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The legal framework for self-regulation in the Netherlands

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Introduction[1]

Self-regulation is a 'hot' topic in the sense that in the public debate it is usually either criticised as a licence for cartels among elite professional groups or hailed as a solution to a variety of problems relating to regulatory quality. In the vast literature on regulation theory the debate is not so black and white: a great deal has been written on the advantages and limitations of self-regulation as a regulatory technique.[2] Furthermore, typologies of self-regulatory techniques, occupying a spectrum from 'pure' self-regulation to forms of 'co-regulation', have been developed.[3] Although self-regulation is occasionally portrayed in the context of delegating responsibilities to private or semi-private bodies,[4] implying a public origin, it is mostly regarded as a bottom-up phenomenon.

Given the fact that 'self-regulation' has for a long time been a current term in public and academic debates it is easy to lose sight of these theoretical subtleties and regard it as an established concept instead. Indeed, as soon as the academic debate on self-regulation is followed up by recommendations in policy documents the core of the debate is often again reduced to the simplistic question 'to regulate or to self-regulate?' The assumption seems to be that 'self-regulation' as an alternative to legislation is something that can be put in place as some sort of package deal. This top-down approach is for instance apparent in the Inter-Institutional Agreement on Better Lawmaking 2003 concluded by the three European Union (EU) Institutions involved in producing European legislation. It defines self-regulation as 'the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes

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2 For a sophisticated argument in this regard, see A.I. Ogus, 'Rethinking Self-Regulation', 1995 *Oxford Journal of Legal Studies*, 1, pp. 97-108; J. Black, 'Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a "Post-Regulatory" World', 2001 *Current Legal Problems*, pp. 103-147.

3 A.I. Ogus, *Regulation: Legal Form and Economic Theory*, 2004. On how to situate self-regulation in the wider regulation debate, see J. Jacint & D. Levi-Faur, *The Politics of Regulation in the Age of Governance*, 2004.

4 G. Majone, *Regulating Europe*, 1996, p. 23.

of practice or sectoral agreements)'.[5] As self-regulation is increasingly promoted by the EU[6] – both on an abstract level and on a concrete level – a reconnection of legal, policy-oriented and theoretical debates is warranted.[7]

In this article we view self-regulation as a variety of forms of regulation, belonging to the category of regulatory instruments relying on consensus and cooperation for regulating behaviour,[8] rather than as an alternative to legislation. A first step is to define self-regulation in substantive terms and not by reference to any legally authoritative source. In this article we speak of self-regulation when an issue of public interest is addressed by standard-setting monitoring and/or enforcement carried out by private bodies *vis-à-vis* their members or affiliates who voluntarily subject themselves to this regulation. Self-regulatory arrangements may derive their authority from formal legal structures such as contract law, but they may also be primarily grounded in social consensus within a community.[9]

These substantive definitions are in line with the transnational discourse on self-regulation, which – out of sheer necessity – uses terms that are detached from national legal vocabularies. Yet there is a need to reconnect to concrete national legal structures. This article deliberately uses certain non-legal terms in the otherwise predominantly legal analysis, in order to make the tensions between self-regulatory arrangements and the legal framework more visible. The use of substantive terminology also allows us to see past the rigid distinction between the private and public legal orders and reveal the way in which the two interact.[10] An example is 'self-regulatory agencies', a term that – just like the term 'independent agencies' – has no self-standing legal meaning. By 'self-regulatory agencies' we mean bodies, public, private or hybrid in nature, which are involved in one or more of the stages of self-regulation: standard-setting, monitoring and enforcement. Although pure self-regulation is carried out by purely private bodies, these bodies can – for judicial review purposes – be considered 'public' if and in so far as they exercise 'public authority'. At the other end of the spectrum, bodies that are public on formal grounds can, materially speaking, be engaged in regulating their own members and therefore possess some self-regulatory qualities. Legal questions arise as to which regulatory relationship exists between the bodies and their regulatees. Another fundamental question concerns the extent to which these bodies – taking into account their nature – can impose duties on their regulatees. A problematic aspect of self-regulatory rules is their ambit: who do they bind? A third issue is the manner in which regulatees and third parties can contest the self-regulatory rules and supervisory decisions of the bodies. Thus, the substantive term 'self-regulatory bodies' covers a whole range of legally distinct bodies and triggers several legal questions.

This is just one example of a self-regulatory concept that has to be translated to concrete legal structures. As Braithwaite and Parker have pointed out there is 'a progressively more complex range of self-regulatory orders to which the law has little choice but to respond'.[11] Yet, legal scholarship is not well equipped to deal with these challenges. Little is known about the legal obstacles to a proper functioning of self-regulatory mechanisms. Many theoretical contribu-

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5 European Commission, European Parliament & Council of Ministers, 'Inter-Institutional Agreement on Better Lawmaking', *OJ* C 321, 31.12.2003, p. 1.

6 G. Falkner *et al.*, *Complying with Europe: EU Harmonisation and Soft Law in the Member States*, 2005.

7 For more examples of EU policy documents referring to self-regulation, often defining it rather narrowly, see the useful overview at http://www.eesc.europa.eu/smo/prism/regulation/conceptsexamples/index_en.asp

8 B. Morgan & K. Yeung, *An Introduction to Law and Regulation: Text and Materials*, 2007, pp. 92-93.

9 *Ibid.*

10 This approach has been extensively explored by A.A.H. van Hoek, 'Private rechtshandhaving, autonome rechtsordes en de EG' in: Van Hoek, Hol, Jansen, Rijpkema & Widdershoven (eds.), *Enforcement and Adjudication in a Multilevel Environment – a user perspective on the growing diversity of legal sources*, 2006. This article was also presented as a working paper at the Staatsrechtconferentie 2005.

11 C. Parker *et al.*, *Regulating Law*, 2004, p. 272.

tions treat self-regulation as detached from the realm of law, whereas policy documents display the tendency to reduce self-regulation to a concept that is either too limited or too abstract. This article aims to fill this gap by interweaving substantive and juristic approaches to self-regulation.

Concretely, we ask which legal provisions, mechanisms and structures affect the recourse to self-regulation in the Netherlands. The article starts out with an analysis of the constitutional framework and then broadens to look at what the specific aspects of Dutch administrative law mean for the nature of self-regulatory bodies. The final part describes to what extent self-regulatory mechanisms can be grounded in private law and in what way are self-regulatory bodies subjected to liability regimes. Of course, these three areas of law should not be seen as neatly demarcated fields and therefore cross-references are plentiful throughout all three parts. The article focuses on the Dutch legal system with an aim that is twofold: to illustrate how this particular legal system embeds self-regulation and to present a case study on how a regulatory environment characterised by fluid lines between the private and the public sphere handles self-regulation. A side-aim is to unlock the Dutch literature on self-regulation to an international readership. The article aims to contribute to the debates on self-regulation by reintroducing the legal nuances, without taking a stance in favour of or against self-regulation.

A brief introduction to self-regulation in the Netherlands

Unsurprisingly, self-regulation does not constitute a legal category as such.[12] There is one official document that mentions self-regulation: the Guidelines for Legislative Drafting, but it has advisory force only.[13] What these guidelines say about self-regulation offers some insight into the position which self-regulation ideally occupies *vis-à-vis* statutory law. One of the steps recommended by policy-makers before the legislative option is chosen involves an inquiry into whether the chosen objectives cannot also be attained by relying on the self-regulatory capacity in the sector concerned.[14] Further on in the Guidelines it is stipulated that the type of regulatory intervention to be chosen should, to the largest extent possible, link up with the self-regulatory capacity in the sector.[15] The explanatory note to this guideline states in general wording that direct state intervention should only come into play when the self-regulatory capacity of society – supported/strengthened by state measures or not – cannot be expected to suffice. A report attempting to subject self-regulation as a phenomenon to cost-benefit analysis concludes that in spite of the existence of these Guidelines, the choice between legislation and self-regulation is hardly ever explicitly made in the course of the policy-making process.[16]

The active involvement of social partners[17] in the Dutch political tradition means, on the one hand, that there is a flourishing culture of private involvement in regulation, especially in areas such as education and labour law. On the other hand, the culture of deliberation and consensus has been so heavily institutionalised and thereby brought under at least some degree

12 Paradoxically the only case which mentions the word 'self-regulation' is not about self-regulation at all, but about the internal regulation of a public agency. HR 2 December 1988, *RVDW* 1988/210 and *NJ* 1989, 752 on the rules on access to files of the Municipal Medical Service (*Gemeenschappelijke Medische Dienst*, GMD).

13 *Aanwijzingen voor de Regelgeving*. These guidelines have the legal status of 'policy rules' and they bind the governmental drafters but not the legislator as such, and neither does the Council of State refer to them explicitly. There has been no or little research done on their impact on the legislative outcome and opinions on this matter differ.

14 Guideline no. 7.

15 Guideline no. 8.

16 SEO report, *Goed(koop) geregeld: Een kosten-baten analyse van wetgeving en zelfregulering*, 2004, p. 96. No research has been carried out into the reasons behind this. It could well have something to do with the limited impact that Guidelines such as these have on any policy-making process if they are not enforced in one way or another. It could also be connected to the constitutional obstacles inherent in Dutch constitutional law.

17 Meaning all representative socio-economic organisations.

of supervision by the state that regulation by these social partners is predominantly regarded as belonging to the public sphere. An example of the latter is the introduction of 'trade and industry organisations' ('*Publiekrechtelijke bedrijfsorganisatie*') in the Constitution in 1939, reflecting the idea that professional and other private organisations also have to take into account the public interest.[18] The famous '*polder model*', which is a rather loose variety of corporatism,[19] is another. This tendency to leave room for private regulation, but only as long as it takes place in the shadow of public power, has implications for the place that self-regulation can occupy in the regulatory landscape and *vis-à-vis* legal structures.

Although self-regulation has roots in private autonomy or 'subsidiarity' (see part 1) in the catholic sense, it has come to be looked upon as an instrument among many at the disposal of government, closely associated with deregulation. The trend to view self-regulation as an alternative to legislation was expressly encouraged in the government communication 'View on Legislation' (*Zicht op wetgeving*).[20] Whereas in the early 1990s Balkenende, the future Prime Minister, still concluded in his academic writings that 'there has been no willingness [in governmental policy] to stimulate a regulatory role for voluntary non-governmental organisations',[21] nowadays a clear desire on the part of the Dutch Government to implement forms of co-regulation (often still called 'self-regulation') can be discerned.[22]

Pure self-regulation (*zuivere zelfregulering*) is characterised by the fact that the initiative rests with the regulatees themselves[23] and the state remains neutral as to the outcome of the self-regulatory process. However, the term self-regulation is regularly used when in fact there is a situation of cooperation between public and private regulators, often induced by public authorities through a soft threat of the possibility of initiating command-and-control regulation in the future. The middle ground in types of self-regulation is represented by the option of providing incentives for self-regulatory solutions or as putting in place 'meta-regulation',[24] to some extent put into practice by the governmental *MDW* project[25] on market regulation, deregulation and public regulation.[26] At the other end of the spectrum we find 'co-regulation', which is sometimes literally translated into Dutch as '*coregulering*' although the more accurate Dutch expression is '*wettelijk geconditioneerde zelfregulering*' ('statutorily conditioned self-regulation').[27] This form of 'impure' self-regulation occurs in different degrees and has three characteristics: 1) the legislator has a role which is complementary to that of private bodies and restricts itself to formulating preconditions; 2) private bodies enjoy considerable freedom to implement this statutory framework; and 3) the state has an important role in supervising the results of self-

18 J.H.M. Dassen, *De Grondwetsherziening 1938*, 1938, pp. 134-136, cited by A.K. Koekkoek & G. Leenknegt, 'Subsidiarity as a Principle of Dutch Constitutional Law', in J.H.M.v. Erp & E.H. Hondius (eds.), *Netherlands reports to the fourteenth International Congress of Comparative Law*, 1994, pp. 237-249, note 4.

19 See R.B. Andeweg & G.A. Irwin, *Governance and Politics of the Netherlands*, 2002, p. 145 for a detailed explanation of this Dutch model in English.

20 *Kamerstukken II* 1990-1991, 22 008, no. 1-2.

21 J.-P. Balkenende, *Overheidsregelgeving en maatschappelijke organisaties*, 1992, p. 311, cited by Koekkoek & Leenknegt, *supra* note 18, p. 246.

22 The Balkenende II Cabinet's 'Main Lines Agreement' (*Hoofdlijnenakkoord*). For an elaborate account of the developments in regulatory policy in the Netherlands see R.A.J. van Gestel & M.L.M. Hertogh, *Wat is regeldruk? Een verkennende internationale literatuurstudie*, 2006, Study commissioned by the Dutch Ministry of Justice (WODC), Tilburg/Groningen. An English summary is available at http://www.wodc.nl/onderzoeken/onderzoek_1288.asp?soort=publicatie&tab=pub

23 P. Eijlander & W.J.M. Voermans, 'Outlooks for legislation: Introduction', 1999 *RegelMaat*, 3, p. 71.

24 See for instance the Government memo '*Bruikbare rechtsorde*' ('practical legal order'), *Kamerstukken II* 2003-2004, 29 279, no. 9 in which meta-regulation is proposed as the way forward for self-regulation in less obvious policy areas too.

25 *Marktwerking, Deregulering en Wetgeving.*

26 Examples of the latter are market elements introduced in the Act on Advocacy (after the Cohen Commission's evaluation in 1995), the new Notaries Act (1999), the new Usher's Act, alterations in the Taxi sector and the Financial Markets sector.

27 Sometimes the literal Dutch translation '*coregulering*' is used to denote a rather narrow form of private participation in standard-setting or agenda-setting. Apart from this, the word is found in Dutch translations of EU documents.

regulation. An example is the case of social service providers which have to regulate themselves to the extent that they comply with the statutory injunctions on quality in health care.

Despite the popularity of arrangements of a 'co-regulatory nature', many instances of persisting pure self-regulation remain, *i.e.* cases in which the state keeps a certain distance. These occurrences can roughly be divided into two categories: self-regulation by associations (*e.g.* regulation by associations in the sport sector) and self-regulation in areas which are heavily protected by fundamental rights (*e.g.* Press Merger Code).

1. Implications from constitutional law

The written Constitution (*Grondwet*) is silent on the subject of 'self-regulation', but constitutional law in the wider sense certainly contains provisions and principles either encouraging self-regulation or limiting the possibilities for self-regulatory activities.

1.1. Constitutional elements encouraging self-regulation

Private autonomy

Private autonomy acts as the main underlying constitutional principle for self-regulation. Neither private autonomy in general nor the autonomy of the social partners has an explicit constitutional basis. Yet when reading the Constitution carefully one certainly comes across a constitutional conception of private autonomy. First of all, Chapter 1 contains an elaborate collection of fundamental rights aimed at a demarcation of a sphere that is exclusively private. Secondly, Chapter 7 on decentralised bodies mentions the autonomy of lower territorial bodies in Article 124. Furthermore, private autonomy is constituted through the possibilities which private law offers private parties to set agreements on the basis of the law of contracts and can organise themselves as legal persons (see 3).

Subsidiarity

Subsidiarity is known in the Netherlands as a catholic principle, not as an explicit constitutional principle, although some constitutional lawyers argue that it does implicitly underpin the Dutch Constitution.[28] More widely shared is the conviction that subsidiarity and its protestant equivalent of 'sovereignty in one's own circle' have played an important role in securing a firm footing for societal organisations in politics and governance. After the 'depillarization',[29] the religious divisions withered away, but the organisations stayed, although their influence was subject to the caprices of the political climate. A remaining institutional oddity which at the same time can be seen as an explicit constitutional encouragement of delegated self-regulation is to be found in Article 134 of the Constitution, which calls for the establishment of the industry and trade organisations and allows a delegation of regulatory powers in this field by a statutory provision. Once this delegation has taken place self-regulation can be required, *e.g.* some professional organisations such as the *KNB*, the professional organisation of notaries, are required to self-regulate.[30]

28 Koekkoek & Leenknegt, *supra* note 18, p 240.
29 '*Ontzuiling*', *i.e.* the falling apart of the strictly segregated politico-religious 'pillars' of which Dutch society consisted for many decades.
30 These bodies are in fact public bodies, but we argue that there is a good case for considering their activities as self-regulatory nonetheless.

Facilitating aspects of fundamental rights

Generally speaking, fundamental rights codified in the Constitution and international treaties like the ECHR contribute to a demarcation of a private sphere free from governmental intervention. The Dutch Constitution clearly stipulates for each right whether and how the state can limit the exercise of the right in question.

Freedom of association comes to mind as the main candidate for an enabling role in self-regulation. Sometimes this fundamental right requires active cooperation from the state, as clarified in national case law[31] as well as by a decision by the ECHR.[32] The Court stated that there can be an obligation for the state to intervene between private parties to ensure the actual exercise of the freedom of association. Although the freedom of association can be seen as an important bedrock for pure self-regulation it does not feature as prominently as one would expect in parliamentary debates (for instance, it did not play an important part in the debate on submitting the notaries to public regulation). One reason for this is that the Netherlands has no constitutional court and Dutch judges cannot review statutory provisions for breach of constitutional provisions and principles. This paves the way for an instrumental logic on the part of the legislator: as long as self-regulation and self-supervision is satisfactory, pure self-regulation may exist; once a free-rider problem arises it is quite easily overruled.

A second relevant fundamental right is Article 8 ECHR (and Article 10 Constitution), the right to private life. Horizontal effects of this provision are – while not completely imaginary – not needed because the usual 'standards of care' from private law or the duty of care of Article 1.1a Environmental Management Act (*Wm*)[33] can be used when dealing with private-private relationships. These duties need to be fleshed out in further rules or standards, which do not need to be of a public nature: covenants, company plans for the environment and behavioural codes are also well-suited to perform this function. A third fundamental right, the freedom of expression (as laid down in Article 7 Constitution), is particularly relevant for self-regulation in the media sector, where it protects against censorship and requires a statutory basis for almost all regulatory interventions.

If one views – as some Dutch authors do – self-regulation in the light of the overburdened welfare state, rediscovering the self-steering capacities already present in society – especially wherever 'civil society' is well-developed – can be a way for the state to live up to its constitutional commitment towards social rights and to even address the internal tension they often contain.[34] There has been some discussion among academics as to whether Article 21 of the Constitution ('the care of the state is directed at the habitability of the country and the protection and improvement of the environment') precludes self-regulation in the environmental sector, because the state has exclusivity in this sector. One explanation for the 'state-mindedness' of the constitutional text is that the Dutch Constitution of 1980 was drafted in the seventies, just before the boundaries of the welfare state became visible, in an era when traditionally important societal organisations were set aside. However, the consensus nowadays seems to be that a 'dynamic perspective on fundamental rights'[35] warrants an active role for private actors. The most interesting suggestion in this regard is that Article 21 could contain certain procedural guarantees

31 HR 25 June 1982, *NJ* 1983/296, (*De Schans*).
32 ECHR decision of 25 April 1997.
33 *Wet milieubeheer*.
34 P. Eijlander, R.A.J. van Gestel & P.C. Gilhuis, 'Perspectieven op wetgeving', 2000 *RegelMaat*, 2, pp. 68-97.
35 R.A.J. Van Gestel & J. Verschuuren, 'Artikel 21 Grondwet en de noodzaak van zelfregulering in het milieurecht: naar een andere betekenis van sociale grondrechten?', in H.R.B.M. Kummeling & S.C. Van Bijsterveld (eds.), *Grondrechten en zelfregulering*, 1997, p. 127.

concerning the participation of third parties[36] and legal protection for those affected by environmental self-regulation; however, these recommendations are not reflected in the case law up until now.

1.2. Constitutional obstacles to self-regulation

The rule of law

In Dutch constitutional law the doctrine of the 'primacy of the legislator' seeks to ensure that all major politico-legal choices are made by the legislator and the legislator only. A closely related and important principle of constitutional law, although not explicitly mentioned as such in the Constitution, is the rule of law, or, remaining closer to the Dutch wording, the principle of legality (*legaliteitsbeginsel*).[37] The written Constitution (*Grondwet*) operationalises the principle of legality by demanding statutory regulation for certain topics. Examples of areas requiring primary legislation and thereby excluding self-regulation are military service, monetary matters, taxation, judicial organisation, criminal law and decentralisation. Outside these areas, there is some consensus on the rather vague standard that 'drastic' measures can only be taken by the legislator. When it comes to more concrete criteria to determine whether certain issues require a statutory basis, the proposals in the literature vary considerably. The most common way of phrasing this is to state that all legislative acts as well as all administrative acts 'affecting individual rights and freedoms' need to be based on a statute. It is often argued that the ambit of the legality principle has been extended to encompass all governmental actions imposing unilateral obligations on citizens,[38] extending even to the allocation of subsidies for example.[39]

This rather broad interpretation of the legality principle restricts the scope for self-regulation to some extent. The operational value of the legality principle and the doctrine of the primacy of the legislator is limited, however: it is more or less clear which broad preconditions they stipulate, it is less clear what these constitutional standards require in each individual case. The government has stated that self-regulation is not desirable 'whenever the fundamental values of the democratic, constitutional state are at stake'[40] – chiming with a similar proposition in the EU Inter-Institutional Agreement on Better Lawmaking[41] – but it is not clear what these norms encompass. The criterion of 'public interest' is not helpful in demarcating the boundaries between public and private tasks either. The Scientific Council for Government Policy defines public interest as 'social interest of which the government takes of the promotion in the conviction that this interest will otherwise not come into its own properly',[42] thus leaving the matter solely to political judgment.

There is no case law in which self-regulation is prohibited because of infringements of the 'primacy of the legislator' doctrine or the legality principle, nor are big cases likely to appear.

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36 A real problem when covenants are used is that environmental organisations often feel neglected when the government concludes a 'deal' with, for instance, farmers on environmental targets.

37 F.J. van Ommeren, *De verplichting verankerd: de reikwijdte van het legaliteitsbeginsel en het materiële wetsbegrip*, 1996.

38 W.J.M. Voermans & S.C. van Bijsterveld, 'Inleiding hoofdstukken 5 en 6: wetgeving, bestuur en rechtspraak', in A.K. Koekkoek (ed.), *De Grondwet. Een systematisch en artikelsgewijs commentaar*, 2000, p. 398.

39 Art. 4:23 GALA.

40 *Kabinetsnota* 1998, p. 180 Although one example might be the concerns about the exclusion of the regular courts when establishing an alternative dispute resolution system.

41 HR 22 June 1973, *NJ* 1973/386. In this case it was actually factual intervention (adding fluoride to drinking water) by the public authorities which needed a legal basis.

42 WRR, *Safeguarding the public interest* (summary of the 56th report), 2001, p. 13. The report also analyses conditions to which the private actors are held (or should be held) in order to safeguard the public interest, such as the expertise of the sector, transparency and rendering account of the governance of the sector. But as we stated before, all these conditions are political conditions and not legal tools to define why and when the delegation of public tasks or interests to private parties is possible.

This is not only because the Netherlands has no constitutional court that can determine that the legislator has acted *ultra vires* by usurpating the territory of other authorities, private or public. It is also because the top-down perspective of the legality principle does not leave much room for incorporating private law acts into the hierarchy of norms as they are deemed to be inherently bottom-up and two-sided in character. However, the next part will set out how Dutch administrative law offers sufficient flexibility to draw self-regulatory bodies in the public law realm of the legality principle in some cases.

Restraining aspects of fundamental rights

The question of whether self-regulatory bodies need to comply with fundamental rights has never directly come up in court. This is perhaps not surprising, given that a) these rights apply first and foremost in relations between public bodies and citizens and b) the legal system follows the logic that citizens who choose to join a self-regulatory scheme are thereby 'renouncing' (some of) their fundamental rights. As long as a *public* body is involved (in any kind of action, regulatory, factual or commercial) it may only breach fundamental rights if it has been mandated to do so in accordance with constitutional delegation rules. In the case of co-regulation, where private actors regulate alongside state actors, the case law is based on the assumption that the involvement of private bodies cannot amount to a 'licence to breach fundamental rights.'[43]

As concerns pure self-regulation, the general principle is that contracts breaching fundamental rights as laid down in the constitution constitute an illegality and are therefore null and void.[44] But since the focus on public-private relations is reflected in the way the fundamental rights are drafted in the Constitution, this will not readily happen. The issue comes up every now and then in practice though, as demonstrated by a ruling of the Appeal Tribunal for the Advertising Code Committee (*Reclame Code Commissie*). Here the attempt by an information office for tobacco to invoke Article 10 ECHR failed: since the companies associated with the appellant had voluntarily committed themselves to certain conditions when advertising through a self-regulatory code, they could not invoke the freedom of expression when these conditions are enforced.[45] This decision has been criticised in the literature, albeit more for its reasoning than for its result.[46] The emphasis on a voluntary character is mostly criticised on the basis of the argument that it can be an 'empty' concept if there is peer pressure to accede to the regulation or if the association/foundation in question is so predominant in the field that there is no way around it. Stricter competition rules have, however, made the latter situation vulnerable to challenges on the basis of unlawful anti-competitive effects.

When the relationship between the parties is purely private and therefore voluntary, it is for the courts to decide on an ad hoc basis whether the self-regulatory body needs to respect the human right in question as if it were an organ of the state. Dutch courts apply a rather loose balancing test, using fundamental rights to 'flesh out' private law principles.[47] The societal power of the body and the degree of the voluntary nature of an association are important factors. The doctrine of 'horizontal effect'[48] starts from the contention that equality in relations between citizens is often lacking; they can amount to power relations not unlike those between the state

43 HR 3 November 1989, *NJ* 1991/168 and HR 26 April 1996, *NJ* 1996, 728 (*Rasti Rostelli*).
44 *Verbintenissenrecht deel II*, note 410.
45 Appeal against *RCC* decision of 14 January 1992; 7 April 1992, nr. 695 91 7131, 695 91 7132.
46 M. Leijten, 'Grondrechten en handhaving van zelfregulering', in H.R.B.M. Kummeling & S.C. van Bijsterveld (eds.), *Grondrechten en zelfregulering*, 1997, p. 199.
47 See HR 30 March 1984, *AB* 1984, 366 (Turkish employee)
48 '*Horizontale werking*' in Dutch or '*Drittwirkung*' in German.

and citizens.[49] Especially the unilateral actions of large associations and contractual relations between unequal parties can pose problems of abuses of power. Yet the legal pervasiveness of this doctrine is by no means clear. The main conclusion of an essay collection dealing with 'fundamental rights and self-regulation' specifically[50] is that the impact of fundamental rights on self-regulation is an indirect one. Furthermore, the existence of constitutionally entrenched rights can impose a 'duty to give reasons' on purely private self-regulatory bodies, such as to ensure protection of privacy by a Registration Office.[51] Lastly, it is possible for courts to resort to the private law norms of 'reasonableness and fairness' as interpretative instruments for the concrete meaning of fundamental rights in horizontal relations. To conclude, no cases are known in which the horizontal effect of fundamental rights has led to a duty to self-regulate.[52] Tentatively, it could be argued that such a duty could easily be a breach of the freedom of association (Article 8 Constitution) itself.

2. Implications from administrative law

As mentioned above, in certain cases self-regulatory mechanisms can be drawn into the public sphere, because a public law status is assigned to the body in charge of the self-regulatory regime. Dutch administrative law and most notably its General Administrative Law Act (GALA)[53] – which has been described as 'a law with a near constitutional status'[54] – contain provisions on the conditions under which this can happen as well as provisions relevant for determining the regulatory scope of 'semi-public' self-regulatory bodies.

2.1. Self-regulatory bodies and the General Administrative Law Act (GALA)

Rules for delegation

Since a constitutional review of secondary legislation by the ordinary courts is not prohibited, a question more likely to come up in court is whether public powers derived from the Constitution can subsequently be delegated to self-regulatory bodies. Dutch constitutional law distinguishes between the delegation of rule-making powers, on the one hand, and the delegation of executive powers (monitoring/enforcement) on the other. In most Dutch regulatory regimes, rule-making functions and monitoring/enforcing functions are conducted by separate bodies.[55] There is strong doctrinal hesitation to delegate rule-making powers too far out of parliamentary reach. The American model of the strong regulator has by no means taken root. The delegation of executive functions is regarded as less problematic. A clear statutory basis is always required, however (Article 10:15 GALA), both for executive and for rule-making powers and in order to delegate powers, a public body must not just possess the power in question, it must also have been given explicit authorisation to 'transfer' those powers. The authorising statutory norm will

49 H.R.B.M. Kummeling & S.C. van Bijsterveld, *Grondrechten en zelfregulering*, 1997. For literature in English see for instance the edited volume by T. Barkhuysen & S.D.. Lindenbergh (eds*.), Constitutionalisation of Private Law*, 2006.

50 Kummeling & Van Bijsterveld, *supra* note 49.

51 *Ibid.*, p. 92.

52 *Ibid*.

53 An English translation of the GALA is available at http://www.justitie.nl/Images/11_7093.doc

54 I.C. van der Vlies *et al.*, 'Application of Administrative Law to Privatizations', in J.H.M. van Erp & E.H. Hondius (eds.), *Netherlands reports to the sixteenth International Congress of Comparative Law*, 2002.

55 For example, in the government communication (*nota*) on Standards, Certificates and Open Boundaries (*Normen, Certificaten en Open Grenzen*), *Kamerstukken II* 1994-1995, 21 670, no. 7-8, p. 29 it was recommended to keep 'private functions' (quality control and certification) separate from the 'public function' (supervision).

usually also prescribe to which authority the rule-making power can be delegated and this will usually be a 'hard core public authority', ruling out self-regulation.

Delegation of executive powers should also have a basis in statutory law (Article 10:15 GALA), but the conditions for delegability are less strict. Public tasks are awarded to private bodies in two different ways. The powers can be officially delegated, in which case the private body acquires a public status (see below) or the private body can *de facto* exercise a supervisory function without any legal basis. Occasionally questions about the limits of the delegation of executive powers arise, such as: can the legislator delegate monitoring and enforcement of statutory rules and licensing provisions to private certification institutions? These issues are often solved on the basis of 'common sense constitutionalism', which with regard to this latter question would lead to the conclusion that it would be in any case constitutionally unacceptable if all power would be placed in the hands of those paying the fees.[56]

Self-regulatory bodies and administrative bodies

The GALA regime is rigid in the sense that its applicability depends, first of all, on the qualification of the body involved as an administrative authority (*bestuursorgaan*). It follows from Article 1:1 GALA (see below) that there are two kinds of administrative authorities: those fulfilling the formal condition of belonging to an entity possessing 'public legal personality' ('a-type') and those who derive their legal personality from private law instead but who do satisfy the substantive condition of being invested with public authority ('b-type').[57]

B-type bodies

There is no statutory definition of what constitutes an exercise of 'public authority', leaving the interpretation of this phrase to the judiciary. The case law is famously volatile and for our current purposes it is enough to state that providing a public service is not a sufficient condition for being regarded as a b-type public body and a strong financial relation with or institutional influence from the state will at least be needed to sway a judge. However, once the delegation of a public law power takes place, the private body (*e.g.* an association or a foundation) immediately falls under the GALA regime. In other words: there are no limits to delegation to private regulatory bodies (other than the constitutional limits described above); it just makes these bodies 'public' for the purposes of judicial review and the applicability of principles of proper administration. Thus, bodies with a 'self-regulatory origin', often established for quality assurance purposes, can be regulated by administrative law as b-type authorities and will have to comply with the GALA provisions in so far as it exercises public authority.

Self-regulatory a-type bodies?

Although a-type GALA bodies are generally synonymous with 'hard-core' public bodies, there are two types of a-type bodies that can be said to possess self-regulatory qualities: 'Article 134 bodies' and 'independent administrative agencies'. Against the background of ongoing transnational and EU-triggered discussions on self-regulation, they need to be part of the picture because of the functional overlap with pure self-regulatory bodies or private bodies with a public status in other European legal systems.

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56 A.J.C. de Moor-van Vugt & F.J. van Ommeren, 'Certificering als reguleringsinstrument', 1999 *SEW* 3, pp. 89-96.

57 Art. 1:1 GALA: '1. "Administrative authority" means: (a) an organ of a legal entity which has been established under public law, or (b) another person or body which is invested with any public authority'.

'Functional decentralisation' (*i.e.* devolution of power not to lower levels of government but to central public institutions rooted in civil society) is a predominant characteristic of the Dutch constitutional system. Article 134 of the Constitution created the possibility to establish Public bodies for Businesses and Professions[58] ('Article 134 bodies' for the purpose of this chapter) in two main categories: 'trade and industry organisations' (*PBOs*) consisting of the Commodity Boards (*productschappen*) and the Industrial Boards (*bedrijfschappen*), and 'other' bodies, mainly for the professions. These 'hybrid' bodies that are privately financed by contributions by members, but that benefit from an obligatory membership can be awarded rule-making powers in or through a statute.[59] These bodies stem from a tradition of profound corporatism and were mostly established in the 1950s or rather, they were 'built through a refined web of private, public and administrative law'.[60] Although these organisations are indisputably public,[61] some even possessing rule-making powers, the fact that most of them are privately financed lends a 'self-regulatory feel' to them. The most prominent examples of bodies of this type that are still associated with self-regulation are the *NOvA* (the Dutch Bar Association) and the *KNB* (the Notaries' Association). The structure of the Article 134 bodies has received a great deal of criticism as being a breeding ground for outright capture, and in 1999 some responsibilities were given back to the government and the legislator based on a reform of the Article 134 bodies.

The second category of public bodies in the 'a-category' with possible self-regulatory aspects that remain hidden because of their overtly public status are the 'independent administrative agencies' (IAAs)[62]. IAAs mostly have hard-core public functions, but some possess self-regulatory features in the sense that they regulate their own members.[63] Existing independent administrative agencies are more often used when a kind of meta-regulatory supervision of pure self-regulatory institutions has to be arranged. IAAs can be 'hard-core' public bodies which have gained some degree of independence from the government (*e.g.* the Dutch Competition Authority NMa was recently made into an IAA) or they can be bodies with private roots which have been drawn into the public realm (*e.g.* the Financial Market Authority AFM).

2.2. Regulatory scope of self-regulatory bodies under the GALA

GALA bodies can only engage in regulatory or supervisory activities once they have been explicitly authorised to do so by means of delegation. Once they have this power a unifying characteristic is that public supervision or regulation is one-sided and does not require the prior consent of the regulatees. Real rule-making powers which go further than setting technical standards are usually only delegated to hard-core public bodies (and IAAs even only in specific circumstances). Therefore, if a private regulator adopts a code that is binding on its members or affiliates, this will most likely be done on a private law basis. However – and this complicates matters – sometimes it is foreseen in a statute that a hard-core public body or an Article 134 body needs to approve internal codes or regulations.

The formalistic approach of the Dutch courts when it comes to applying the legality principle to self-regulatory structures was already mentioned in the previous part. Their virtual

58 *Openbare lichamen voor Bedrijf en Beroep.*

59 This is an example of the famous constitutional terminology indicating that further delegation is allowed.

60 G. van den Heuvel, 'Convenanten in de Nederlandse overlegeconomie', 1994 *Justitiële Verkenningen*, p. 9.

61 In a recent case the question of whether the Dean of the National Bar could be regarded as an administrative authority was put before the Administrative Law Division (of the Council of State). Despite the private air of this body, its formal public nature was easily established because the National Bar derives its legal personality from public law. Decision of 30 June 2004.

62 '*Zelfstandige bestuursorganen', ZBOs*.

63 *E.g.* Association of National Professional Education Organs (*Vereniging van Landelijke Organen Beroepsonderwijs* (*COLO*)) and the College for Health Care Fees (*College Tarieven Gezondheidszorg* (*CTG).*

immunity from the legality principle leaves a great deal of leeway for private regulators, including self-regulators in theory. However, in practice many self-regulatory bodies are considered public for the purpose of their regulatory tasks on the basis of their 'public authority' activities. In a case on the quality control of plants and seeds[64] the court was willing to review whether there had been a breach of the legality principle, but only after the public law nature of the supervisory Dutch Inspection Service for Horticulture (*Stichting Naktuinbouw*) had been established. Other case law dealing with constitutional limits on regulation by private actors deals with the type of private regulation that cannot be conceptualised as self-regulation in any meaningful way, because the public interest element is lacking or it is not 'the own group' that is being regulated (*e.g.* owners of large shopping malls enacting regulation prohibiting cycling inside the mall building).

Regulation by a-type 'self-regulatory' bodies
Of the Article 134 bodies in the category 'trade and industry bodies' only some have been given rule-making powers, but they are usually quite limited in substance. All 5 Article 134 bodies for the professions (in the category 'other bodies') have also been given rule-making powers, which are clearly public and truly regulatory in the sense that they go further than mere technical standard-setting. However, their ambit is restricted to the members of these organisations (of which membership is obligatory). For instance, the *NOvA* and the *KNB* used to be associations established by lawyers and notaries in which membership was voluntary, but they were granted public powers in 1952 and 1999, respectively, transforming them into Article 134 bodies. As a result all the (private law) professional rules that these bodies have created had to be converted into public law regulations.[65]

Ex-post recognition
Ex-post recognized self-regulation has been seen to occur, *e.g.* in the case of collective labour agreements (CAO). These agreements have been declared generally binding after they were concluded. In the case of the registration of Internet domain names the state issued a 'quality mark' for the self-regulatory provisions, indicating that they had been approved. When it comes to quality marks the legislator has a choice: either the material norms can be transposed into legislation or the quality marks can as such be made obligatory. The organisation than loses its collective, voluntary nature and becomes mandatory. Making a quality mark obligatory comes down to awarding public law powers,[66] because at that point the regulation is binding on public law grounds (*e.g.* the certification company *KEMA Quality BV* is considered a b-type public body for some of its activities and is mentioned on the list of IAAs).[67]

2.3. The administrative liability of self-regulatory bodies
Regulatees that suffer damage because of decisions of public bodies engaged in self-regulation can contest these decisions before an administrative court.

64 Decision of the Administrative Law Division (of the Council of State) of 24 December 2003, *JB* 2004/82.
65 GALA a-type bodies are subjected to ministerial review. Only those regulations that have been approved by the Minister (or in cases in which the *KNB* successfully contested the non-approval of the Minister before a GALA judge) can come into force.
66 J.A.F. Peters, 'Zelfregulering en organisatievorming', in P. Eijlander (ed.)*, Wetgeven en de maat van de tijd*, 1994 , p. 145.
67 http://www.zboregister.nl

Public rule-making
Decisions of GALA bodies based on public regulation can be subjected to a judicial review by an administrative court, but this applies to concrete decisions only. If the unlawfulness of the decision is established, the judge can decide on the reparation of the damages suffered by the regulatee. If the judge does not award damages the regulatee can apply for compensation in the form of damages through tort procedures at a civil court (see 3).

If the regulatee fails to commence GALA proceedings contesting the lawfulness of the decision of the administrative body, he will not be able to obtain compensation in civil law proceedings. The decision of the regulatory body will be qualified as having *binding force* (because it was not contested) and subsequently as *lawful*, ruling out the possibility to incur liability.

Taking these procedural rules into account one could argue that regulatees that are affected by decisions based on self-regulatory norms drafted by public bodies can contest these before an administrative judge. The *Wouters* case is a perfect example of regulatees that tried to quash a decision of a public self-regulatory body before an administrative court.[68] Two law firms and a firm of accountants started a GALA liability procedure to contest the decision of the *NOvA* (the Dutch Bar) not to allow a multidisciplinary partnership operating under one name between the firms. This decision was based on a public regulation of the *NOvA* (the Regulation on Cooperation) that prohibits MDPs in which lawyers share profits and with professionals other than notaries or tax lawyers.

Public supervision
The Dutch term for supervision, '*toezicht',* encompasses a wide variety of enforcement, control and monitoring measures such as *education*,[69] *assessment and the supervision of assessment*,[70] *control and tests*,[71] *examination* and subsequent *certification, classification* or the *issuing of diplomas and licences*, as well as *registration*, *financial support* and *financial supervision* and, last but (certainly for our project) not least, *supervision of regulation*.[72]

In the Netherlands supervision and regulation are generally not entrusted to the same body. Supervisory tasks are attributed to independent bodies. Supervision in Dutch law virtually coincides with public supervision for – as Giesen points out – multiple reasons such as paternalistic reasoning, control over natural monopolies, prevention of negative external effects and monetary policy, and most Dutch supervisory authorities are public bodies.[73]

Regulatees who want to contest supervisory failure can only apply for judicial review by an administrative court if the supervisory failure is based on a concrete decision of the supervisory body. It is useful to mention that a decision not to enforce (or a policy on non-enforcement in certain sectors) or a failure to take a decision upon application can also be qualified as a concrete decision for these purposes. Extensive case law deals with the supervisory tool of enforcement. Enforcement is seen as an obligation of the state, to which the state can make temporary and well-considered exceptions, if and when the state provides guarantees for infringements of the interests of third parties. If the situation is urgent, however, the supervisory

68 C-309/99 (*Wouters c.s.*).
69 *E.g.* the Foundation for Bread and Pastry Education.
70 *E.g.* the Dutch Assessment Institution that evaluates the assessment of businesses that have implemented company control mechanisms.
71 *E.g. Keboma* (control of mobile cranes and tower cranes).
72 *E.g.* the Press Fund (*Bedrijfsfonds voor de Pers*) and the Media Authority (*Commissariaat voor de Media*).
73 I. Giesen, *Toezicht en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de rechtvaardiging voor de aansprakelijkheid uit onrechtmatige daad van toezichthouders ten opzichte van derden*, 2005.

body cannot reasonably invoke its possibility to decide *not* to supervise/intervene. If damage is foreseeable, the supervisory organ is obliged (supervision becomes a duty) to intervene and prevent damage from occurring.[74] Theoretically speaking, one would think that public bodies could be held to comply with the same rules as the state. Supervisory failures of self-regulatory norms could be assessed on the same basis, meaning that the supervision and enforcement of self-regulatory norms becomes a duty once damage is foreseeable.

Legal scholars have extensively debated the issue of governmental liability for supervisory failures of public bodies with their hopes set on the trial case against the State in the aftermath of the Enschede firework disaster.[75] Although in this case the court ruled that the State could not be held liable, it cannot be ruled out that public authorities (or the State) may be held liable for supervisory failure in the future, because in this case juridical technicalities prevented the appellate court from delivering a ruling based on the merits of the case.

3. Implications from private law

Although the term 'regulation' has a public flavour, the addition of the word 'self' points to the voluntary nature of this type of regulation, drawing the concept into the sphere of private law. The concepts of freedom of contract and the autonomy of private parties give these parties a wide margin of possibilities when drawing up agreements. Self-regulation by private parties encompasses the voluntary act by these private parties to commit themselves to the private norms and procedures that they enact and to monitor and enforce these agreements through private law techniques. The exercise of private law powers may not however breach codified or non-codified public law rules (Article 3:14 of the Civil Code) and are otherwise null and void (Article 3:40 Civil Code). Therefore even pure self-regulatory rules have to remain within the statutory framework, *e.g.* the internal rules of sports organisations may not breach provisions of competition law.

3.1. Self-regulatory bodies and private law

Company law and contract law provide for several mechanisms that are a dynamic for the enactment of rules, norms and procedures between private parties.[76] Private parties can form cooperational structures and choose a private legal form for their organisation. Private bodies can have several legal forms, the most apt for self-regulation being associations, foundations and companies.

Associations are entitled to regulate their own members, based on the constitutionally entrenched freedom of association and the law of associations as laid down in the Civil Code (*BW*). The association model is used in the more traditional fields of (pure) self-regulation, such as sports, the media and liberal professions.[77] In the sociological sense[78] this model enhances the possibility of self-regulation because of the freedom this model offers to organize oneself. An advantage of the use of the association model in co-regulatory relationships is the democratic character of associations. An important drawback when applying this model is that enforcement

74 *E.g.* the famous case of a robbery: the police did not intervene in the robbery but were waiting to catch the villains. The liability for the death of a victim of the robbery was attributed to the State.

75 Court of Appeal of The Hague, 24/12/2003, *LJN* AO0997, 01-2529

76 I. Giesen, 'Alternatieve regelgeving in privaatrechtelijke verhoudingen', 2007 *Handelingen Nederlandse Juristen Vereniging,* p. 92.

77 In 1952 and 1999, respectively, the association of lawyers and that of notaries were vested with public powers and transformed from private associations to public bodies. The distinction between (private) associations of the liberal professions and the (public) professional organisation will be explained in the second part of the report.

78 A group of people setting standards, monitoring these standards and imposing them on the (new) members of the group.

and compulsory membership do not befit the voluntary nature of associations and as a result free-rider conduct is a common problem.[79]

Freedom of association implies that associations should be able to decide on the admittance of their members. The articles of association may stipulate qualities that a person should possess in order to be admitted as a member. In theory, quality demands do not necessarily constitute a breach of the prohibition on discrimination. In some circumstances, however, the non-admittance of a member can be contrary to proper societal conduct (enacting liability on the basis of tort). If it is very important for the prospective member to become a member of the association – for vocational purposes, for example – and one could not speak of a reasonable and fair reason for refusal. In such a case the association can be held liable for the damage suffered as a result of non-admittance.

Members are bound by the articles of association (*statuten*) and by-laws (*reglementen*), as well as the resolutions (*besluiten*) of the association.[80] Self-regulatory norms enacted by associations, such as codes of conduct, are usually drafted as resolutions. Members of an association are conjointly represented in the general assembly and have a right to vote on matters that concern the association, but self-regulatory norms drafted as resolutions are established by the board of the association. If and when these resolutions remain within the boundaries of the articles, members have few grounds to contest them and are held to comply therewith. One would think that new members are bound by contract to join the association, but legal scholars argue that the accession of members is a relationship *sui generis*.[81] It is a legal bond in which the members are held to comply with the rules of association through accession (a bilateral juridical act).

Another common legal form of self-regulatory (and co-regulatory) bodies is the foundation. The foundation model comes into play as a method to institutionalize cooperative structures. In these cases the foundation is an overarching organization that can determine regulatory and supervisory agreements, such as covenants, codes, settlements and general terms, to which other organizations can accede.[82] The agreements enacted by the foundation stipulate the enforcement mechanisms that parties to the contract need to comply with. The enforcement tools most applied are arbitration and complaint procedures. Examples of self-regulatory foundations can be found in the Internet and advertising sector. Most supervisory bodies also have the foundation model as their legal form.

In the context of self-regulation only a few civil law companies can be traced. The Dutch Assessment Institution *BV* and the *Kema Quality BV* – the certification institution for the electricity sector – are examples of public[83] supervisory bodies having the private company with limited liability (*besloten vennootschap*, *BV*) as their legal form. Two examples of self-regulatory bodies with the company limited by shares (*naamloze vennootschap, NV*) as their regulatory structure are the Cooperating Electricity Producing companies (*NV Samenwerkende Elektriciteits-Productiebedrijven*) and the Dutch National Bank (*Nederlandsche Bank NV*). Eijlander points out that the company as an organisational structure of a regulatory body comes into play when financial assistance is needed. [84] One of the characteristics of a civil law company is the compulsory monetary contribution.

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79 P. Eijlander, *Wetgeven en de maat van de tijd*, 1994, p. 151.

80 And of committees, sub-committees and officials that have been granted decision-making powers by the board. The board can only delegate decision-making powers to sub-organs of the associations if the articles so permit.

81 Amongst others see W.L. Valk, *Tekst & Commentaar BW*, 2003, and P.L. Dijk & T.J. van der Ploeg, *Van vereniging en stichting oöperatie en onderlinge waarborgmaatschappijen*, 2002.

82 A.L.G.A. Stille, *Rechtspersonen*, 1998, Art. 2:285, note 4.

83 They are independent administrative authorities: *ZBOs* (see Table 2).

84 Eijlander, *supra* note 79.

Collectively the shareholders of a company constitute the general assembly of the company. Each shareholder has the duty to financially contribute and the right to take part in shareholders' consultations. In these decision-making procedures the principle of 'one share, one vote' (as opposed to the 'one man, one vote' principle of the association's general assembly) applies, limiting the democratic character of companies at least to some extent as Mendel argues.[85] Eijlander reasons that when discussing self-regulation the traditional model of company relationship (a company and its shareholders) is not suitable. Instead he argues that the model of regulatory relationship for companies should be that of a company enacting civil law agreements with its regulatees.[86]

3.2. Regulatory scope of purely private self-regulatory bodies

Binding force beyond regulatees?

The voluntary nature of private legal persons and their associates does not tally with the idea of generally binding rules or obligatory accession. Keeping this in mind, private regulation is in principle only binding on those who wish to subscribe to it, potentially posing a free-rider problem.

The free-rider problem has often led to some public involvement in the regulatory process, for example the awarding of a public status to the notaries' and lawyers' professional organisations or the fact that most (if not all)[87] Dutch supervisory tasks have been awarded to public bodies. Moreover, the civil courts have not hesitated in extending the scope of private regulation so that it has generally binding force in practice. The Dutch Civil Code contains several open (and as a result vague) standards – such as reasonableness and fairness, the general duty of care, proper merchant conduct and proper societal conduct – that need to be developed in practice or in case law.

In a rather rigid jurisdictional divide in the legislation – Article 79 of the Judicial Organisation Act stipulates what is categorized as being *law* subjected to the interpretation and decision of the courts – traditionally there is not much room for alternative forms of regulation. Self-regulation comes into play when civil courts either 'consult' self-regulatory norms in making a decision, or they explicitly base their decision on these rules. Dutch case law shows that both types of reasoning are applied.[88] Slowly, private regulation and self-regulation are paving the way through the traditional jurisdiction structures in which only *Article 79* legislation can be employed. The courts have stated that self-regulatory norms should be interpreted as common norms of the sector.[89] The courts have also applied self-regulatory norms as standards for proper conduct. Clear examples of the latter can be found in the case law concerning medical protocols.[90] Medical protocols are perceived as norms based on a consensus reached between the hospital and the medics who work at that hospital. Those norms encompass what the medics and the hospital conceive as being proper medical care. The courts reason that the medics are thus held to uphold the rules of the protocol, unless the interest of the patients demand otherwise. In

85 M.M. Mendel, *Hoofdzaken NV en BV*, 1997, p. 48.
86 This is true for the National Bank, its regulatees are not its shareholders, instead a statute determines who falls under its regulatory scope; but as we pointed out the National Bank is *sui generis*. Moreover, Eijlander's argument (the regulatory structure of enacting agreements instead of a company-shareholder relationship) is also true for the *Kema Quality BV* and the Cooperating Electricity Producing companies.
87 See Giesen's comment on Dutch supervisory bodies in 2.3.
88 Art. 79 of the Judicial Organisation Act stipulates what is categorized as being law subjected to the interpretation and decision of the courts.
89 See for example HR 11 July 2003, *RvdW* 2003, 123 (*Kouwenberg/Rabo*).
90 See J.B.M. Vranken, *Inleiding tot de beoefening van het Nederlands Burgerlijk Recht, Algemeen Deel*, 2005 and Giesen, *supra* note 76.

that case the medic should justify why he has dissented from the rules of the protocol.[91] Disciplinary proceedings within the liberal professions have also been drawn in the realm of private law. Recently the Supreme Court[92] has decided that civil courts dissenting from the decision of the disciplinary body must provide sufficient reasoning in their decisions as to why they have decided not to follow the decision of the disciplinary body.[93]

Moreover, pure self-regulatory acts can have *some* effects outside the group of members, imposing obligations or restrictions on third parties without their consent. Examples of the latter are two cases concerning an agreement which was applicable between two professional associations in the medical sector. The so-called BACO agreement did not constitute rights or duties for the associations' members, but the civil court still extended the scope of the agreement so that it was binding on the members of the associations as well, because it could be seen as 'expressing the norm prevailing in the sector'.[94]

Another example is a case concerning pharmaceutical advertising in which a non-regulatee to the Code of Conduct of Pharmaceutical Advertising was held to comply with the code.[95] The court held that the use of the code by consumers and other actors in the sector was so omnipresent that the court adopted the private regulation as being the norm applicable in the pharmaceutical sector, thereby extending the scope of the private regulation to third parties.
The civil court concluded that taking all the circumstances of the case into account, it cannot be seen why it is justified for the non-regulatee to fail to meet the norms of the code.

The ambit of self-regulation and regulatees
In cases in which one cannot speak of public involvement in or court acceptance of conduct rules, the ambit of private regulation is determined by the regulatory scope stipulated by Dutch company law on the several legal forms. This regulatory relationship is either contractual or based on the internal law of legal persons. Thus members of an association are bound by the self-regulatory rules laid down in the associations' articles, by-laws and resolutions, while parties to the agreements of foundations and civil law companies are bound by contract. These contracts can take several private law forms such as third party clauses or general terms and conditions.[96]

3.3. The civil liability of self-regulatory bodies
Regulatees – and in some instances third parties – can employ the mechanism of civil law liability to contest the regulation and supervision of self-regulatory bodies.

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91 HR 2 March 2001, *NJ* 2001, 649 and *NJ* 2004, 307 (*Trombose*).
92 Translation by K. Boele-Woelki & F.J.A. van der Velden, *Nederlandse rechtsbegrippen vertaald. Frans-Engels-Duits*, 2005.
93 HR 12 July 2002, NJ 2003, 151 A/B.
94 *Van der Tuuk Adriani/Batelaan* (HR 15 March 1996, NJ 1997/3) and *Hulsman/Van der Graaf* (HR 2 February 2001, *NJ* 2001/319).
95 Judge in interim injunction proceedings, The Hague 26 July 2004, *JGR* 2004/34. In earlier case law the civil courts have already established that the test developed in practice by the *CGR* in assessing the correctness of the claims of a producer of medical products stating that his product - in comparison with another medical product of another producer - has a certain effect (two independent studies must prove the producer right), is the same test to be used in civil proceedings. Earlier case law also states that the norms developed by the *CGR* are to be interpreted as the act of filling in the general criteria (open norms) set in the Civil Code (in this case in Art. 194 Book 6 of the Civil Code), the Provision of Medicines Act (*Wet op de Geneesmiddelenvoorziening*; in this case Art. 3 Para. 8) and the Decision on the Advertisement of Pharmaceutical Products (Arts. 3,4,11 and 12). The civil courts have in several judgments used the norms of the *CGR* and case law supports the correctness of this practice. See Giesen, *supra* note 76.
96 The regulatory relationship can be qualified as contractual if and when codes and contracts drafted by the regulators are not incorporated in the by-laws of the association, foundations or companies. If the codes are incorporated in by-laws the regulatory relationship is not contractual because the general rules on the internal law of the foundations come into play.

Public regulation

Third parties and regulatees who want to contest the lawfulness of self-regulatory rules enacted by public bodies can file tort proceedings. The civil law judge will decide on the lawfulness of the regulation assessing the conformity with statutory legislation (and other judicial norms of a higher hierarchical value, but not constitutional provisions see Part 1 on the prohibition of constitutional review) or general principles of good administration. In the rare cases in which the regulation is found to be unlawful it can be annulled and this can give rise to liability and compensation for damages suffered by citizens.[97] Civil law judges can also prohibit or prescribe public bodies from applying norms stipulated by the contested regulation.[98] The competence of the court to 'prohibit' or to 'dictate' the coming into force of regulations is however not widely accepted.[99]

When third parties contest a public regulation the issues of imputation and a casual link between the damage suffered and the unlawful regulation will be addressed more capaciously. A general principle of Dutch private law is that every person ought to rectify the damage they inflict, unless societal conviction would imply otherwise. The fact that the nature of the unlawful regulation contested is public can provide a reason to believe that such a societal conviction is at hand. The standing of third parties in imputing the liability of a public regulation will be assessed on a case by case basis.

Private regulation

The illegality of private regulation as well as supervision can be invoked by regulatees and in some cases by third parties. In order to contest self-regulatory norms enacted by private bodies both avoidance and injunctive relief are possibilities. According to the regulatory relationship between the regulatees and the self-regulatory body, be it *sui generis* (membership) or contractual (third party clause, general terms and conditions or common contracts), the procedural route to be followed is stipulated by the *legi speciali*. Avoidance of both internal rules and private regulation based on contract can be invoked by all interested parties (not just regulatees) that have an interest in the annulment of the regulation. In those cases in which the regulatory relationship between parties is not contractual (*e.g.* membership) and if a regulatee wants to invoke the unlawfulness of private regulation, tort proceedings can be commenced.

Regulatees can only resort to tort proceedings if they have suffered damage, if there is causality between the damage suffered and the unlawful regulation and if the unlawfulness of the regulation can be imputed to the legal person. Because most private self-regulatory bodies have internal dispute resolution systems, tort procedures will not be the first dispute settling mechanism at hand. If and when regulation has financial importance, however, tort proceedings are invoked. The civil judge has to test any breach of private regulation with mandatory legislation and is held to test for expectations of parties and the applicable codes in the sector. A marginal and distant review of private regulation is at hand because of the private autonomy of private legal persons and the voluntary nature of the regulatory relationship between regulatees and the

97 G.E. van Maanen, *Onrechtmatige overheidsdaad : rechtsbescherming door de burgerlijke rechter*, 2005, p. 132.

98 HR 11 December 1987, *NJ* 1990,73. In this case the standard laid down in the 'Cable Decree' (*Kabelverordening*) was contested. This norm was not in accordance with Art. 7 of the Dutch Constitution. The Supreme Court prohibited the public body involved from imposing the norm laid down in the Cable Decree.

99 The only case in which a judge has ordered the enactment of a regulation is the Court of Appeal of The Hague judgment of 10 September 1987 (*KG* 1988, 10). The judgment still stands because the case was not contested before the Supreme Court, but legal scholars debate the question whether such a court judgment is in conformity with Dutch liability law and public law. Because the case was not brought before the Supreme Court it is also not clear what the standpoint of the Supreme Court is (in this case the Court of Appeal ordered the 'National Health Tariffs Authority' (*COTG: Centraal Orgaan Tarieven Gezondheiszorg*) to render a decision).

legal person. Regulatees have been successful, however, in invoking a breach of EU law (*e.g.* restriction or distortion of competition). In the sports sector athletes have been seen to contest the lawfulness of rules laid down in codes of conduct for a breach of competition law, labour law and human rights.[100] However, sports associations have in some cases outsmarted the judgment of the civil courts (*e.g.* by threatening to call off the competition that the regulatees are seeking to access). Another ground that has been accepted as incurring liability is the abuse of power by the legal person. In some socio-economic fields accession to a foundation is almost a necessity (*e.g.* accession to a quality test and successive certification in the *PBO* sector), making the foundation's rules extremely important for the sector; if the unlawfulness of these rules could not be invoked and assessed in depth, these legal persons would be able to acquire a semi-monopolistic status.[101]

Third parties seeking to contest the legality of self-regulation enacted by private bodies must prove the causality between the regulation and the damage suffered. An additional complication is that the regulatory scope of private regulation only extends to the parties that voluntarily commit to them. Third parties must prove that although they are not in a regulatory relationship with the private self-regulatory body, the regulation of that body still has a great (financial) impact on them. In situations in which there is a dominant private regulatory body in the sector, an abuse of power by that body through self-regulation that causes damage to third parties can be invoked. The effects of self-regulatory norms on third parties have been addressed by civil law courts in cases in which a self-regulatory code is dominant in the sector and thus can be qualified as shaping the general duty of care that actors in the sector can expect from one another, thereby extending the scope of the self-regulatory norm to actors in the sector that are not parties to the code. Two examples of the latter can be found in case law dealing with the norms applicable in the medical sector (see 3.2).

Supervision

A supervisory failure by public supervisory bodies can be assessed according to two private law aspects. Either the supervision is tortious (an unlawful omission which is attributable to the supervisory body according to Article 162 Book 6) or – if one is contractually involved with the supervisory body – the supervisory failure can also be qualified as a failure in the performance of an obligation (Article 74 Book 6 Civil Code). Contractual and tort liability for supervisory failures by public supervisory bodies can be invoked if a decision of a supervisory body is not at hand (excluding the applicability of the GALA liability regime).

If the supervisory failure amounts to being either insufficient or inadequate, based on tort or contractual relations, the same ground for assessing liability applies: did the supervisory body in question breach its 'duty of care'? The test is based on the ideal situation and is an abstraction of reality: how does one expect that a reasonably acting supervisory body would have acted in this particular situation? The civil law judge has to take the margin of discretion of public supervisory bodies into consideration. One cannot be expected to monitor everyone everywhere.[102] Taking the margin of discretion (usually incorporated in policy rules) into account, the civil law judge can subsequently assess whether the body failed to fulfill its duty of

100 *E.g.* Court of Appeal of Amsterdam, 1 August 1991.

101 ECJ decision 3 February 1983, ECJ 13 December 1983 and HR 28 February 1997, *NJ* 1999,732 and 10 December 1999, *NJ* 2000, 8.

102 T. Hartlief, 'Aansprakelijkheid van toezichthouders: vertrouwen is goed, controle beter? Bespreking van preadvies van A.A. van Rossum', 2005 *NJB*, pp. 1126-1130, and A.A. van Rossum, *Falend Toezicht*, 2001, p. 80. See HR 19 April 1996, *NJ* 1996 727.

care. If liability is incurred the remedies will most likely be monetary in tort cases as well as in contractual liability cases.

It is useful to mention that the rules applicable for the assessment of the liability of public supervisory bodies have never been applied in case law. As mentioned before, the civil court could not engage in assessing the merits of the *Enschede* case because the case stranded on procedural aspects. The only cases in which liability for supervision was incurred are three cases dealing with monetary supervision (and not the supervision of regulation).[103] Liability was incurred in these three cases because the supervisory failure was apparent and possibly the fact that the damage caused was so overwhelming also played a role. The bodies involved were well informed about malpractices and they had the authority to act against them, but they failed to intervene. The compensation was monetary. Legal scholars are careful in concluding from these three cases that liability for the failure of non-monetary supervision and in other circumstances could also be incurred.

Earlier on we stated that most supervisory bodies in the Netherlands are public. For the sake of completeness we would like to point out that supervisory failures is evaluated on the same grounds for both public and private regulatory bodies. If the liability of a private supervisory body is invoked the applicability of public principles is excluded so the margin of discretionary powers of private supervisory bodies is narrower. It should be noted that third parties can only contest the supervisory failures of private supervisory bodies by lodging a complaint before a civil court and incurring liability based on tort (no contractual relationship).

If the private supervisory body is an association the following rules can also be relevant. Members of associations can start proceedings against the board if it fails to monitor a member that does not adhere to the by-laws, resolutions or third party agreements to which the non-obeying member is held (Article 46 Book 2 Civil Code). The plaintiff (member) can request observance (Article 8 Book 2 and Article 296 Book 3 Civil Code) or compensation for the suffered damage (Article 8 Book 2 and 162 Book 6 Civil Code).

We do emphasize that the liability rules applicable to private supervisory bodies are of a theoretical nature, because, as we have mentioned before, in the Netherlands most if not all supervisory bodies are public bodies. Moreover, we have not found any case law which deals with the complaints of members based on the provision of Article 46 of Book 2 of the Civil Code or on the supervisory failures of private bodies (as mentioned before only two cases in Dutch history have dealt with *monetary* supervisory failure).

103 *Vie d' Or* case (Court of Appeal of The Hague 27 May 2004, *JOR* 2004,206) and Nusse Brink Case (Court of Appeal of Amsterdam 7 July 2000, *JOR* 2000, 153). In these cases the control over the financial institution was too superficial and signals from the field were ignored while control was the supervisory body's main task (Giesen, *supra* note 76, p. 134). In the *AFM* case (District Court of Amsterdam 14 September 2005, LJN AU2638) the court applied a proportional liability test.

Overview of the different types of regulatory bodies

	Definition	**Statutory basis?**	**Legal personality**	**Governance structure**	**Financing**	**GALA regime?**	**Public powers?**	**Self-regulatory function?**	**Examples**
'Hard core' public bodies (*Gewone bestuursorganen*)	Bearers of public law with powers to take (unilateral) decisions which carry legal effect. Art. 1:1 GALA	Yes	Public	Public	Public	Yes, a-type	Regulatory (Legislative, executive, jurisdictional)	No	Ministry of Environment
Public bodies for Business and Profession (*Openbare lichamen voor Bedrijf en Beroep – PBOs*)	Art. 134 of the Constitution enables so-called 'Public bodies for Business and Profession' to be established	Yes	Public	Mixed	Private (but often obligatory on the basis of public law)	Yes, a-type	Regulatory (Legislative) Supervisory	Sometimes, in spite of public status, since the content and ambit of their regulatory capacities are restricted, only to their regulatees	There are two main categories: 'trade and industry organisations' (*PBOs*; *e.g.* the Product Board for Margarine, Fats and Oils) and 'other bodies', mainly for the professions (*e.g.* Dutch Bar *NOvA*)
Independent Administrative Authorities: IAA (*Zelfstandige bestuursorganen – ZBOs*)	Public authorities in the sense of Art. 1:1 GALA at the level of central government, not hierarchically subordinated to a Minister and are not advisory bodies.	Mostly	Public or private	Public or private	Usually (partially) public	Yes, a-type or b-type	Regulatory (executive + legislative only in exceptional circumstances) Supervisory	Mostly not, but some are regulating their own group	*AFM* (b-type) Commissariat for the Media (a-type) See also www.zboregister.nl

	Definition	**Statutory basis?**	**Legal personality**	**Governance structure**	**Financing**	**GALA regime?**	**Public powers?**	**Self-regulatory function?**	**Examples**
Private legal persons with statutory task (*Rechtspersonen met wettelijke taken – RWTs*)	Bodies that have been constituted according to private law in as far as they exercise a task assigned to them by a statute	The body as such, not necessarily	Private	Private, although sometimes the State can appoint board members	Partially public (wholly or partially funded by the revenues of the statutory changes)	Some of them b-type, in as far as exercising their statutory task	Supervisory (Regulatory)	Some. However this is a large group comprising many foundations merely allocating funds rather than regulating	School boards, academic hospitals, Railways 'task organisations', Foundation Control Office for Poultry, Eggs and Egg products (*CPE*)
Pure 'self-regulatory bodies'	No legal definition	None (private)	Private	Private	Private	No Theoretically; no good examples	'Incidental public powers' (supervisory)	Yes	Sport federations, Dutch Association of Journalists, Advertising Code Foundation

Conclusion and outlook

The overarching picture emerging from the Dutch legal system is the persisting strong division between public regulation (unilateral and bound by constitutional norms) and self-regulation (assumed to be based on mutual consent and positioned in the realm of private law). Despite the Dutch tradition of private involvement in regulation and an explicit encouragement to consider self-regulation in the Guidelines for Legislative Drafting, it is clear that Dutch constitutional law does not readily accommodate the design of self-regulatory solutions. The concept of self-regulation is only to a limited extent rooted in the mode of thinking of the *rechtsstaat*. The rule of law has a lot to say about preconditions for state action, but less about the boundaries between public action and private action. Although some objections to the use of self-regulation are similar to the objections to delegated legislation, the legal literature on delegation and the legality principle does not provide many clues as to the constitutional boundaries of self-regulation. Due to the absence of a constitutional court and the prohibition of a constitutional review, the constitutional mechanisms limiting and encouraging self-regulation are rather 'soft'[104] and are determined by academic doctrine rather than case law. Whereas fundamental rights provide some protection concerning self-regulation, they primarily address the relationship between public actors and private actors and are less developed when it comes to private actors regulating themselves.

Widening the perspective to the realm of administrative law, the GALA comes into play. In this general act regulating the public administration and its behaviour, some important choices have been made. Any private law body exercising public authority is deemed to be a public body for the purposes of the GALA. This has important consequences for the treatment by the courts of all regulatory activity of which its purely private nature can be questioned as well as for liability issues, such as the applicability of general principles of proper administration (see I.3). However, the importance of the GALA should not be overstated, in particular not as far as rule-making is concerned since there are no provisions on participatory rights such as in the American Administrative Procedure Act (APA) and general rules cannot be subject to judicial review.

Shifting our lens to the private legal order, we encounter the private law principles of the freedom of contract and private autonomy as – constitutionally supported – breeding grounds for self-regulation. Self-regulatory rules in the traditional sense of the concept according to which regulatees commit themselves on a voluntary and democratic basis to self-regulation are based on private law. But the purely private and voluntary nature of private regulation is only one side of the story. The status of self-regulatory norms shifts from merely rules applicable and enforceable between regulatees to norms that can be relied on in litigation proceedings. Purely private norms enter into the realm of private law when judges rely upon self-regulation in operationalising the open norms of the Dutch Civil Code. Judges have also broadened the scope of purely private regulation so that – in specific circumstances – it can be binding on a group of regulates which is wider than those who explicitly subjected themselves to self-regulation.

Drawing on regulation theory, liability for insufficient or inadequate regulation should be an incentive for good regulation in the public interest.[105] However, as we have observed, Dutch liability case law for failure to regulate and supervise is scarce. Even if in some sectors this

104 *E.g.* in a recent case before the Administrative Law Division (of the Council of State) of 1 December 2004 it became clear that the applicants could not claim to have legitimate expectations that the Minister would not come up with public regulation in the fisheries sector based on his implicitly approval of a covenant between an organization for bird protection and an association of fishermen concluded earlier.

105 Hartlief, *supra* note 102, regarding liability for insufficient or inadequate regulation.

merely means that the alternative dispute settling mechanisms are functioning properly, in general it can lead the public to believe that these sectors are rather self-protectionist than self-steering. This public perception – justified or not – can in turn lead politicians to aim for introducing public regulation.

These legal aspects ought to be taken into account in the debate on the emergence of more responsive and market-based styles of regulation. One consequence of a legal system centred on a rather rigid public-private divide is that it is clearly not designed to accommodate all specific problems caused by hybrid forms of regulation. Whilst public regulation increasingly gets input from different sides, the entanglement of self-regulation in public structures makes voluntary adherence to self-regulation less straightforward. This is not to say that self-regulation in the Netherlands is on the wrong track, but it is to observe that in the current legal structure the voluntary nature of many self-regulatory arrangements is not always protected or acknowledged. The lack of case law in the field cannot be taken as proof of the reverse, since it is largely due to the dynamics of the litigation structure (both in public and in private law) that dissatisfaction with self-regulation or co-regulation is not often expressed in courtrooms.