side. Public and private regulators do not have a hierarchical relationship here. Instead, their interaction in regulatory activities begins rather organically. At a transnational level, public regulators have found themselves interacting with private regulators acting on a global scale. Public regulators here – both national and supranational – have proven essential in advancing the effectiveness of private regulators, even if they have not intended to influence them. By introducing greater uniformity in their procurement policies and standards, cooperating regulators may play an important priming role for NGO-driven private regulation schemes. Nonetheless, uniformity has its limits. The more explicitly and uniformly that governments seek to reinforce global self-regulatory efforts, the more they also confirm, and even reinforce, its problems. Moreover, variety among national regimes – including public regulators – does a good job in stimulating self-regulatory efforts. National governments are relatively powerful as clients of privately regulated products and they can help shape regimes wherein suppliers decide to join self-regulatory initiatives. Private regulators, for their part, have proven to be quite adaptive in coping with different national regimes.

Fourth, uniformity may reduce tolerance for national experiments. At the national level, public and private regulators in co-regulation initiatives have sought arrangements that suit each other's interests and values. This has proven difficult however. Co-regulation appears to be a zero-sum game between public and private regulators, and arrangements resulting from this game can easily grow rather complicated and – intentionally or not – relatively experimental. Internationalization is problematic for these arrangements in two ways. First, although the arrangements may produce a national regime, the regulated industry operates in a global market. This suggests that it will face trade-offs between export position and the values of the national regime, as evidenced by the Dutch poultry sector. Second, and related to the first, even if an arrangement works within a national context it may not be accepted by foreign regulators, as anticipated in the Dutch coach travel case. Because co-regulation inevitably becomes an experiment at the national level, a major question for transnational cooperation is whether room to experiment is desirable. Involvement of public inspectorates is crucial to gauge the transnational tolerance for national experiments.

These observations imply that there is no such thing as independent co-existence of national public regulators. Such independence is a myth. Public regulators may be linked by central coordination through a framework, by the processes and products they regulate, including international trade and transport, and by private regulators that operate on a global scale and turn governments into clients.

A second myth is the independent co-existence of public and private regimes. They influence each other, if only by their very existence. This suggests that policy discussions about private regulators should not revolve around the question of *whether* to interact with them, but rather *how*. The final section below gives some ideas for answering this how-to question.

In between the models: Meta-roles of governments

The two models represent extremes. The relationship between public and private regulators may not be merely vertical (model 1) or horizontal (model 2). The cases and literature show that governments use their special abilities to facilitate interaction between public and private regulators. In doing so, they fulfil a meta-role. This means they do not participate in the game of regulation and inspection themselves, but rather influence the rules of this game. Several such meta-roles are conceivable.

A first meta-role is priming function, as found in the MSC case. Setting quality standards may enable self-regulatory initiatives to develop and market themselves as compliant.

Priming can be done without reference to self-regulation. Second, governments can refer to private regulation more directly. The European Union did this with its 'Principles for Better Self- and Co-Regulation'[113]. These deal with procedural issues (like openness, monitoring and resolving disagreements) and the motives of self-regulatory organizations (like good faith and legal compliance). Although the principles explicitly target self-regulation, there is no reference to any particular self-regulatory initiative.

Third, governments can facilitate establishment of regulatory regimes by specific industries or NGOs, to enlarge the regulatory playing field. The European advertising industry has regulated itself by means of a code of conduct and a self-regulating organization carrying out policing tasks. To develop its regime, the industry held consultations with consumer and public health bodies under the auspices of the European Commission's Directorate General for Health and Consumer Protection. Among other features, the model applied calls for involvement of non-industry stakeholders in the process.

Fourth, governments can exert hierarchical pressure on specific industries to regulate themselves. Prakash (2000) found that after the Bhopal gas tragedy in 1984 strong legal pressure was exerted on companies to join self-regulatory regimes. This pressure became an important incentive for the chemical industry to found the Responsible Care Programme. This variant is often called 'enforced self-regulation'.

Fifth, hierarchical incentive can also be provided indirectly. In the Netherlands, the government has held clients of temporary employment agencies liable for fines imposed due to the agencies' infringements of labour laws. This has motivated the employment agency industry to develop a register of reliable agencies (i.e., agencies that have been demonstrated to pose little risk of liability to their clients). In this case, the government used its hierarchical position to establish liabilities, but left room for the industry to regulate itself and organize its own regime.
Finally, governments can frame self-regulation entirely within their own regimes. This is a meta-role. Private regulators cannot develop their own regime entirely, but execute tasks within a public regime in the public domain.

These meta roles taken together provide a starting point for deliberations on how public regulators might relate to private regulators in specific circumstances.

[113] European Commission, "Principles for Better Self- and Co-Regulation", 11 February 2013

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