Amongst rulemakers: Conceptualizing the role of intermediaries for co-regulation

Haiko van der Voort, Phd
TU Delft, Faculty of Technology, Policy, and Management
Delft, the Netherlands
h.g.vandervoort@tudelft.nl

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

Abstract
Public regulators are increasingly accepting helping hands for carrying out their regulatory activities – such as standard setting, information gathering, and enforcement. These helping hands often belong to private actors that also regulate businesses for their own compliance programs, like industry associations and scheme managers. One can speak of co-regulation if the whole of regulatory activities are carried out by both public and private actors.

Intermediaries – such as industry associations and scheme managers - may play a pivotal role in co-regulation, because they may inform public regulators about compliance to standards. From the public regulator’s perspective, it is tempting to see intermediaries as cogwheels in the regulatory machine. However, a danger of this view is the implication of some public ownership of this regulatory machine. Although it is often stressed that governments are end responsible for regulation, private actors may perceive ownership and responsibility differently.

An alternative approach to co-regulation focuses on interaction among multiple spheres of rules. ‘Public regulation’ is one of these spheres, alongside ‘industry self-regulation’ and ‘standardization’. Each sphere has its own institutional logic, i.e. history, governance, and actors. Each sphere has its own ‘ruletakers’ and ‘rulemakers’. Intermediaries, then, have their own responsibilities in the ‘standardization’ sphere, with for instance standardization organizations managing standards, and certifiers using these standards for their services.

In this contribution the two approaches to co-regulation are further conceptualized on a national level. Two casestudies of co-regulation will be used as illustrations. Using the second approach to co-regulation some intermediaries are seen as rulemakers, among other rulemakers such as public regulators. It is likely that the multiple institutional logics will collide and that rules will conflict. For regulatory scholars this implies accepting compliance as a multiple principal problem, and accepting the importance of intermediaries for the quality of decision making processes.
1. A paradox of co-regulation and its significance for intermediaries

Whether it is a consequence of budget cuts or philosophies of risk-based regulation, public regulators and inspectorates are seeking for elements that may enrich their risk analyses. In this context public regulators and inspectorates find self-regulatory initiatives - such as certification initiatives - promising. Good self-regulation by industries provide opportunities to distinguish the good and the bad efficiently. Public regulators then may dedicate their scarce resources to the bad.

If public regulators and inspectorates decide to cooperate with self-regulating industries, all kinds of hybrid regulatory arrangements emerge. The public and the private meet each other for regulation in ‘regulatory networks’ (for instance - Majone, 1997; De Bruijn et al, 2007; Richardson, 2008). In such arrangements typical regulation and oversight activities - such as standard setting, information gathering, and sanctioning - become subjects of coordination between public and private actors. I call such coordination efforts co-regulation (Bartle and Vass, 2005; Van der Heijden, 2009; Börzel and Risse, 2010).

Co-regulation presupposes some form of industry self-regulation, run by either business groups, trade organizations or other intermediaries. It is these intermediaries that draw the attention of several scholars, because they play a pivotal role for self- and co-regulation. They are organizing regulation themselves, but are - as representatives of industry - also subject to public regulation. In their classic article, Gunningham and Rees (1997) stress the importance of ‘mediating institutions’ for self-regulation. They have a potential to develop “an effective industrial morality that brings the behavior of industry members within a normative ordering.” Major events, such as the Bhopal-tragedy in 1984 and the Three-Mile-Island accident in 1979, serve as examples for catalysts of the emergence of a ‘common meaning system’ at the industry level, or a new industrial morality. It is not entirely clear whether this ‘morality’ is to be viewed broader than compliance with the law. However, this classic publication acknowledges a vital position of business groups for self-regulation. These institutions are in the position to connect the interests behind self-regulation. However, this seems to be a tough job, indeed. Furger (1997) points out that the somewhat generic notion of “business groups” can translate into sophisticated interactions between various and diverse intermediary organizations. He frames self-regulation as a multi-actor problem. Potosky en Prakash (2009) shed light on mediating institutions with their ‘club theory’. They target ‘clubs’ that pose rules upon themselves. Studying such clubs may increase our understanding of the conditions under which self-regulation develops. Clubs provide several advantages to their members, such as services. Members also provide several advantages

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1The 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. 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 hybrid 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, hybrid regulation presupposes self-regulation.
towards the club as a whole, such as its legitimacy. If a club is big enough, a whole industrial sector may enjoy its presence, for example if the club improves the sector’s image. The latter advantage also brings a danger of free riding, as it is possible not to be member of the club, while still enjoying the advantages of its presence (see also King et al. 2002). Another danger is shirking, which involves being a member of a club and enjoying the advantages, but not complying with its rules. Every club deals with these dangers differently, from inviting as many members as possible to avoid free riding, to indeed sharpening rule enforcement and monitoring to prevent shirking. An important suggestion from this theory is that intermediaries develop institutions for self-regulation, and by doing so, face dilemmas for standard setting, monitoring and enforcement. Self-regulation is not only a multi-actor, but also a multi-value phenomenon.

In literature on regulation and governance self-regulation enjoys much attention. However, there is an odd paradox about regulatory debates in the context of governance. On the one hand ‘regulation’ has a hierarchical connotation. There is an actor setting and enforcing rules that expect other actors to comply to. And the rule-setter has sanctioning power. On the other hand, governance suggests respecting a networked reality, thus accounting for horizontal relations shaped by mutual dependencies among actors, including public regulators. (Koppenjan and Klijn, 2004, De Bruijn et al, 2010)

The paradox as described is highly relevant for the perception of the intermediaries’ role in co-regulation. Intermediaries may play a different role in a hierarchical relation between government and industry than in a networked relation.

Main question in this paper is how to conceptualize the role of intermediaries between government and self-regulating industries.

In the second and third section I’ll explore this paradox some more to find first, conceptual anchor points for the role of intermediaries. Each section describes a perspective on co-regulation. Both perspectives, however, are conflicting. Contrasting both perspectives results in three conceptual roles of intermediaries in co-regulation. The three roles are explored further with the help of two Dutch case studies. The case studies concern compliance to regulations on the quality of eggs and the safety of coach travel. In both cases public and private rule makers have built a joint regime to better detect offenders. However, the joint regimes differ substantially, and the role of intermediaries as well. Based on the both theory and casestudies two principles for assessment of intermediaries are proposed.
3. An instrumental perspective on co-regulation: co-regulation as a risk for public regulators

Co-regulation can be placed on a continuum from classic public oversight by government to fully private self regulation (Bartle and Vass, 2005; Börzel and Risse, 2010). It involves some form of coordination between the oversight activities by the public inspectorate and the self-regulating industry. This coordination involves oversight activities such as information gathering, judgment of information and sanctioning. In other words: some activities will be done apart from each other, while other activities will be taken jointly by public and private actors. (also see Van der Heijden, 2009, p. 65).

Co-regulation implies public trust in self-regulation. However, this trust is not a given. Public regulators remain end responsible for safeguarding public interests. Even if this is not the case in a formal sense, they are often held accountable if incidents might happen. For example, in The Netherlands ‘failing oversight’ is a popular qualification by media as explanation after an incident has occurred. For public regulators this raises the question whether they can count for the quality of self-regulation because they feel vulnerable. Only then they can find out whether hybrid arrangements may be an option. This question has a central position in regulatory literature. This literature produced a range of conditions that has to be met by self-regulatory industries before public regulators would be advised to get involved. The following three categories are the most prominent conditions:

1. The interests of public and private actors should be aligned (Gunningham and Rees, 1997; Hutter, 2006). This is about incentives for private parties to comply to public regulations. If these incentives are congruent with public interests, then public regulators may rely on self-regulation.

However, the incentives are subject to serious doubts. Self-regulation would rarely have safeguarding public interests as a motive (Grabosky, 1995, Hutter, 2006). The sector’s image would be of greater concern for them. A hallmark or certificate would seem to be an indication that the keeper of it finds its image very important, rather than an indication of its intrinsic motivation to deliver quality (Lidestav and Berg Lejon, 2011). In some cases a certification initiative even attracts bad companies seeking for legitimization of their practices (Gulbrandsen, 2005). If motives of public and private parties are very different, being involved in horizontal coordination efforts might be risky for public regulators. A regime that is increasingly influenced by private industries might pose effectiveness and legitimacy problems for public regulators. In regulatory literature this situation is coined ‘regulatory capture’ (Stigler, 191; Levine and Florence, 1990; Ayres and Braithwaite, 1991).

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2Discussions do exist about what are ‘public values’. For this contribution I define them as values that governments appear to find important and want to protect, considering their policies. (zie Saanen, 2013)
Public regulators would get captured by private industries, because they would become dependent on private industries' goodwill.

2. The self-regulatory institutions are strong (Gunningham and Rees, 1997; Potosky and Prakash, 2009). This condition includes the ability of the regulated to organize themselves and the level of participation in self-regulatory initiatives (Baarsma, 2010). If an industry is able to organize itself well, there is a bigger chance that an entire sector will commit themselves to norms.

However, self-regulatory initiatives would be vulnerable to market forces. Certification arrangements are particularly vulnerable because a certification body gets paid for its services by its customer. This would withhold the certification body to be all too tough, because of a fear to lose its customer to a competing body. (King en Lenox, 2000; O'Rourke, 2003). Also those who manage standards – often industry associations – would have incentives to be lenient. If they are not, the hallmark or certificate would get an exclusivity for the elite, although the image of a sector would be helped by a critical mass of hallmarks and certificate holders (Potosky and Prakash, 2009).

3. The capacity of self-regulating institutions is sufficient (O'Rourke, 2003; Baarsma, 2010). Developing and managing regulatory standards cost time, skills and money. A self-regulatory industry should be able and willing to cover these costs.

This too is subject of doubt. Especially small and medium sized enterprises (smes) seldom have the knowledge and means to comply to public and private rules (Gunningham, 2002). Moreover, an industry seldom is a unity. It usually encompasses multiple actors with varying ideas about rules and compliance (Gunningham and Rees, 1997). Conflicts are not rare, and these conflicts would weaken self regulation (Patton and Olin, 2006).

These doubts seem to have normative implications for co-regulation. Hybrid arrangements would be risky, if private actors are not able to meet the conditions described above. Empirical studies reveal mechanisms that explain that self-regulatory initiatives will rarely meet these conditions. From this point it is just a small step towards a conclusion that co-regulation should be avoided.

3. A decentered perspective on co-regulation: regulation not state-centered

Much literature on governance deal about horizontal networks getting more prominent in the relation between government and society. This is often expressed by the idea ‘from government tot governance’ (for example Peters and Pierre, 1998; Hirst, 2000; Jordan c.s., 2005, Hysing, 2009). While ‘government’ refers to a hierarchically steering actor, ‘governance’ seem to concern a steering process (Mayntz, 2003). This process would refer to
governing and explicitly has a horizontal character (Rhodes, 1997). Governance isn’t exclusively an initiative by a single actor, but happens in a network of actors, where every actor favor its own rules. Common rules in networks are – although often implicitly – based on proportionality and mutual adjustment, not on compliance like in a hierarchy (De Bruijn en Ten Heuvelhof, 2008).

With regard to regulation, this line of reasoning quite radically differs from the first. The most notable scholars using this perspective call for a ‘decentered view’ on regulation, wherein government does not act as the central regulator of the public sphere and regulation is essentially not state-centered (Black, 2001; Scott, 2004; Haines, 2011; Garcia Martinez c.s., 2013). From this perspective co-regulation involves multiple actors that set standards and expect regulatees to comply to them.

Assessment criteria from this perspective tend to deal about processes of interaction (Voets c.s., 2008). Jessop (1998) has published about ‘governance failure’, which also implies an opposite – ‘governance success’. He views failure as an inability to reframe goals in the context of continuous conflict about the question whether the goals are still valid for the actors involved. He describes a situation of stagnation of interaction processes. From here a criterion for successful governance seem to be prevention of such a stagnation, or some continuous interaction process. To get this process going, trust is a well-agreed factor of relevance (Reinicke et al., 2000; Mandell and Keast, 2008). Trust fuels the viability and quality of interactions. The essence here is that it is not the analyst determining the effectiveness of regimes on a moment in time, but it is the actors involved assessing whether interaction still provides perspectives of gain. A second criterion is learning. Where an instrumental perspective ‘effectiveness’ means effectiveness for the public regulator - not for any private actor that is also involved (Gray and Silbey, 2011) - from a decentered perspective it seems to make more sense to look for some common gain of interaction, not interpreted by government only, but by any involved actor for itself. These gains are generally sought in learning effects (Jessop, 1998; Peters, 1998; Koppenjan and Klijn, 2004, Van Bueren, 2009: 66-68) and joint problem solving processes (Fisher and Ury, 1981; Jessop, 1998; Koppenjan and Klijn, 2004, De Bruijn et al, 2010).

4. Intermediaries as cogwheels or as mediators?

What do these competing ideas on governance and co-regulation imply for the role of intermediaries? The regulation literature discussed in the second section seems to be written from a public perspective. Indeed, self-regulatory efforts - run by intermediaries - have to meet several conditions that are made up with a government’s concern in mind. They reflect a concern whether getting involved with self-regulation is effective for the public regulator. This suggests an somewhat instrumental perspective. What’s more, the literature views governments as problem owners. Because for who self-regulation should be
effective? The regulatory literature as described seems to suggest it’s the government. For
government effectiveness, efficiency and legitimacy are at stake. Effectiveness issues
concern the ability of self-regulation to safeguard public values, efficiency is the efforts
expected from government to make the hybrid arrangement effective, and legitimacy
concerns for instance questions about whether public regulators get captured by powerful
companies. This way co-regulation is seen as an instrument for public regulators. From this
instrumental perspective it makes sense to formulate conditions for intermediaries for the
sake of effectiveness, efficiency, and legitimacy.

If intermediaries would meet these conditions, they can be seen as part of this public
instrument. They would be a cogwheel of a machine made out of public and private
elements run by government. As the organizer of self-regulation they are perceived as an
interesting actor to discuss the way public regulation can be a part of the self-regulatory
system to safeguard compliance to public regulations.

Instead, intermediaries in this literature are generally seen as weak. Taken to the extreme,
intermediaries can also be seen as cogwheels in a private machine that is purely erected for
business interests. Self-regulation, then, is organized for window dressing, for a promise to
governments to comply and this way preventing governments to reinforce regulation.
Potosky and Prakash (2009) speak in this context of ‘shams’, being self-regulatory efforts
with weak norms and a limited amount of enforcement instruments. The word ‘shams’
suggests that its limited force has a purposeful background.

A third possible role for intermediaries can be derived from the ‘decentered view on
regulation’ as described in the third section. This perspective stresses the multiplicity of
actors, standards and values. They even might conflict. Neither governments nor industries
may have the power to impose their standards upon the other. The main compliance-
question, then, is not ‘how to comply?’, but ‘what to comply to?’ Several actor may act as
rulemakers here. Public regulators – like inspectorates, policy departments, representatives
– define and enforce laws and regulations. In case of self-regulation also the regulated
define and enforce rules for themselves. This is usually done or commissioned by an industry
association. In many cases they hire industries that are specialized in defining and managing
standards. This third type of actor – like standardization organizations such as ISO,
certification industries and accreditation bodies – represent institutional rules about the way
self regulation should be organized and methodological rules about how to assess outputs or
processes of the regulated.

Co-regulation from the ‘decentered view’ implies a coordination game among multiple
rulemakers representing different kinds of rules, driven by different motives and shaped by
different institutions (Van der Voort, 2013). Intermediaries here may have a pivotal role in
mediating between the different rulemakers and their standards. Hallström en Boström
(2010: 112-117) in their study on transnational standardization initiatives as the Forest
Stewardship Council (FSC) and the Marine Stewardship Council (MSC) found that scheme managers develop from merely technical organizations towards important mediating institutions that increasingly take moderating roles in stakeholder discussions. They fill in a latent need of organizations for overcoming particularistic interests by exchange and mutual learning (Barnett and Finnemore, 2004; Wälti et al. 2004).

Table 1 summarizes the three roles of intermediaries, as described so far.

<table>
<thead>
<tr>
<th>Problem owner</th>
<th>Cogwheels of government</th>
<th>Cogwheels of industry</th>
<th>Mediators among rulemakers</th>
</tr>
</thead>
<tbody>
<tr>
<td>View on co-regulation</td>
<td>Instrument for government</td>
<td>Instrument for industry</td>
<td>A networked arena</td>
</tr>
<tr>
<td>Main norm for governance</td>
<td>Effectiveness Efficiency Legitimacy - in safeguarding public values</td>
<td>Effectiveness Efficiency Legitimacy - in safeguarding business interest</td>
<td>Trust building Learning Problem solving</td>
</tr>
<tr>
<td>Role intermediaries</td>
<td>Stimulate compliance to public rules</td>
<td>Shielding business from public regulation</td>
<td>Discussing and aligning diverse regulations</td>
</tr>
</tbody>
</table>

*Table 1: Three perspectives on intermediaries*

5. Two Dutch case studies of co-regulation

The argument so far is derived from a review of theories on regulation and governance. To explore the role of intermediaries some further an empirical study has been conducted of two Dutch examples of co-regulation. Both cases show a blurred line between the public and the private and both cases reveal an active involvement of the three categories of regulators.

The studies consisted of desk research 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, interviews were conducted with entrepreneurs, sector executives and sector associations. With regard to the certification industry, interviews were held with certifying bodies and the Dutch Accreditation Council.

For each case I explored both the co-regulatory arrangement (the ‘instrument’ if you like) and the process of decision making around it. This way both perspectives are used. The description of the process of decision making is made around
- the main issues that dominated the agendas of actors involved
- the way the issues are solved in the course of time
- the role of intermediaries for regulatory compliance, industries’ interests and the problem solving process respectively.
It is explicitly not the ambition to compare the case studies. They are different in many aspects. Main concern here is to explore the role of intermediaries in co-regulation, taking the concerns from both perspectives as described into account. This provides a rich picture of what they do.

5.1 Quality of eggs: negotiating guarantees with government

The arrangement

Every year, approximately nine billion eggs are produced in the Netherlands, 6.3 billion of which are exported. 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 scheme IKB ei, enabling certifying bodies to assess in accordance with these standards. There are information exchange arrangements as well. A database for private audit results has been built that can be used by public regulators. 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 a policy framework. The Ministry didn’t sign the agreement, because it wanted the sector to be responsible. The intermediary here is a foundation (Stichting IKB ei), that should function as the operating manager of the scheme, of certification and accreditation issues and the inputs from public inspectorates.

Issue: An administrative fine

In the wake of negative reports about self-regulation in the broader agricultural sector, the Ministry called for the inclusion of a fine in the TOC arrangement for the poultry sector, enforced by private certifying bodies. The regulated have agreed, but without enthusiasm. The private regulators were strongly opposed to this. After consulting with their European counterparts, the Dutch Accreditation Council threatened to refuse accreditation of the IKB ei-scheme 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 and a fine and the Dutch Accreditation Council refused accreditation if the fine were introduced.

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3These figures are taken from the annual report of the Productschap Pluimvee en Eieren, 2009.
4Policy framework ‘Toezicht op Controle’, 2005; translates into “Supervising inspections”.
5For product certification (EN45011 Guide 65).
Both the public and private regulators argued from their own perspectives, either legal or based on accreditation standards. This implied 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 the scheme. The foundation provided this message to the Ministry. The Ministry hasn’t responded to the message.

*Issue: The number of 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. The Ministry and public inspectorates 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 the Ministry.

The unannounced inspections caused a confrontation between public regulators and regulated industries. The number of inspections called for by the Ministry (50% in the first year) has been accepted by the sector as a temporary move, but eventually led to doubts 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. A second doubt was about whether the Ministry actually trusted the sector, if they wanted that many extra inspection visits. Commitment to the TOC initiative declined. The foundation hasn’t managed the unannounced inspection visits vigorously. This waning commitment resulted in the sector unilaterally reducing the number of unannounced inspections to 15% after a year, pending evaluation. Again the foundation sent the message to the Ministry, again the Ministry hasn’t responded.

*Reflection from an instrumental perspective: a theoretically efficient regime brought down by private actors*

TOC had potential for efficiencies for both the public regulators and the regulated. It would reduce superfluous inspection visits by coordination among public and private visits. The quality of information exchange improved because of the database of audit results. However, the public regulator hasn’t succeeded to take the *IKB ei* – scheme and its management much further than it was before TOC. Additional arrangements like an extra fine in the scheme and extra unannounced visits – that would safeguard compliance to public regulations – have been abolished or reduced unilaterally by the regulated. The inspections are taking place by private audits. However, the supervision of these inspections is being reduced considerably. That’s why it is questionable if there are enough guarantees for public regulators whether the private regimes is functioning well enough.
Reflection from a decentered perspective: a design lacking trust-building capacities

The policy framework of TOC is designed by the Ministry and further specified in a covenant signed by the actors involved. The Ministry – as the designer of the framework – hasn’t signed the covenant as they wanted the other actors to be responsible for execution of TOC. Both issues were wishes of public regulators that have been refused or criticized by private actors, even after signing the covenant. No innovative solutions to the problems emerged. The discussions on the unannounced visits were about percentages. The discussion about the fine was about had just two optional results: a fine or no fine. It appeared hard to solve those issues. The IKB ei foundation was expected by the Ministry to be the connector between public regulators, private regulators and the regulated. However, they became the messenger of the regulated. They never felt responsible for TOC, for they haven’t designed it and they couldn’t do concessions to a design that was already put on paper. Trust has diminished in the course of the process. Eventually, the amount of inspections was seen by private actors as an indicator of public regulator’s trust. This way trust became a number and was hard to rise. TOC eventually has been abolished in its then-designed form. A different Ministry is thinking of a lighter regime with the same name.

5.2 Coach transport safety: Committing actors to discuss quality

The arrangement
The coach sector - under the umbrella of its industry association 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. Both the scheme and the certification bodies are accredited by the Dutch Accreditation Council. Hallmarks are awarded based on these audits and reports made by public regulators, under which the former Transport, Public Works and Water Management Inspectorate (IVW). IVW focuses its inspections on compliance with drivers’ driving and resting times. IVW also issues the permits that coach companies need in order to run their companies. The hallmark awarding process is managed the business organization KNV and its foundation SKTB - the main intermediaries discussed in this case. The have 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, which makes this arrangement a hybrid.

Issue: 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. Certification and accreditation also contributes to the status of the hallmark. This plan also resulted in a confrontation with the private regulator. The Dutch Accreditation Council was willing to agree to the accreditation of the certification process, but not to the process of
awarding the hallmark that ultimately resulted in the sticker on the bus. The reasons for this were methodological. The certificate refers to the company's quality system and not to the bus on which the sticker is placed. Such a sticker would imply a product certificate.

As a solution, KNV, public and private regulators have developed a new regime. The process of awarding the hallmark has been divided from the certification process. Certification became a condition for hallmark provision, besides one further condition. This further condition is a maximum of infringements found by public regulators. The process issuing the certificate has been accredited, but not the further process of information gathering from public regulators and awarding of the hallmark. These steps now is managed by SKTB. SKTB now hosts a variety of commissions that should guarantee the fairness of sanctioning and scheme management.

**Issue: Provision of information by public inspectorate**

The quality of the hallmark awarding process is now largely dependent on information from public regulators. The sector considers information about compliance with the driving and resting times of drivers to be important, because it believes this to be a key component of the standard. This information comes from IVW, based on their in-company inspections. 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 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 IVW (once every three years). However, IVW’s dedication to this inspection frequency diminished. Main reason was a reorganisation, which made the same inspection unit 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. SKTB will receive less information from IVW. However, it is not in a position to demand that the IVW conduct company inspections. Negotiations led to a temporary solution. If SKTB finds a need for information on certain companies, it may ask IVW to conduct brief analyses of tachograph disks. It is believed that the emergence of digital tachograph technology will definitively solve this problem, because this will provide much more information in little time.

**Reflection from an instrumental perspective: a synergetic regime damaged by suboptimal solutions**

The private hallmark regulations imply opportunities for risk-based oversight by public regulators. The hallmark can be used as an indicator for quality, so that a public regulator can concentrate on non-hallmarked companies. This is an expected synergy between the regimes. There is also an unexpected synergy. IVW may fine companies if infringements are detected. The fine, however, is not the only consequence for the company. If the company has a hallmark, this is at risk, because IVW will also inform SKTB. Coach companies fear withdrawal of a hallmark by far more than a fine of

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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).
a public regulator. That’s because of the visibility of the hallmark. Big clients – such as travel agencies – also take the possession of a hallmark into account. Withdrawal of a hallmark may result in declining market share. Because of this information exchange coach companies may get more compliant to public regulations.

However, the solutions found for the issues described above are at least suboptimal. First, IVW contributes actively to the quality of the hallmark. If IVW concentrates on non-hallmarked companies, the hallmarked companies will be inspected fewer times. The information flow about these companies to SKTB will reduce. The hallmark then becomes a poor indicator of compliance by these companies. Second, the 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. Third, the tachograph-analyses-on-request by SKTB implies that the self-regulating body in the sector is forced to take the initiative itself. It is now its responsibility, rather than that of IVW, to select the companies eligible for this kind of analysis. The spontaneous analyses of IVW – with spontaneous detection of infringements and spontaneous information flows to SKTB – are gone. This implies a bigger chance for non-compliant companies to free ride.

Reflection from a decentered perspective: a vivid, but unarticulated regime

Launching a hallmark seems a difficult job. Several issues have come on the way. Public and private regulators are involved, but is appeared to be hard to connect the hallmark system to their policies and regulations. Still the regime seems vivid. For every issue an innovative solution has been found. Still all regulators are contributing actively to the safety of touringcar travel. The emergence of innovative solutions is an indicators that involved actors have sufficient trust that the regime is trustworthy and that the regime provides opportunities for learning. For every solution new institutions had to be erected. The splitting of the certification process and hallmark process asked for several commissions and meetings – such as a Hallmark Provision Committee, a Commission for Appeal and several ad hoc meetings. All categories of regulators participate. The meetings are all hosted by SKTB. SKTB becomes an information hub for quality issues around touringcar companies. SKTB becomes a main connector between the three regulators, with strong ties to public regulators, private regulators and the regulated industry.

One main vulnerability has to be mentioned. What is the regime exactly? TOC – the former case – had a name, a policy frame, and a covenant everybody may refer to. The coach travel regime is a set of agreements laid down in bilateral information exchange agreements, an innovative certification regime, and a couple of meetings around SKTB. The solutions to the issues contribute to the regime, but they don’t make it more elegant. As an illustration, the scheme was found to be too complicated, and SKTB once took the initiative to simplify it. After several ad hoc meetings the job was done, but two weeks later the Dutch Accreditation Council called for additional requirements to comply to the management system standards. Because of its complexity and poor articulation, it may become vulnerable for new undermining policies. This is not just guessing. IVW has embraced system-based regulation – which is a major trend for Dutch inspectorates. There is a huge overlap between the
hallmark-regime and system-based regulation, because both ground inspections on management systems. It is questionable whether the top of IVW wishes to spare the hallmark regime or will choose for further separation from it.

5.3 A mixed affair, and why

Both cases show intermediaries busy matching public and private regulations. In both cases issues arose, originated in differences between public and private interests. But which of the three roles of intermediaries - cogwheels of government, cogwheels of industry or mediators - describe the efforts of intermediaries most accurately?

Clearly, the intermediates didn’t work properly as cogwheels of governments. The instrumental reflections reveal limited possibilities for public regulators to safeguard compliance. The original arrangement seemed promising on paper, but the solutions found damaged the arrangement and their promises to public regulators. The potential of the arrangements might stay intact, but the arrangements-in-practice are difficult to account for. In the poultry farmer case the amount of inspections has decreased, compared to the original intentions. In the coach travel case the validity private hallmark is decreasing as an indicator of quality.

From an instrumental perspective, a conclusion may be that the intermediaries are at first cogwheels of industry. In fact, the case of poultry farmers didn’t show intermediaries contesting industry’s interests that they made the same tradeoffs between quality and efficiency as industry did. However, the other case shows an intermediary trying feeding public inspections with important information about compliance and - due to demands from the Dutch accreditation body - finds itself responsible for the sanctioning of the industry. This suggests that this intermediary might be put in place as cogwheel, but it is running loose in the course of time.

In fact, in the touring car case, the intermediary can be best conceptualized as a mediator between government, industry and certifying industry. It developed ties to all, and by doing so it became an important node for information exchange and decisionmaking about quality and safety issues. In a formal sense the intermediary in the poultry farmer case did the same. However, the conflicts were not solved. Indeed, the intermediary got involved in conflict and eventually chose the side of industry, which unilaterally deleted the public regulator’s demands from the scheme.

Table 2 summarizes the findings about the intermediaries.

<table>
<thead>
<tr>
<th>Character of issues</th>
<th>Case poultry farmers</th>
<th>Case touring cars</th>
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<tbody>
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<td></td>
<td>Government tries to reinforce self-regulation by adding extra sanctioning instruments and inspections to the scheme for the public interest.</td>
<td>Industry tries to commit certifiers and public regulators to their self-regulatory system. Both are reluctant.</td>
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How are issues solved?
The inspections and sanctioning instruments are deleted unilaterally by industry after a period of confusion. Compromises are found after intensive efforts by industry, although they are a little awkward.

Role intermediary Mediating, negotiating, eventually chose industries’ sides Mediating, negotiating, moderating discussions.

Contribution intermediary to regulatory compliance Half-hearted implementation, eventually little contribution to regulatory compliance. Provides input to public regulators for their risk analyses.

Contribution intermediary to business interests In compliance to business interests. Quality is promoted in an efficient way. In compliance to business interests. Promotes safety, service and image of industry.

Contribution intermediary to joint problem solving process Conflicts with regulators, no solutions to issues initiated by intermediary. Intermediary became node for network and knowledge exchange, because of ties to business, government and certification industry.

Table 2: Two intermediaries in co-regulatory processes

Not surprisingly, the results are a mixed affair. The intermediaries can be described by all three roles, but per case some roles are more accurate than others. Both intermediaries had potential to get mediators, but eventually the intermediary of the poultry farmer case tended to be a cogwheel of industry. This suggests that intermediaries will blossom to be mediators under certain conditions. As hypotheses - and only based on these two cases - I will describe three of those conditions.

First, intermediaries should be interdependent enough from industry. This is a logical idea. Many trade organizations and scheme managers are funded by their members, which are usually private - sometimes large - companies. If the intermediary continuously has to fear the commitment of its member, it is impossible to be more than a spokesman of industry.

Second, all regulators involved should have some commitment to co-regulation. In both cases the commitments to co-regulation are only lukewarm. However, in the poultry farmer case the commitments of the regulated industry proved problematic, while in the touringcar case the commitments of public regulators was at stake. They were at least committed to the overall aim of the industry’s efforts, which is the safety of travel by touring car. In the poultry farmer case the overall aim became issue of conflict. The policy framework promised efficiency, but the extras demanded by government all compromised on that promise.

Second, the intermediary has to feel problem owner. In the poultry sector no problem owner of the arrangement emerged that served as a connector between the three regulators. This seems mainly
due to the fact that the arrangement in the poultry is designed by a single actor (a government department), and the designer pulled back after formalization of the design. By the time the design got contested nobody had incentives or possibilities to defend the design. In the touring car case a connector did exist, even reinforced by the solutions found to the issues. SKTB became a problem owner, creating networks around quality by founding and hosting committees and ad hoc meetings.

6. Conclusions and discussion

Co-regulation arrangements are being developed in the context of paradox. Regulation has a hierarchical connotation and is generally seen as an instrument in hierarchical settings. At the same time there is also wide support for the idea that arrangements are developed in more horizontal, networked settings. These opposing views have critical implications on the way intermediaries are conceptualized. In this paper I have elaborated on the role of these intermediaries, helped by theory on governance and regulation. I also enriched my findings with two Dutch examples of co-regulation. The cases show that intermediaries are not only understood by cogwheels of either the government’s or the industry’s regime. They may also play a relatively autonomous, moderating role in between public and private interests.

Two case studies of Dutch co-regulatory regimes reveal mixed findings. None of the three roles does an entirely accurate job describing what intermediaries exactly do. They are not cogwheels in government’s machine. However, describing them as cogwheels in the industry’s machine does not justice to the significant mediating efforts they commit. They may blossom as mediators between the many actors of the industries, governments and certifying industries. That is, they may blossom under certain conditions. It is these conditions that may be a vital target for more research on how co-regulation functions.

These findings suggest that an instrumental perspective falls short in assessing the efforts of intermediaries. As food for further discussion I would like to suggest three instrumental pitfalls for and principles that may help walking around them (see also Van der Voort, 2013).

Pitfall 1: The norm for intermediaries is their ability to safeguard public values

Assessments from regulation-literature suggest serious doubts about the motives, the institutions and capacity of private partners. However, these assessments implicitly or explicitly are about whether hybrid forms of regulation and oversight are effective or not for governments. This question is awkward, though, if one considers co-regulation as a governance efforts. As suggested by Mandell and Keast (2008) respecting the network character of regimes implies the inclusion of multiple perspectives on effectiveness.

Principle 1: Not only assess intermediaries on public, but also on private values

Pitfall 2: Norms for intermediaries are about effectiveness

Regimes - and intermediaries alike - can be effective or not. There is a danger in focusing too much on the instrumental question whether they ‘work’. Claims on this issue – if valid at all – usually regard a limited time span. As network decision making is dynamic in nature, assessments on
effectiveness are generally soon outdated. It seems more helpful to look for the driving mechanisms behind functioning. Well-agreed factors of relevance for networks are trust, learning and problem solving. They fuel the viability and quality of interactions. These kind of criteria, however, will tend to loosen the connection between results (in this case compliance). The suggestion here is that the analyst takes a step back in determining the effectiveness of regimes on a moment in time, in favour of the actors. They are supposed to be able to assess whether interaction still provides benefit to them, both in the short and in the long run.

**Principle 2: Not only assess intermediaries on their instrumental values, but also on their contribution to the viability and quality of interactions**

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