

# Confrontations of co-regulation

**An essay on governance among public regulators, private regulators and regulated industries**

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Imagine a scenario in which public regulators, private regulators and the parties subject to regulation join forces to set rules for guaranteeing a public value. This would be a case of what is known as 'co-regulation'. Co-regulation entails overlapping and sometimes conflicting regimes applied by these three parties. This in turn makes governance among the three a challenge. This article raises the question of how this governance works. What kinds of confrontations may arise? What strategic reflexes do those involved display?

In contrast to most standard literature, this article has been written from a neutral (governance) perspective. It therefore does not examine *whether* co-regulation is effective for individual parties, but rather *how* co-regulation develops when it happens. Three case studies suggest that both public and private regulators are reluctant to fully commit to co-regulation. This reluctance can lead to higher administrative costs for regulated industries or limitations on the guarantees that the parties involved are able to offer each other.

Keywords: co-regulation, self-regulation, governance, certification

## Introduction

Public regulators are facing a problem. The term 'regulatory failure' features regularly in the press and is even used by politicians.<sup>1</sup> Rightly or wrongly, regulators are partly blamed for wrongdoing by regulates, because they might have been able to prevent the debacle. At the same time, cost-cutting measures are affecting inspections. As a result, pressure to improve regulation is coinciding with the need to achieve this improvement with fewer inspectors. This means that concepts such as 'risk-based regulation', 'responsive regulation' and 'smart regulation' are popular. They suggest a consciously selective approach to enforcement: use intelligence to adapt enforcement strategies to the specific case conditions. This way it is possible to spent valuable resources to those regulatees that form risks and to be lenient to other s. The concepts promise efficient regulation: economy in terms of resource use, and effectiveness in terms of enforcement. The quality of the risk analyses required for this is of crucial importance. An effective risk analysis can be complicated and time-consuming.

This may go some way to explaining the current focus on self-regulation. It is tempting to consider the possession of a privately organized hallmark or certificate in the risk analysis process. This has the following potential advantages:

- The sector involved will often already have subjected companies to some level of selection. Including this selection in the risk analysis improves efficiency.
- The sector has a thorough knowledge of its own processes and can use this to devise its own rules.<sup>2</sup> The inclusion of self-regulation in risk analyses can therefore be effective.
- Nevertheless, regulation is still considered a burden. The reduction of administrative burdens has long been high on the political agenda.<sup>3</sup> Trusting in self-regulation can help achieve this kind of reduction, at least from the perspective of the regulator.<sup>4</sup>

Sometimes the relationship between regulators and self-regulating agencies goes beyond the inclusion of self-regulation in risk analyses conducted by inspectorates. The potential advantages mentioned above are also increasingly being acknowledged at a policy level. Many inspectorates and ministries are developing visions of regulation that focus on trust in the parties subject to regulation.

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<sup>1</sup> As concerned the Dutch press: for example 'Meer fraude door falend toezicht fiscus', *NRC Handelsblad*, 27 November 2007, 'Bos: geen aanwijzing voor falend toezicht', *Trouw*, 13 October 2009, statement by Jolande Sap on regulation by DNB DSB-bank on the website of GroenLinks (Dutch Green Party), 29 June 2010. On 13 January 2011, a search for the Dutch term "falend toezicht" ("regulatory failure") on Google resulted in 189.000 hits.

<sup>2</sup> See also B.E. Baarsma 2010, Afwegingskader bij het gebruik van zelfreguleringsinstrumenten, *Tijdschrift voor Toezicht* 3; Gunningham and Rees 1997: "Industry Self-Regulation: An Institutional Perspective", *Law and Policy*, 19 (4)

<sup>3</sup> See for example the Dutch programme 'Eenduidig toezicht', later 'Vernieuwing toezicht' [http://www.inspectieloket.nl/vernieuwing\\_toezicht/](http://www.inspectieloket.nl/vernieuwing_toezicht/). See also the UK "Better Regulation"- programme

<sup>4</sup> Research conducted by Oude Vrielink-Van Heffen and Dorbeck-Jung shows that the reduction of burdens for companies is not always effective if the regulations imposed by government and the business community are added up; M.Oude Vrielink-Van Heffen and B. Dorbeck-Jung 2006, Kan zelfregulering regeldruk verminderen? *Bestuurskunde*, 15 (4). Berenschot refers to an "accumulation of regulation" by the self-regulating and public inspection agencies; 2010 'Certificatie en Regeldruk', commissioned by Actal, [http://www.actal.nl/upload/40335\\_\\_rapport\\_definitief\\_16032010.pdf](http://www.actal.nl/upload/40335__rapport_definitief_16032010.pdf)

This results in *co-regulation*: a hybrid of the classic unilateral regulation by government and self-regulation (see box 1).<sup>5</sup>

The terms 'regulation', 'self-regulation' and 'co-regulation' occur regularly throughout this article. They therefore call for further explanation. I think of *regulation* as a sequence of activities. It involves setting standards, collecting information, making judgements and intervening.<sup>6</sup> In the case of *self-regulation*, standards are set by private parties and the other regulatory activities are undertaken by or under the supervision of private parties. Sectors of industry set standards for themselves, often overseen by an umbrella organisation, such as an industry association. In many cases, they hire in private regulators – such as certification bodies and accreditation bodies – , who in turn set standards. In the case of *co-regulation*, some of the regulatory activities are being undertaken jointly by public and private parties. This means that public regulation becomes closely intertwined with self-regulation. As such, co-regulation presupposes self-regulation – without self-regulation, co-regulation is not possible.

*Box 1: Regulation, self-regulation and co-regulation*

In this paper I assume that co-regulation implies a governance effort. Co-regulation implies a confrontation between different regimes, such as the public regulatory regime, the regime of the regulated industries and the certification- and accreditation regimes. The rules that make up these regimes have different origins and motives, and this way inevitably clash (more about this assumption in the next section). The governance of co-regulation is characterised by confrontations between public regulators, private regulators and regulated industries. This suggests a coordination challenge between the different regime managers.

The main question addressed in this article is two-fold. The first is the question how public regulators, private regulators and regulated industries respond to such confrontations. In other words: how do they solve the governance problems? The second question is what impact these solutions have on the effectiveness of co-regulation. To address the first question, I will discuss three cases of co-regulation, relating to the quality of eggs, the safety of travel by coaches and the reliability of temporary employment agencies. I will investigate the administrative confrontations that dominated these cases and assess the solutions reached by the parties involved. Based on these findings, I will argue answers to the second question.

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<sup>5</sup> This is a broad definition. It is in line with the definitions of co-regulation in the field of public administration such as those of I. Bartle and P. Vass 2005, *Self-Regulation and the Regulatory State; A Survey of Policy and Practice*, Centre for the Study of Regulated Industries (CRI), Research Report 17, University of Bath, and T. A. Börzel and T. Risse 2010, *Governance without a state: Can it work? Regulation and Governance* 4: 113-134.

<sup>6</sup> Here I am following the three-pronged control process defined by Hood et al.. Regulation requires a 'director' (a standard), a 'detector' (information) and an 'effector' (enforcement mechanism). In the standard definition used by the Netherlands Court of Audit of the Dutch term '*toezicht*', translated here as 'regulation', 'standard-setting' is not mentioned. However, I consider standard-setting to be important, since regulators' higher bodies often have discretionary powers to set standards within existing legislation or norms. C. Hood, H. Rothstein and R. Baldwin 2001. *The Government of risk. Understanding Risk Regulation Regimes*. Oxford. Oxford University Press.

## Co-regulation as a three-way alliance

This paper reports on a study of co-regulation in three sectors. The study exclusively examines types of certification, despite the fact that self-regulation is actually much broader than this.<sup>7</sup> The study also ignores private institutions that can set standards under certain conditions, such as banks and insurance companies.

A key feature of certification is that an organisation employs a certifying body in order to secure a certificate. The aim of this certificate is to offer third parties a guarantee of the value represented by the certificate. Certifying bodies are also themselves subject to accreditation. In the Netherlands, the body designated by government for accreditation is the Dutch Accreditation Council (*Raad voor de Accreditatie*; RvA).

This means that there are three different types of players setting rules for co-regulation. First, there are public regulators, that provide regulation based on statutory standards and are legally authorised to do so. Secondly, there is the regulated industry, who, in the case of co-regulation, also set rules. This is generally done in order to improve the image of the sector or in response to the threat of legislation by government. In many cases, an umbrella organisation, such as a sector association, is closely involved in this and the rules are managed by a legally independent body. Finally, there is the organisation hired to do the certifying. This organisation also sets rules, often from a perspective based on official standards. For example, the RvA sets demands with regard to the organisation of standards management and the working methods applied by certifying bodies.<sup>8</sup> I call this third category 'private regulators'.<sup>9</sup> Essentially, co-regulation involves collaboration between those that set the rules. I am defining 'co-regulation' very broadly: it refers to any form of coordination between public regulators, regulated industries and private regulators regarding the rules applied by these three bodies (see also box 1). Figure 1 provides a visual representation of this interpretation of co-regulation. The arrows represent coordination. I have also defined the various domains very broadly: 'public regulators' also include policy ministries, 'regulated industries' consist of sector administrators as well as companies and the 'private regulators' are certifying and accreditation bodies.

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<sup>7</sup>For a more extensive assessment, see: Baarsma 2010.

<sup>8</sup>Strictly speaking, the RvA does not set requirements, but rather interprets international standards.

<sup>9</sup>I am aware that these are not regulators in the strictest sense of the word, because they have limited or no statutory powers. However, in material terms, they very much resemble regulators because they collect information, make judgements on it and impose sanctions (i.e. refusing to issue or withdrawing a certificate or accreditation).

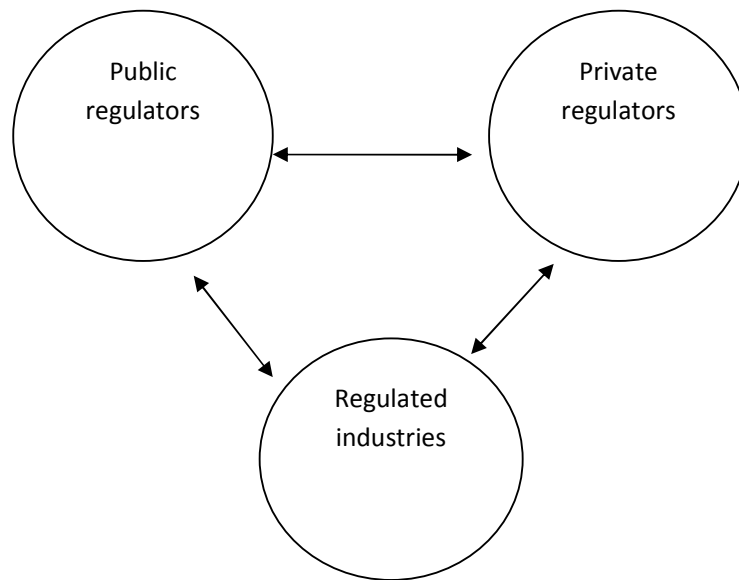


Figure 1. Co-regulation

### **Perspective: governance in practice**

#### *From government to governance*

In cases of co-regulation the standards for regulated industries are not set by public regulators only. The subjects also set standards themselves, and are supported in this by private regulators. They also play a supervisory role and in many cases do so in order to safeguard a value that is similar to the public value.<sup>10</sup>

In the literature on the subject of governance and regulation, the large number of actors involved in regulation is acknowledged. The literature describes the fact that the relationship between the state and society is in a process of change. The government is no longer seen as a central, hierarchical actor that can control or direct society unilaterally. Society is too complex for that. One of the consequences of this is that the government adopts a different approach to directing society. This is often referred to as a movement 'from government to governance'.<sup>11</sup> This refers to the movement from a government that provides unilateral and hierarchical direction to a government that acknowledges its position among a multitude of other powerful actors. In other words, the government is no longer the only actor in control. 'Governance' refers to coordination between parties without a hierarchically superior party necessarily being involved. There is also no single party that embodies this governance. Governance does not involve public values being safeguarded by

<sup>10</sup> I am applying a broad definition of a 'public value', namely as a value that is considered to be in the general public interest. This is quite separate from the issue of for whom the value is being safeguarded; see Dicke and De Bruijn 2003, *De borging van publieke belangen in nutssectoren*, Bestuurswetenschappen 6.

<sup>11</sup> See for example B. Jessop 2002, *The Rise of Governance and the Risks of Failure: The Case of Economic Development*, *International Social Science Journal* 50 (155); B. Hutter and C. Jones 2007, *From Government to Governance: External Influences on Business Risk Management, Regulation & Governance* 1.

government alone, but rather through the interaction between the different parties.<sup>12</sup> It does not involve the simple imposition of rules by public regulators, for example. Table 1 briefly summarises the governance perspective.

	Government	Governance
Safeguarding public values	Public regulator	Several interacting actors
Regulation and supervision process	Hierarchy: imposing and monitoring of standards	Network: coordination of standards

Table 1: Government and governance

*Potentially attractive normative concepts for regulation*

The literature on regulation and governance is full of potentially attractive normative concepts for public regulators. The following are just two examples:

- *Responsive regulation*<sup>13</sup>. In this arrangement, the enforcement strategies and the level of sanctions depend on the attitude adopted by the private parties. Enforcement is based on a relationship of trust between the regulator and the party being regulated. If this trust is undermined, the regulator can respond more firmly (focusing on more sanctions). Ayres and Braithwaite propose this arrangement and, by way of illustration, describe a pyramid in which the lightest intervention is proposed at the base and the firmest at the top. The vertical dimension represents the attitude of the party being regulated. This means that in addition to showing the dynamics involved in the use of mechanisms, the pyramid also represents the emphasis applied in the enforcement strategy: lighter sanctions are preferred over firmer enforcement strategies.
- *Smart regulation*<sup>14</sup> is based on ‘responsive regulation’, but provides a more explicit description of the relationship between the regulated parties and third parties. Many regulated parties are more susceptible to incentives from, for example, insurance companies, banks, the media, interest groups and sector associations than from governments. The structural involvement of these parties and the encouragement of them to act as quasi-regulators is why this is a ‘smarter’ form of regulation and supervision.

Similar concepts have also been applied to public regulators. Academic literature and policy frameworks have also followed up on this. The result of this has been that the literature has become one-sided and instrumental. By ‘instrumental’ I mean that the concept or its application ‘has to work’. Involving regulated industries and private regulators in the process of regulation must be

<sup>12</sup> To cite just one example of many: E. H. Klijn and J. F. M. Koppenjan, *Managing uncertainties in networks*, London: Routledge

<sup>13</sup> I. Ayres and J. Braithwaite 1992, *Responsive regulation; Transcending the deregulation debate*, Oxford: Oxford University Press.

<sup>14</sup> N. Gunningham and P. Grabosky 1998, *Smart regulation; Designing environmental policy*, Oxford: Clarendon Press.

effective, efficient or legitimate.<sup>15</sup> By ‘one-sided’ I mean that they are expected to be effective, efficient or legitimate *for the public regulator*.

### *Disappointments*

However, the literature on regulation is increasingly marked by disappointment. There are serious doubts about the quality of self-regulation. First of all, it is thought that public interests ultimately lose out to the sector’s own interests. These interests are seen to lie in market forces. It is argued that the choice for self-regulation is a response to a perceived image problem, rather than coming from an intrinsic desire to serve the public interest. As soon as the image problem has been solved, the reason for serving the public interest wanes.<sup>16</sup>

Cost considerations are also important for private regulators. For them, regulated industries are actually their customers. For this reason, it is argued, it is in their interest to behave as partners to their customers, thereby neglecting their role as watchdog. In other words, the incentive to achieve customer loyalty is said to detract from the necessary rigour.<sup>17</sup> Public regulators are, on the other hand, in principle independent of those they monitor.

It is worth noting that this wide-ranging literature portrays the public regulator as the owner of the problem, as indeed I did in my introduction. The result is the complaint that self-regulation appears to have little to offer the public regulator. However, this kind of complaint is the logical result of the type of questions being asked, which are instrumental and seen from the perspective of the public regulator. Anyone who considers effectiveness, efficiency and legitimacy for the public regulator to be the key issue in co-regulation is likely to conclude that it is less than ideal.<sup>18</sup> This will certainly apply to public regulators and possibly also to regulated industries and private regulators.

### *Governance revisited*

The acknowledgement that regulation is not only the concern of the public regulator would not appear to go far enough to enable the perspectives of the other parties involved to be assessed seriously. Effectiveness, efficiency and legitimacy are difficult to define in objective terms: when analysing cooperation between the various parties, it is unwise to avoid the question whose

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<sup>15</sup> By way of illustration, the title of the work by T. A. Börzel and T. Risse 2010 (note 5) is ‘Can it work?’

<sup>16</sup> See among others N. Gunningham and J. Rees 1997. *Industry Self-Regulation: An Institutional Perspective*, *Law and Policy* 19 (4); E. Rametsteiner and M. Simula 2002. *Forest Certification – an Instrument to Promote Sustainable Forest Management?* *Journal of Environmental Management* 67; B. Hutter 2006. *The Role of Non-State Actors in Regulation*, Discussion Paper 37, The Centre for Analysis of Risk and Regulation (CARR), London School of Economics.

<sup>17</sup> A great deal has been published about this classic tension, for example, M. Power 2003. *Evaluating the Audit Explosion*, *Law and Policy* 25 (3); D. O’Rourke 2003. *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, *Policy Studies Journal* 31 (1); A protracted debate about certification and regulation raged in the regulatory community ‘Toezicht, opsporing en handhaving’ on LinkedIn in January 2011, with 67 reactions within one month.

<sup>18</sup> I am not attempting to claim that self-regulation cannot, under certain conditions, be efficient from a public and a private perspective; see for example Dutch publications: B. Baarsma, C. Koopmans, J. Mulder, M. de Nooij, C. Zijdeveld 2004. *Goed(koop) geregeld: Een kosten-baten analyse van wetgeving en zelfregulering*. University of Amsterdam Foundation for Economic Research (SEO). An authoritative international publication on self-regulation is Gunningham and Rees 1997: “*Industry Self-Regulation: An Institutional Perspective*”, *Law and Policy*, 19 (4)

effectiveness, efficiency and legitimacy we are talking about. From the point of view of governance, the effectiveness, efficiency and legitimacy of the public regulator is not the key issue of co-regulation. The key issue needs to be formulated from several different perspectives.

Governance suggests that each party involved makes its own deliberations within a network of parties. This inevitably results in confrontations between these parties, which must involve some give-and-take. Based on my definition of co-regulation, this is a confrontation between public regulators, private regulators and regulated industries. All three have their own regimes: the regime of public decision-making, the regime of the market and the regime of standardisation and accreditation. All of these regimes have a different historical background and apply different ways of thinking.

In co-regulation, these regimes and their inherent standards inevitably clash. A simple example of overlapping regimes is the public complaint about certification. A customer indicates perceiving added value in the services of a certified institution. This institution is in turn accountable to the customer. From a market perspective, there is nothing amiss here. However, in the case of co-regulation, a public regulator also has an interest. It is concerned about safeguarding public values and the risk of being held accountable for this in public decision-making. For the public regulator, customer satisfaction is not the end of the matter.

In order to solve confrontations between these various regimes, it is difficult to apply the rules of a single regime. That would result in a hierarchical representation of the matter and conflict with the idea of governance. In this example, the market regime would appear to lack the commitment required by the public regulator, whereas the public regime can be too demanding for a certifying body to operate freely in the market. No rules have been invented yet to deal with these confrontations. What remains is a certain degree of trust of those involved that co-regulation is worth the investment involved. Based on this trust, the parties involved invest in interaction. This implies 'ongoing interaction' as a standard for governance, like already suggested in governance literature.<sup>19</sup> Interaction lasts for as long as the parties have confidence that the long-term costs will be outweighed by the benefits. I would like to apply this standard to the effectiveness of co-regulation.

I would summarise the governance perspective on co-regulation as follows:

1. Governance of co-regulation is characterised by confrontations between public regulators, private regulators and regulated industries.
2. There are no pre-existing, commonly-agreed rules for dealing with these confrontations. The standard for co-regulation is not effectiveness, efficiency or legitimacy for a single party, but ongoing interaction, nourished by the trust held by each party that the long-term costs will be worth it.

I will discuss three cases of co-regulation based on these assumptions.

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<sup>19</sup> B. Jessop 1998, The Rise of Governance and the Risks of Failure: The Case of Economic Development, International Social Science Journal 50 (155)



## The study: three cases of co-regulation

I assume that confrontations between public regulators, private regulators are inherent to co-regulation. Based on this assumption, I propose the following research questions:

1. How do the confrontations manifest themselves in terms of issues?
2. What strategic reflexes on the part of those involved can be seen in response to these confrontations?

I intend to answer these questions based on three case studies of co-regulation. These are:

- Co-regulation in the poultry sector. The Dutch Ministry of Agriculture, Nature and Food Quality (LNV) developed a policy framework entitled '*Toezicht op controle*'.<sup>20</sup> This indicates the conditions according to which public regulators and self-regulating organisations can work together. The regulatory authorities are given a meta-role: they monitor whether the regulation or self-regulation is working as it should. This is applied in the poultry sector, in particular in the private quality scheme '*IKB ei*', which is managed by a legally independent body. The policy framework was developed into an arrangement in co-operation with sector representatives at the initiative of and under conditions set by the government. Accreditation is a key requirement.
- Co-regulation in the coach sector. At the initiative of the sector association for coach transport, *KNV busvervoer*, standards were developed for a hallmark for coaches. These standards relate to the quality and safety of coach transport. Part of the standards process involves securing a certificate. It also involves the number of infringements identified by public bodies. The hallmark is awarded under the management of a foundation, which collects information for this purpose from public and private regulators. Bilateral arrangements with regard to information have been made with these parties.
- Co-regulation in the temporary employment sector. At the initiative of the temporary employment sector, and in the light of threats of a reintroduction of the licensing system for temporary employment agencies, standards were developed for the organisation of these agencies. These standards relate primarily to the payment of tax and the welfare of agency workers. The standards deliberately overlap with statutory provisions, enforced by the Dutch Tax and Customs Administration and Labour Inspectorate. This is related to the most important reason for self-regulation: reducing the risks of those hiring in agency workers. It is they who are held responsible if the inspectorates identify wrongdoing. The self-regulation consists of inspectorates run by private institutions and records kept in a register.<sup>21</sup> A legally independent body agrees covenants with the public regulator, in this case the Tax and Customs Administration. The Labour Inspectorate considers a covenant. The aim of this is to benefit certified employment agencies.

Table 2 shows a number of important characteristics of these cases.

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<sup>20</sup> Policy framework '*Toezicht op Controle*', 2005; translates into "Supervising inspections".

<sup>21</sup>Strictly speaking, the register is not a hallmark, since the organisation that manages the register keeps records and does nothing else, in contrast to the coach sector. For the sake of readability, I will still refer to this register as a 'hallmark'.

	<b>Poultry</b>	<b>Coaches</b>	<b>Employment agencies</b>
<b>Public inspectorates involved</b>	General Inspection Service (AID)  Food and Consumer Product Safety Authority (VWA) <sup>22</sup>	Transport, and Water Management Inspectorate (IVW)  Government Road Transport Agency (RDW)  STO <sup>23</sup>	Labour Inspectorate  Tax and Customs Administration
<b>Bodies founded by regulating industries</b>	Two sector organisations  Poultry and Eggs Commodity Board  <i>IKB ei</i> foundation	One sector organisation  Coach Hallmark Foundation (SKTB)	Three sector organisations  Labour Standards Foundation (SNA)
<b>Private regulators involved</b>	Two certifying bodies  Accreditation Council	Three certifying bodies  Accreditation Council	Seven certifying bodies  Accreditation Council
<b>Public values</b>	Animal welfare  Food safety	Road safety	Welfare of temporary workers  Tax revenue

Table 2: Three cases of co-regulation

The research consisted of document analysis and 59 semi-structured interviews with parties involved from all three categories of actors. Among the public regulators, interviews were conducted with public administrators, policymakers and inspectors. Among regulated industries, there were interviews with entrepreneurs, sector executives and sector associations. With regard to the private regulators, interviews were held with certifying bodies and the Accreditation Council

The search resulted in three descriptions of specific practical cases relating to this co-regulation. These are explained in the next three sections, along with a brief introduction of each case. This is followed by a presentation of the most important governance issues. For each of these issues, I describe the confrontations and the dominant reflexes.

<sup>22</sup>The VWA has delegated controls relating to a number of legal standards to the private regulatory body for poultry, eggs and egg products, *Stichting Controleorgaan voor de Pluimvee, Eieren en Eiproducten* (CPE).

<sup>23</sup> *Stichting voor Informatie en Ordening van de Bedrijfstak Besloten Busvervoer*. This is a private organisation that monitors compliance with the Collective Labour Agreement.

## Quality of eggs: applying a policy framework

### *Introduction*

Every year, approximately nine billion eggs are produced in the Netherlands, 6.3 billion of which are exported.<sup>24</sup> For decades, two important public issues have dominated this sector: the welfare of the hens and egg packaging. Both a public and a private regulatory regime had been set up to safeguard these values. As a result of the implementation of the policy framework *Toezicht op Controle* (TOC), an initiative of the former Ministry of Agriculture, Nature and Food Safety (LNV), both these systems become intertwined. As such, the application of TOC in the poultry sector essentially involves public standards being (more) explicitly included in the private standards system *IKB ei*, enabling certifying bodies to assess in accordance with these standards. The public regulators are left with a meta-role, in effect supervising regulation. This involves supervising the certifying bodies by means of systems audits and verification inspections. Public regulators are also calling for the introduction of unannounced inspections by certifying bodies.

The aim behind this, so it was claimed, was to reduce the number of inspections and save on sector costs. This may be true, since in the past inspections were carried out by both certifiers and public inspectors, whereas the former now predominate. TOC is the initiative of public regulators. They were confronted by the following issues:

### *Issue 1. An administrative fine*

In the wake of negative reports about self-regulation in the sector, the then Minister of LNV, Gerda Verburg, urged the accelerated passing of a draft bill, adding an administrative fine to a raft of animal welfare legislation as an enforcement mechanism.<sup>25</sup> In this political climate, the Ministry called for the inclusion of a fine in the TOC arrangement for the poultry sector, enforced by private certifying bodies. The private regulators were strongly opposed to this.

This led to a confrontation with private regulators. After consulting with their European counterparts, the Accreditation Council threatened to refuse accreditation of *IKB ei* if a fine were to be introduced. Their main argument was that it was not the job of certifying bodies to impose fines. It was feared this would result in too much pressure to prevent audit results from leading to a fine. The outcome of this is that TOC called for both accreditation<sup>26</sup> and a fine and the RvA refused accreditation if the fine were introduced.

Both the public and private regulators argued from their own perspectives, either legal or based on accreditation standards. This led to an attitude towards the sector that was inflexible and exegetic. The sector was therefore confronted by different regulators with irreconcilable demands and was forced to choose between TOC and accreditation. Although TOC offers efficiency benefits for the sector, accreditation is essential for its export position. The sector provisionally opted for accreditation and unilaterally scrapped the fine from *IKB ei*. The ball was then in LNV's court.

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<sup>24</sup> These figures are taken from the annual report of the *Productschap Pluimvee en Eieren*, 2009.

<sup>25</sup> Letter from the Minister of LNV, Lower House 2008-2009, 26991, 10 October 2008; the Acts involved were the Animal Health and Welfare Act and the Draft Bill on Animals (Lower House 2007-2008, 31 389).

<sup>26</sup> For product certification (EN45011 Guide 65).

### *Issue 2: (The number of) unannounced inspections*

Public inspections are often unannounced, whereas audits for certification are more likely to be announced. If certifying bodies take on the responsibility of public inspections, this would mean that all inspections would be announced. A disadvantage of this might be that poultry farmers could prepare rather too effectively for inspections, making the results unrepresentative of the actual situation in the companies. LNV therefore called for additional, unannounced inspections by certifying bodies. These additional inspections were to be coordinated by the *IKB ei* foundation. Half of the companies would be subject to an additional, unannounced inspection. After a year, the TOC regime, along with the unannounced inspections, would then be evaluated by LNV.

The unannounced inspections caused a confrontation between public regulators and regulated industries. The number of inspections called for by LNV (50% in the first year) led to doubts within the sector as to whether the promised benefits would actually materialise. After all, the initial aim had been to reduce the number of inspectors' visits. The new scheme was also more expensive. There was a perception that the reasons for participating in TOC were decreasing. Commitment to the TOC initiative declined.

This waning commitment resulted in the sector unilaterally reducing the number of unannounced inspections to 15% after a year, pending evaluation. The issue of unannounced controls is one in which the public regulators take a step back by initiating TOC, whilst at the same time attempting to maintain control over the private regime by placing additional demands placed on private regulators.

### *Issue 3: (The number of) verification inspections*

The public regulators were given a meta-role vis-à-vis the private regulators. They supervise the certifying bodies by means of verification inspections and system audits. The number and intensity of these inspections are the subject of negotiations between the Ministry of LNV and the sector. The latter is responsible for funding the verification inspections.

The verification inspections led to confrontations both with regulated industries and with private regulators. The first confrontation was similar to that concerning unannounced inspections. In this case too, the public regulators wanted more inspections than the other parties and the cost benefits for the sector were also placed under threat. Moreover, the inspections elicited resistance from the certifying bodies, who found themselves confronted by several different regulators. Public inspectors will conduct systems audits of these, despite the fact that they previously had no relationship with such inspectors. They see public inspectorates becoming more active rather than stepping back. In addition, they do not consider the public inspectorates to be their regulators, but rather the Accreditation Council. As a result, the commitment of certifying bodies to cooperate with TOC is being put under pressure. This shows a similar pattern to the issue of unannounced inspections. TOC proposes the relaxing of public inspections in favour of private regulation, but control is being maintained by rules about the organization of this private regulation.

## **Coach transport safety: regulators as information providers**

### *Introduction*

The coach sector, organised under the umbrella of the Royal Netherlands Association of Goods and Passenger Transport Firms (KNV) has established a hallmark intended to improve the sector's image. Coach companies that meet various statutory and extrajudicial standards are entitled to carry a hallmark sticker on their coaches. This sticker testifies to the quality and safety of the transport provided by the company in question. The audits for the hallmark are conducted by certifying bodies within the framework of accreditation. Hallmarks are awarded based on these audits and reports made by public regulators: the former Transport, Public Works and Water Management Inspectorate (IVW), the RDW and the (semi-public) STO. IVW focuses its inspections on compliance with drivers' driving and resting times, while RDW inspects the condition of the buses and STO monitors compliance with the CAO. IVW also issues the permits that coach companies need in order to run their companies. The hallmark awarding process is managed by the legally independent foundation SKTB, which has reached bilateral agreements with public regulators about the provision of information. This information is important for the quality of the hallmark, since the number of infringements identified by public regulators is a criterion for awarding the hallmark. In this case therefore, the regulated industry is initiating a type of co-regulation. They were confronted by the following issues.

### *Issue 1: Accreditation of a hybrid standards system*

The coach sector consists of numerous small companies, many with fewer than ten employees. The set of standards (referred to hereafter as the standards system) underlying the hallmark is a combination of standards for the management of a quality management system (ISO 17021) and product standards (EN45011). The sector believes that it would be too great a burden for the small companies to maintain a fully-fledged quality system including internal audits and management reviews. Nevertheless, they would like it to be possible for these companies to obtain a hallmark. For this reason, not all the internationally applicable management system standards have been included. There are product standards, though, because management system standards alone would not exert sufficient discipline. As a result, the standards system became a combination of management system and product standards.

The development of this kind of system led to a confrontation with the private regulator. The Accreditation Council calls for compliance with at least one single category, in this case the management system standards category (ISO 17021). In order to meet this condition it calls for the adoption of measures that represent a burden on small companies, i.e. the conducting of internal audits and management reviews by hallmark companies. The result of this kind of categorisation (referred to in organisational science as 'pigeonholing') is an ongoing debate between the Accreditation Council, certifying bodies and the sector, with the threat of the withdrawal of accreditation looming as a result of so-called shortcomings.

### *Issue 2: Accreditation of the awarding of hallmarks*

An important reason for self-regulation is the improvement of the image of the coach sector. That is why a visible hallmark is important for the sector. The most visible location is the bus used for transport. For this reason, the sector wanted to develop a hallmark based on the certificate and introduce accreditation for the process of certification and the awarding of a hallmark.

This plan also resulted in a confrontation with the private regulator. The Accreditation Council was willing to agree to the accreditation of the certification process, but not of the process of awarding the hallmark that ultimately resulted in the sticker on the bus. Its reasons for this were that the certificate refers to the company's quality system and not to the bus on which the sticker is placed. It was thought that a sticker could imply a product certificate.

For this reason, the process of awarding the hallmark was divided from the certification process. The awarding of the hallmark is managed by the SKTB. This partial accreditation raises questions about the guarantees that the hallmark offers to third parties, including public regulators. It is up to the self-regulating sector to convince these third parties that the non-accredited process of awarding the hallmark is of sufficient quality and that there are sufficient checks and balances in place.

### *Issue 3: Provision of information by IVW*

The quality of the hallmark awarding process is largely dependent on information from public regulators. The sector considers information about compliance with the driving and resting times of drivers to be important<sup>27</sup>, because it believes this to be a key component of the standard. This information comes from the IVW, based on their company inspections. The inspection results form the basis for the judgement about the company, which is then used to decide whether or not a hallmark is awarded. The fewer company inspections conducted by the IVW, the less data the sector receives, and the less justification it has to refuse coach companies a hallmark.

The exchange of information reflected the IVW's intention, until recently, to inspect coach companies regularly (once every three years). This would mean that the sector would regularly receive data from the IVW (once every three years). However, all of this became the subject of a confrontation between regulated industries and the public regulator, for two reasons. First of all, a reorganisation resulted in the same regulator being made responsible for freight transport, the taxi sector and the coach sector. The other two sectors are much larger and have a poorer record of compliance, leading to the regulatory priority shifting towards them. This will lead to a reduction in the frequency of inspections for the coach sector. Secondly, the IVW embraced system regulation. Companies with an adequate quality system qualify for a less rigorous regulatory regime. For the purposes of system regulation, the IVW is temporarily focusing its company inspections on larger companies that can be audited, in order to investigate whether these are eligible for a less rigorous regime. This priority is undermining the representative nature of company inspections.

It also means that the sector is not receiving the data it wants. However, it is not in a position to demand that the IVW conduct company inspections. Attempts are being made to solve this problem by asking the IVW to conduct brief analyses of tachograph disks at the request of the sector.

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<sup>27</sup> Based on the Working Hours Act, Working Hours Decree for Transport Art. 2.5.1 para 2, (EC) no. 561/2006 Art.5, 6 and 7, European Agreement concerning the Work of Crews of Vehicles engaged in International Road Transport (AETR).

However, this means that, unlike previously, the self-regulating body in the sector is forced to take the initiative itself. It is now its responsibility, rather than that of the IVW, to select the companies eligible for this kind of analysis.

## **Legitimacy of temporary employment agencies: seducing the regulators**

### *Introduction*

Employment agencies range from large companies such as Randstad to one-man businesses with a laptop and a van. This sector is the subject of much political attention because there is (or has been) much wrongdoing, related for example to illegality, underpayment and housing for agency workers. In order to gain control of the sector, the legislator has introduced what is known as 'recipient's liability'. In the event of wrongdoing being identified, the party that deployed the services of the dubious employment agency is held liable. Prompted by this recipient's liability and an effort to improve the image of the sector, the temporary employment sector started a register. A temporary employment agency is registered – or not – on the basis of inspections conducted by certifying bodies.<sup>28</sup> The idea is that people hiring in staff should select an employment agency from this register, thereby reducing the risk of being held liable. As was the case with the coach sector, the co-regulation regime is an initiative of the regulated industry, although this initiative was taken in response to pressure from the government. Without this initiative, a licensing system would have been introduced, which would have been particularly expensive for the sector. A legally independent foundation, the SNA, manages the NEN4400 standard system for certification and harmonises the certifying bodies involved.<sup>29</sup> These bodies are accredited. The SNA organises a range of different consultations with the sectors and certifying bodies concerned. Covenants have been agreed with the Tax and Customs Administration on the sharing of information and measures to encourage those using temporary staff to work with a registered employment agency. The Labour Inspectorate and the Ministry behind it (Social Affairs and Employment) are also considering similar measures.

### *Issue 1: Accreditation of an atypical standards system*

As was the case in the coach sector, the standards system for employment agencies is a hybrid. In this instance it is a mixture of a management system standard (ISO17021) and an inspection standard (ISO17020). The reasons for not solely applying a management system standard are comparable to those in the coach sector. In this case, however, the additional discipline is to result from the establishment of a set of standards for inspection. Because accreditation of a hybrid standard system is impossible, it is up to the sector to decide. It has opted for accreditation of the standards system based on the inspection standard. The advantage of this type of standard is that it lays down the whole process of inspection, including how the results are interpreted.

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<sup>28</sup> In fact, this does not involve certification, certifying bodies or a hallmark, but inspection, inspectorates and a register. This is because of the type of standard underlying the private regulation. For this type of standard, the Accreditation Council uses the latter terms. I have nevertheless used the word 'certification' in order to improve readability.

<sup>29</sup> There are actually two systems: NEN4400-1 and NEN4400-2. The latter applies to companies based abroad. Moreover, these standards do not only apply to the provision of labour, but also to the taking on of labour.

However, experience with applying this type of standard to a non-technical subject, such as a temporary employment organisation, was virtually non-existent since it was originally developed for technical subjects, such as lifts. The result of this was a long-lasting debate about standards with the private regulator, in this case the Accreditation Council. The discussions are being conducted according to the conditions and deadlines set by the Accreditation Council, which starkly conflict with demands from the market.

#### *Issue 2: Accreditation of the awarding of hallmarks*

The registration processes for employment agencies are also divided. The inspection phase is subject to accreditation, whereas registration is not. The main objection raised by the Accreditation Council is that an inspection reflects the situation at a given moment, whereas registration suggests a more long-term judgement. However, registration is essential for the sector, because a register reveals the quality of employment agencies to those hiring in labour, who are at risk if an employment agency turns out to be dubious. This also raises the question what guarantees accreditation offers to third parties. In this case as well, it is up to the sector, and more specifically the SNA, to convince the third parties that the registration process is sufficiently rigorous.

#### *Issue 3: The encouragement of self-regulation by public regulators*

As was the case in the coach sector, the awarding of hallmarks in the temporary employment sector is also managed by the sector and the sector requires information to help it distinguish the good from the bad. Again, public regulators and their inspection results can provide this information and meet the needs of the sector to some extent.

The encouragement of self-regulation can also go beyond the provision of information. Recipient's liability is an important governance issue. Those hiring in labour and employment agencies have come together in order to achieve joint indemnity regarding the liability of those hiring labour who employ the services of certified employment agencies.

Both of these issues result in a confrontation between regulated industries and public regulators. The public regulators are hesitant, because they wish to draw a clear distinction between public and private. Intensive consultations with inspectorates and their ministries have so far only led to a limited covenant with the Tax and Customs Administration about the transfer of information.<sup>30</sup> The Tax and Customs Administration issues statements indicating that payments made by temporary employment agencies correspond with tax returns. Further measures are being considered, but there are major legal obstacles potentially preventing them. A key question is with whom covenants should be entered into. The sector is made up of organisations that compete strongly with each other. There is a body that manages the standards system, but its legal status has been questioned within the ministries involved. Is this kind of body a neutral and fully-fledged representative of the sector, or merely a service provider working for the sector? In terms of policy, the former is preferable, but legally, the latter is more attractive. This debate is still ongoing, especially within the Ministry of Social Affairs and Employment. The Tax and Customs Administration (and the Ministry of Finance

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<sup>30</sup> There are two other covenants between the SNA and the Tax and Customs Administration, but these relate to the (limited) provision of services to registered employment agencies.



behind it) has a long tradition of demonstrating trust. This is not based so much on principle, but rather on pragmatism: the identification of tax evasion is a much more intensive process than, for example, identifying illegal immigrants.

A similar ambivalent role for public regulators applies when assessing the consequences of self-regulation. There is a fear of providing incentives to private initiatives because there is a chance that another, competing quality system may demand the same incentives. This is not completely unlikely, in view of the fragmentation within the sector. There are three sector organisations for employment agencies and as many types of customers as there are sectors. However, there is now a statutory provision suggesting support for certification.<sup>31</sup> Those deploying employment agencies can be held liable up to the level of a statutory minimum wage, if they have had dealings with a non-registered employment agency. A legal construction has been chosen for this. NEN4400 itself is not mentioned in the law, but a ministerial regulation determines which standard applies. Currently, this is solely NEN4400, but if another standard were to be added, this could also be added by the Minister. This means that there is a certain level of commitment, but full indemnity is still far off.

## **Conclusions and discussion**

### *Three parties, three responses to confrontations*

I have presented the governance of co-regulation as a confrontation between public regulators, private regulators and regulated industries. Different regimes will overlap and at times conflict. Governance therefore progresses in fits and starts. The cases studied confirm the view that very little about co-regulation is easy. Seemingly simple processes, such as the introduction of a fine, the instigation of additional inspections or the development of a standards system, quickly lead to stubborn and long-term confrontations with other parties. My first question was how public regulators, private regulators and regulated industries respond to these confrontations. Table 3 provides a summary of these responses. These responses can be seen as solutions of the separate parties to the stubborn governance problems of co-regulation.

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<sup>31</sup> This is Article 692 of the Netherlands Civil Code.

	Public regulator	Private regulator	Regulated industries
Poultry sector	Step back, but demand additional inspections  Step back, but inspect the inspector	Exegesis after acknowledging the irreconcilability of their demands with those of the public regulator	Choosing between forms of regulation after acknowledging the irreconcilability of regulators' demands
Coach sector	Participation, but unilateral revision of the information relationship	Pigeonholing of hybrid standards system	Separating certification and the awarding of hallmarks
Temporary employment sector	Strict division between public and private  Gradual steps towards reconciliation	Pigeonholing of atypical standards system	Separating inspection and the awarding of hallmarks

Table 3: Solutions to the governance problems of co-regulation

The table demonstrates a number of noteworthy similarities between the cases.

First of all, public regulators (and especially the ministries involved) are in all cases at the very least ambivalent towards relaxing control over (part of) their regulatory activities. Three types of ambivalence can be seen in the cases:

*In terms of policy, yes; legally, no.* Especially in the temporary employment sector, there seems to be a willingness on the part of policymakers to embrace co-regulation, but there are numerous legal pitfalls. Failure can make the government agencies involved vulnerable, especially if the issue is in the political spotlight. There is a pattern of initially drawing a strict distinction between public and private, and then gradually pursuing the long route of small steps towards supporting self-regulation.

*In terms of policy, no; operationally, yes.* With its system regulation and its new priorities, the Transport, Public Works and Water Management Inspectorate is showing signs of moving away from hallmarks. At the same time, the IVW is participating in sector discussions and is looking for operational solutions for the resulting problems.

*In terms of policy, yes; operationally, no.* The policy framework TOC, applied to the poultry sector, is a yes in terms of policy as well as legally, because it is an explicit intention, under certain conditions, to step back in favour of self-regulation. At the same time, additional inspections are called for of regulated industries and certifying bodies.

Secondly, the principled attitude of private regulators (especially the Accreditation Council) is worthy of note. The cases show a tendency to apply an exegetic approach and to add special standards to the existing categories of standards. This is actually quite a logical move. For a national, private regulator, international standards lack flexibility. A great deal of harmonisation and coordination at different levels is required in order to attain international standards. Many of regulated industries dream of tailor-made accreditation of the whole process of quality assurance, from inspection through to visible distinction. However, the Accreditation Council refuses to make this dream come

true. Firstly, tailor-made accreditation is difficult to achieve. In two of the cases studied, there was a demand for a hybrid between two categories of standards. That is because no single standard can fully apply to the structure of the sector. And that is why a combination with a different standard is preferred. The Accreditation Council would appear to be responding to this wish by allowing accreditation based on a single standard (pigeonholing), which therefore suits the sector to a certain extent. Secondly, it is not always possible to reconcile the entire quality assurance process with international standards. In two of the cases cited, the RvA therefore allows accreditation for the certification process, but not for a process of awarding hallmarks. As a result, accreditation applies to part of the process. This principled attitude on the part of the RvA was the subject of long-lasting negotiations in both cases, according to the conditions and deadlines set by the RvA. These deadlines are often later than the market would wish.<sup>32</sup>

Thirdly, the attitude adopted by regulated industries would seem to be much more pragmatic. In the poultry sector, regulated industries were able to choose between the conflicting rules of the regulators. In both cases, they agreed to the separation of their standards systems, which meant that accreditation was at least possible for a part.

#### *The impact of these solutions on the effectiveness of co-regulation*

It would appear that the attitude of public regulators is ambivalent, that of regulated industries pragmatic and that of private regulators exegetic. What implications does this have for the effectiveness of co-regulation? The cases studied do not provide a representative picture, since a selection of three cases is too limited. It is therefore not possible to draw an overall conclusion from these cases with regard to effectiveness. It is, however, possible to extrapolate a number of factors that undermine the effectiveness of co-regulation. When defining the 'effectiveness of co-regulation', I am applying the standard described earlier: ongoing interaction, nourished by a trust on the part of each party that the long-term benefits will outweigh the costs.

#### 1. Exegesis versus ambivalence: the danger of deadlocks

Public regulators would appear to wish to maintain control of regulated industries, despite policy intentions to take a step back. Private regulators prefer to stick to international standards. If the public regulator has invested in a policy framework that involves co-regulation, as was the case in the poultry sector, there is a danger of deadlocks, as the discussion cannot progress. Both types of regulator are protecting standards frameworks in which a great deal has been invested. If there are conflicts between standards, it is a question of who will give way. In such cases, giving way involves losing out on one's investments. In the poultry sector, there appeared to be very little administrative willingness to give way. In the case of the fine, adherence to the standard frameworks was considered preferable to finding a solution. This brought an end to interaction and did not result in a solution. The fact that regulated industries with regard to this issue were able to opt unilaterally for a single regime can therefore be interpreted as a failure of co-regulation.

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<sup>32</sup> According to a respondent from the RvA, this hybridity can be explained as follows. In recent decades, liability for quality aspects has increasingly been borne by suppliers. As a result of this shift, aspects relating to the provision of services have become associated with products. Standardisation is now catching up on this trend.

## 2. Exegesis versus pragmatism: the danger of a solution that works for two, but not for three

Regulated industries would prefer tailor-made private regulation, while the private regulators insist on adhering to international standards. The pragmatic solution in two of the cases is the separation, after long-lasting consultations, of the quality assurance system and partial accreditation. This is the perfect solution for two parties, but not always for the third, such as public regulators. If public regulators consider certification and accreditation as a guarantee, for example, by including these in their risk analyses, they will need to be sure the extent to which these guarantees apply. Does certification apply to a product or to a service? Does certification apply to the entire quality process? Public regulators are not always aware of the scope of the guarantees. This logically raises the further question whether public regulators consider these guarantees sufficient. This question is instrumental in terms of the willingness of public regulators to continue to invest in co-regulation.

## 3. Ambivalence versus pragmatism: the danger of loss of efficiency

Regulated industries take a different view to co-regulation than public regulators. In all cases, regulated industries were continually concerned about finances. Co-regulation brings with it the promise of increased efficiency, even for regulated industries. After all, coordination between regulators will in theory result in less conflict between types of regulation and sometimes also fewer inspections. The ambivalence of public regulators is a serious threat to this efficiency, which at best leads to unpredictability, and sometimes even unreliability. The question is whether regulated industries will continue to anticipate the behaviour of public regulators. The cost of coordinating a great unknown may ultimately turn out to be more expensive than the benefits that co-regulation seems to have on paper.