Puppets of industry?

Scheme secretariats as mediating institutions for co-regulation

Haiko van der Voort, MA
Delft University of Technology
Faculty of Technology, Policy and Management
h.g.vandervoort@tudelft.nl
Status paper: first draft for a journal article + exercise for a conclusion in my thesis

1. Introduction: mediation for co-regulation

There is an odd paradox about self-regulation. Literature on co-regulation is at least sceptic about all kinds of self-regulatory efforts. This doesn't invite governments to get involved in them. Still that's exactly what increasingly happens in practice: governments get involved. All kinds of co-regulation have emerged, for example HACCP in food regulation (Martinez et al., 2007) or consumer protection against cyberattacks in Europe (Bonnici, 2008: 15).
Literature on self-regulation stress the importance of mediating institutions between businesses. The strength of these institutions would be a major determinant of the quality of self-regulation to promote 'industrial morality' (Gunningham and Rees, 1997). Some authors on these mediating institutions pay special attention to secretariats of self-regulation initiatives. They would increase in significance as institutions connecting the interests of several businesses. What roles do secretariats play as mediating institutions for co-regulation? In this paper I present two Dutch cases of co-regulation. Based on 38 interviews and desk study I will describe the development processes of the secretariats involved.

This is another paper about regulation, self-regulation, and co-regulation. These concepts are very popular, and it is well-known that the more popular a concept is the larger the variety of definitions, interpretations, and misunderstandings. That's why I made a little glossary. I think of *regulation* in material terms. It involves setting standards, collecting information, making judgements and intervening.[1] 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 a sector association. In many cases, they hire in private regulators, who in turn set standards. In the case of *co-regulation*, one or more regulatory activities are undertaken jointly by public regulators (Bartle and Vass, 2005; Martinez et al,

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

2007; Van der Heijden, 2009). This means that public regulation becomes closely intertwined with self-regulation. As such, co-regulation presupposes self-regulation – without self-regulation, co-regulation is not possible. Co-regulation, this way, implies multiple actors all having different ideas what and how to regulate.

Box 1: regulation, self-regulation, co-regulation… a glossary

This study complements existing literature on secretariats as mediating for co-regulation. Co-regulation implies involvement of more actors than just self-regulating businesses. Also public regulators and standardization businesses (coined as 'private regulators') have a stake in co-regulation. Public regulators insist upon the importance of obeying the law and is not too interested in other norms. They will only be interested if a co-regulatory regime would have sufficient mechanism for law compliance. Private regulators look at the matter from a more methodological perspective. They are in if the standards for co-regulation fits predefined schemes made up in international standardization organizations, such as the International Organization for Standardization (ISO).

Are these secretariats just puppets of industry and business organizations, or are they serious candidates for further analysis? And is the role played by secretariats in co-regulation different than found in literature on self-regulation?

An answer to these questions contributes to a discussion on the organization of mediating institutions on co-regulation. The following sections are derived from literature on self- and co-regulation. Next section I will dig a little deeper in the importance of mediating institutions for self-regulation. In section 3 I focus on the roles and functions of secretariats. Co-regulation is the subject of the fourth section. Result of the sections on literature is an agenda for the empirical part of this paper (section 5 and 6). I conclude with an agenda for further studies on the organization of mediating institutions.

2. Mediating institutions for self-regulation

Self-regulation enjoys popularity in both regulation literature and regulatory practice. That is, if one considers the amount of books, papers and policy documents. The actual content of this output doesn't suggest such popularity. A massive amount of literature is skeptical about the value of self-regulation for public purposes. They find plenty of incompatibilities between the purposes of self-regulating industries and public regulators. Industry would most prominently serve their own interests rather than public values (Gunningham and Rees, 1997; Grabosky, 1995; Bartle and Vass, 2005; Hutter, 2006). An emphasis on efficiency would compromise the effectiveness of self-regulation (Rametsteiner and Simula, 2002). A lack of commitment would result in symbolic self-regulation (King and Lenox, 2000; O'Rourke, 2003; Power, 2003).

This is not to say that self-regulation would be unpromising for governments. Industries have more knowledge on their own processes than governments. And self- regulation is an act of taking responsibilities for values that exceed interests of individual businesses. These ideas

could entice public regulators facing budget cuts to get involved in self-regulation (making it co-regulation).

Gunningham and Rees (1997) have summed up advantages and drawbacks of self-regulation from a public perspective. They aim at realizing the 'potential' for self-regulation.[2] Their point of departure is that this is a potential to develop "an effective industrial morality that brings the behavior of industry members within a normative ordering." Major events such as Bhopal and Three Mile Island serve as examples for catalysts of an 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 broader than compliance to the law. However, this classic publication acknowledge a vital position of business groups for self-regulation. These institutions have the position to connect the interests behind self-regulation.
This is a tough job. Furger (1997) points out that the somewhat generic notion of "business groups" can translate into sophisticated interactions between diverse intermediary organizations. He frames self-regulation as a multi-actor problem. Also Gunningham and Rees ask themselves who this 'self' of self-regulation actually is. Individual businesses in all variety – small and large, new and old, innovative and traditional – look differently at morality. In other words, this makes the 'self' internally differentiated. This makes the self "a wonderfully complex entity, which is matched to, which reflects and is reflected in, the complexity of the social world" (Walzer 1996: 85; cited by Gunningham and Rees, 1997). This differentiation could be viewed, again from a public perspective, in both a negative and a positive way. Cheit (1990: 176) complains about private standards to be 'consensus' standards. "The need for consensus (…) leads to a 'watering down' of many standards". Question is whether this would also hold true for public standards, such as laws and regulations. A more positive view on differentiation is that it forces self-regulatory organizations to interact and start discussions on their aims.

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 towards the club as a whole, such as legitimacy of the club. If a club is big enough a whole industrial sector may enjoy the club's presence, for example if the club improves the sector's image. The latter advantage also brings a danger of free riding, for it is possible not to be member of the club, but still enjoy the advantages of its presence (see also King et al. 2002). A different danger is shirking, which is being member of a club and enjoy the advantages, but not complying to its rules. Every club deal with these dangers differently. It varies from the invitation of as many members as possible to avoid free riding to indeed sharpening rule enforcement and monitoring to prevent shirking. This way Potosky and Prakash present a typology of clubs with two variables: stringency of standards and strengths of the monitoring and enforcement programs.

[2] I quote 'potential', for this is again 'potential' from the perspective of the government, not necessarily from other actors.

An important suggestion from club theory is that the regulatees themselves develop institutions and by doing so face dilemmas for standard setting, monitoring and enforcement. The many selves legitimately contest each other's position on these dilemmas. This makes self-regulation both a multi-actor and a multi-value phenomenon.

As a result not all self-regulation initiatives show powerful mediating institutions (Sinclair, 1997; Bartle en Vass, 2005). Potosky en Prakash's typology already suggests a category of weak norms and a limited amount of enforcement instruments. They call this category shams, suggesting that the limited force has a purposeful background. Clubs would be organized consciously for window dressing. Other scholars show that also the authority of willing clubs is not guaranteed (i.e. O'Rourke, 2003). For example, conflicts within a business sector may have a negative effect on self-regulation and self enforcement (Patton and Olin, 2006). This implies that the environment of self-regulation initiatives may cause an inability of mediating institutions to develop sufficient authority to regulate. The environment may also reinforce the power of mediating institutions. The Institute of Nuclear Power Operations (INPO) in the United States is generally seen as a successful self-regulation initiative, which had its foundation right after the near-disaster at Three Mile Island in 1979 (Gunningham and Rees, 1997; Hutter, 2006).

3. Secretariats as mediating institutions for self-regulation?

So mediating institutions bring together different interests and values. And the strength of mediating institutions is not only a purposeful decision, but may also emerge because of both internal and external forces.
Now what are these mediating institutions? Gunningham and Rees target 'business groups' or industry associations. These organizations are common platforms gathering common industrial interests. They represent the industries towards other actors, such as governments and ngo's. Sometimes they cover issues that rise above the individual interests. An example of such an issue is reputation building towards other businesses, governments or customers. Here the collective interest of reputation building may conflict with individual temptations towards free riding (Potosky and Prakash 2009, King and Lenox, 2002).
However, some sectors comprise of more than one industry association and these organizations develop several activities of which self-regulation is just one. This way the concept of 'clubs' suits the idea of a group purposefully regulating itself better. However, as noted, also clubs aren't monoliths. As it comes towards standard setting and standard management clubs usually raise a foundation that is formally independent from the industry associations that lie behind the clubs. These foundations I call 'secretariats' (see also Hallström en Boström (2010: 112-117). Secretariats are founded as more technical institutions, that organize the necessary bargaining processes between technical and more political experts about formulation and implementation of standards. This suggest a nodal position among stakeholders, but no substantial contribution is expected from a secretariat. Figure 1 is a simple representation of the institutions I mentioned.

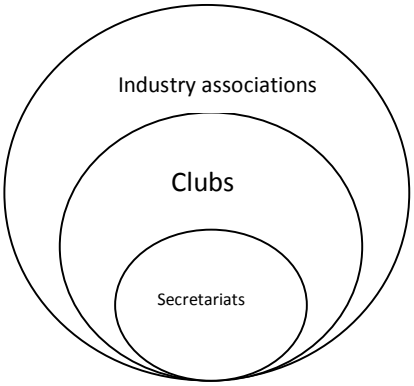

Figure 1: Mediating institutions

Secretariats range from single persons towards full-grown organizations employing dozens of people. Hallström en Boström (2010: 112-117) pay attention to these secretariats in their study on transnational standardization initiatives as run for the Forest Stewardship Council (FSC) and the Marine Stewartship Council (MSC). They sum up manifest and latent roles of secretariats. They include more technical roles such as:

- Ensuring consistency of standards and policies and the interpretation of standards and policies worldwide
- Doing work for decision-making bodies within the standard-setting arrangement (e.g. boards and general assemblies
- Taking responsibility for fundraising issues and oversee the finances of the organizations

They also include moderating roles such as:

- Developing and communicating new procedural rules and organizational structures
- Organizing and convening international work meetings, and handling rounds of comments in connection to meetings
- Handling information, training, and education, and education in relation to national and regional offices, to members, and to other stakeholders (e.g. certification bodies and direct users); assisting in the interpretation of standard principles, criteria, and policies
- Performing moderating roles in stakeholder discussions.
- Pushing and assisting in national or regional standards development or assessment processes

Striking is their observation that these roles increase in importance over time as the standards and the governance structures became institutionalized. The secretariats-staff for FSC and MSC has grown considerably, as has their autonomy, authority and power (Hallström en Boström (2010: 112-117; Barnett and Finnemore, 2004). They gradually assume more

decisions, tasks, and responsibilities. This increasing significance of secretariats in the run of time has at least two explanations.

Secretariats develop knowledge and expertise that proves unique. It is the combination of technical knowledge on standards, juridical knowledge on regulations and economical knowledge on the market. As a consequence, this knowledge feeds their mediating role (Barnett and Finnemore, 2004)

A second explanation deals with the position of secretariats. Standardization Organizations create credibility and authority, because many actor have to be involved in the standardsetting process (inclusiveness) (Cashore, 2002; Boström, 2006). While inclusiveness adds legitimacy for standardization organizations a need rises for mediation to overcome particularistic interests and to enhance solidarity as well as to provide forms for exchange and mutual learning (Wälti et al. 2004). Secretariats, as moderators of the standardization process and relatively independent from business interests is a natural candidate for this mediation.

Time has done more to some secretariats. Literature on self-regulation warns for 'capture', which is increasing dominance of bigger industries over the self-regulation process. Taylor observes that the FSC has evolved from an NGO concerned with addressing degradation and deforestation to a "buyer driven preoccupation with delivering large quantities of certified wood products, which has naturally led to a focus on those big producers who already have well managed forests and can readily supply the produce" (Bass et al. 2001: 86, cited by Taylor, 2005).

A common means to mitigate capture is the inclusion of all interested industries. This inclusiveness would prevent the bigger industries to override other stakes (Boström, 2006). Verbruggen (2011) points to the inclusion of non-industry members is a strategy to mitigate the risk of capture, such as governments and ngo's. They would have extra qualities to mitigate conflicts between industries.

Literature with a focus on secretariats is not very common. Hallström and Boström clear up their roles considerably. They play hosting and moderating roles. These roles may become more significant over time, the risk of losing independence (capture) is considerable, but mitigating mechanisms may be in place.

4. Co-regulation: enter public regulators

Self-regulation is a multi-actor affair in which secretariats may play a pivotal role. In the case of co-regulation the amount and diversity of actors even increases. Co-regulation suggests some involvement of public regulators in the self-regulatory process or vice versa.

In the case of co-regulation at least three different types of players set rules for regulatees. First, there are public regulators, that provide regulation based on statutory standards and are legally authorised to do so. Public regulators involve administrators, policymakers, and

inspectors, all involved in defining and enforcing regulations. Secondly, there are regulatees, who, in the case of self-regulation, also define rules. These regulatees involve businesses, industry associations, and standard-setting organizations (including secretariats).
However, defining rules is not exclusively done by these two types of players. Compliance to rules is a common prerequisite for services provided by for instance banks, insurance companies (Gunningham and Grabosky,1998; Baggott 1989; Hutter, 2006; Dorbeck-Jung *et al.*, 2010). Moreover, many self- regulation regimes hire an industry explicitly for regulation, which is the standardization industry. In this case a 'third party certification regime' emerges.[3] A key feature of third-party certification is that an organisation employs a certifying body in order to secure a certificate. Such a certificate is an indication of whether the organization or its products or services can be trusted. This way certification bodies provide reputation by applying pre-set standards to the organization (Van Waarden, 2011) Standards are defined by (inter)national standards organizations such as ISO. The abilities of certifying bodies and the regime in which they operate to apply these standards are subject to accreditation by an accreditation body.

Certification and accreditation represent an entirely different regime with its own standards and institutions. Certification- and accreditation bodies apply and specify international standards that are different from the rules from the public regulator or the regulatee. They are typically technical or institutional rules, depending on the standard a regulatee chooses for to comply to. For example, certification standards such as ISO17021 set demands with regard to the organisation of standards management and the working methods applied by certifying bodies.[4] I call this third category of regulators 'private regulators'.[5]

Essentially, co-regulation involves collaboration between those that set rules. In case of third party certification this is a collaboration of three types of actors. Public regulators provide legal rules, regulatees provide rules for their own ends and private regulators provide institutional and technical rules based on the standardization regime the regulatee wishes to comply to. Figure 2 provides a visual representation of this interpretation of co-regulation.

The rules are different in character and origin from different regimes and are articulated by different actors with a variety of interests. This suggests a high potential for conflicts between rules. Where conflict potential may increase the need for mediating institutions for self-regulation, this could be even more the case for co-regulation. In case of co-regulation the story of mediating institutions may not only involve business interests, but also interests of public and private regulators.

[3] In a strict sense these third parties could also be hired for regimes other than certification, such as inspection regimes.
[4] Strictly speaking, the RvA does not set requirements, but rather interprets international standards.
[5] I am aware that these are not regulators in the strictest sense of the word, because they have limited or no statutory powers. However, in material terms, they very much resemble regulators because they collect information, make judgements on it and impose sanctions (i.e. refusing to issue or withdrawing a certificate or accreditation).

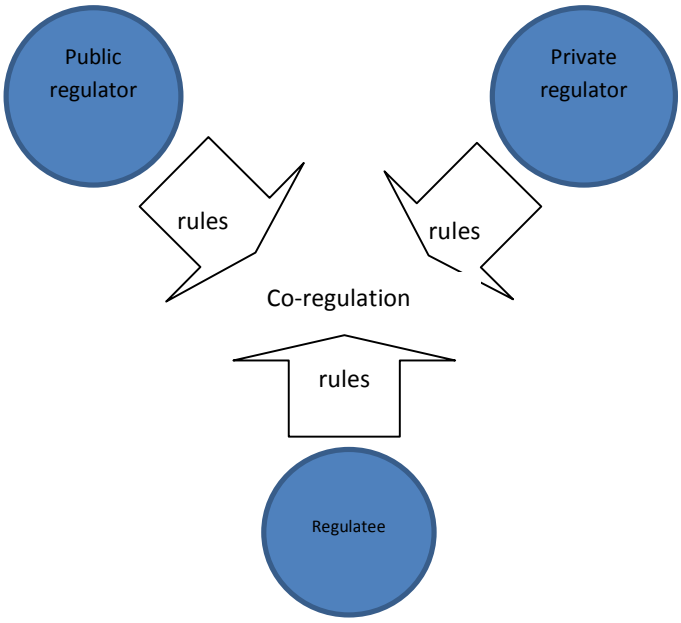

Figure 2: Rules for co-regulation

What is the significance of public and private regulators for the roles played by secretariats? What does the involvement of public and private regulators do with the danger of capture? I will look for first answers to these big questions.

Main inspiration for these first answers are two Dutch case studies of co-regulation. These are regulations on the safety of coaches and regulations on the reliability of temporary employment agencies. Besides a desk study of policy documents and agreements I committed 38 interviews with key actors from all three types of regulators. I started with two in depth interviews with the involved secretariats, then 33 interviews with other stakeholders and finally confronted the secretariats with my findings. Main questions for the interviews have been:

- What rule-conflicts dominated the administrative agendas of those involved in the co-regulatory regime.
- What (temporary) solutions have been reached by the parties involved?
- What roles have the secretariats played in finding these solutions?
- Have these roles evolved over time?

In the next sections the stories of co-regulation will unfold.

5. Safety and quality of Dutch coaches

Key players for quality

The Dutch coach sector, organised under the umbrella of the Royal Netherlands Association of Goods and Passenger Transport Firms (Koninklijk Nederlands Vervoer, 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 with the use of standards for management systems (ISO17021). The certifying bodies are accredited by the Dutch accreditation body RvA. The scheme is managed by the legally independent foundation SKTB (Stichting Keurmerk Touringcarbedrijven), a secretariat. Public regulators are the IVW (Transport, Public Works and Water Management Inspectorate) and the RDW (Rijksdienst voor het Wegverkeer; Public Service for Road Traffic). IVW focuses its inspections on compliance with drivers' driving and resting times, while RDW inspects the condition of the buses.

International standards such as for products, services, persons management systems or inspections are set by special committees under the regime of *Standardization Organizations*. Famous examples are ISO for international standards, EU for European standards and NEN for Dutch standards.

In the Netherlands tailor-made schemes are common, which are international standards adapted to the special needs of a certain industry. The *Dutch Accreditation Council* has an important role to look whether these 'adaptations' are compliant to international standards they claim to specify. Main consultation partner for these compliance issues are '*scheme managers*', institutes defined this way by the Dutch Accreditation Council. Usually these scheme managers are private foundations that represent industries, which I call 'secretariats' in this paper. The Dutch Accreditation Council prescribes rules for scheme management. One important rule is about the representation of stakeholders in the formulation and the management of the schemes. For every scheme *Expert Commissions* are erected, in which a representation of businesses and sometimes governments have a chair. Scheme managers also have to manage harmonization between certification bodies, so that these bodies interpret the schemes the same way.

Box 2: Standardization, the Dutch way

Rule conflicts and solutions

Issue 1: Accreditation of the awarding of hallmarks. An important reason for self-regulation is the improvement of the image of the coach sector. That is why a visible hallmark is important for the sector. The most visible location is the bus used for transport. For this reason, the sector wanted to develop a hallmark based on the certificate and introduce accreditation for the process of certification and the awarding of a hallmark.
This plan also resulted in a confrontation with the private regulator. The Dutch Accreditation Council (RvA) was willing to agree to the accreditation of the certification process, but not of the process of awarding the hallmark that ultimately resulted in the sticker on the bus. Its reasons for this were that the certificate refers to the company's quality system and not to the bus on which the sticker is placed. It was thought that a sticker could imply a product certificate.

The conflict took a couple of years before a solution was found. The solution involved a split of the process of awarding the hallmark from the certification process. The so-called 'aspectcertificate' was born, which means that the certification- and accreditation procedure involved just an aspect of the total process of quality acknowledgment. The other process, which is the awarding of the hallmark, is managed by the SKTB. This includes a sanctioning system, a hallmark awarding procedure, and a procedure for complaints. This partial accreditation raises questions about the guarantees that the hallmark offers to third parties, including public regulators. It is up to the self-regulating sector to convince these third parties that the non-accredited process of awarding the hallmark is of sufficient quality and that there are sufficient checks and balances in place.

Development of this 'aspectcertificate' implied that the process for awarding the hallmark was not certified. So it was of utmost importance for the sector to show thirds (such as suppliers, customers, insurance companies and public regulators) that this process was organized carefully and professionally. The process should have enough 'checks and balances' to guarantee that it was not an affair dominated by large companies. SKTB, as a formally independent organization involved in the quality ensurance process, was a logical choice for organizing this hallmark awarding process. It involved several tasks. A first task was the hosting of committees for awarding, sanctioning and complaints, wherein a broad range of regulatees, suppliers, customers and public regulators had a chair. A second task was information gathering from public regulators. By lack of indicators from certifiers, hallmarks were awarded based on audits and reports made by public regulators. KNV has reached bilateral agreements with the public inspections for the provision of information. The number of infringements identified by public regulators is a criterion for awarding the hallmark. SKTB gathered and managed this information. A third task is ensuring certification and accreditation of the scheme. A number of requirements from the Dutch Accreditation Council (RvA) had to be met (see box 2). The institutions involved are all hosted and managerd by SKTB. Furthermore, SKTB is the regulatees' single tie to the RvA.

Issue 2: Provision of information by IVW

The quality of the hallmark awarding process is largely dependent on information from public regulators. The sector considers information about compliance with the driving and resting times of drivers to be important[6], because it believes this to be a key component of the standard. This information comes from the public inspectorate IVW, based on their company inspections. The inspection results form the basis for the judgement about the company, which is then used to decide whether or not a hallmark is awarded. The fewer company inspections conducted by the IVW, the less data the sector receives, and the less justification it has to refuse coach companies a hallmark.

[6] 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).

The exchange of information reflected the IVW's intention, until recently, to inspect coach companies regularly (once every three years). This would mean that the sector would regularly receive data from the IVW (once every three years). However, all of this became the subject of a confrontation between those subject to regulation and the public regulator, for two reasons. First of all, a reorganisation resulted in the same regulator being made responsible for freight transport, the taxi sector and the coach sector. The other two sectors are much larger and have a poorer record of compliance, leading to the regulatory priority shifting towards them. This will lead to a reduction in the frequency of inspections for the coach sector. Secondly, the IVW embraced system-based regulation. Companies with an adequate quality system qualify for a less rigorous regulatory regime. For the purposes of system regulation, the IVW is temporarily focusing its company inspections on larger companies that can be audited, in order to investigate whether these are eligible for a less rigorous regime. This priority is undermining the representative nature of company inspections. It also means that the sector is not receiving the data it wants. However, it is not in a position to demand that the IVW conduct company inspections. That's the responsibility of a public regulator, not of any private initiative.
Attempts are being made to solve this problem by asking the IVW to conduct brief analyses of tachograph disks at the request of the sector. However, this means that, unlike previously, the self-regulating body in the sector is forced to take the initiative itself. It is now its responsibility, rather than that of the IVW, to select the companies eligible for this kind of analysis.

As the host and manager of the quality safeguarding process, SKTB is the natural communication point for quality issues. As the institution that gathers and manages the information from the public regulator, SKTB will be the initiator for tachograph analyses by IVW. Based on their information they will judge for what cases it is desirable to do those analyses and in what cases not. This is more than just an operational issue, but an issue of potentially political significance. What companies should have an extra analysis and what companies shouldn't? The solution has been found just recently. Time will show whether SKTB will be involved in political discussions about the analyses or not.

Role evolvement of the secretariat
The issues made SKTB more and more a quality hub. Regarding quality, SKTB is the main tie for public regulators, private regulators and regulatees. Public regulators provide information to SKTB, provide tachograph analyses and participate in their quality institutions. For regulatees SKTB is the main communication point for quality issues. SKTB, furthermore, harmonizes certifiers, manages the scheme and is the single tie to the RvA.
So solutions for conflicts between those involved in co-regulation resulted in the secretariat SKTB getting a hub position. However, in the course of time the position of SKTB seem to get stronger, besides any conflicts. Respondents observe an emerging power of SKTB as integrator of different interests and actors. In the course of time a variety of contacts emerge, that also get institutionalized.

First, RvA formulate requirements for the scheme management process. One of the requirements is the organization of a broad societal support in the commissions to be managed.[7] SKTB seems to take this tasks seriously. They enter relation networks and use them to invite a broad range of both public and private actors.

> We have been approached by SKTB (…) They were looking for a broad societal support for their scheme. That's why they came to us. We ourselves founded a Client Council for Coach travel. IVW was also a member and from these relations the invitation came to enter the Expert Committee of SKTB (Public regulator, other than IVW)

Within these networks information exchange takes place. This makes participation in SKTB-institutions all the more attractive.

> *HV: Where did your first get to know about the new IVW-policy of system-based regulation?*
> I heard it the first time at a meeting at SKTB. In their Expert Committee. (Public regulator)

All relevant actors meet each other in institutions managed by SKTB. This way SKTB itself becomes an important mediating institution. Their position seems to be a result of problem solving, a result of solutions from rule-conflicts. However, SKTB as a host and moderator, increasingly gets more means to initiate problem solving. They have close ties to all actors and can easily use them if conflicts would arise. This way the hub position of SKTB is not only a result of problem solving, but also of more emergent developments. The hub position could potentially reinforce itself.

6. Compliance by Dutch employment agencies

Key players for compliance

Employment agencies range from large, internationally operating companies to one-man businesses with a laptop and a van. This sector is the subject of much political attention because there is (or has been) much wrongdoing, related for example to illegality, underpayment and bad housing for agency workers. In order to gain control of the sector, the legislator has introduced what is known as recipient's liability. In the event of wrongdoing being identified, the party that deployed the services of the dubious employment agency is held liable. Prompted by this recipient's liability and an effort to improve the image of the sector, the temporary employment sector started a register. A temporary employment agency is registered – or not – on the basis of inspections conducted by private inspection bodies.[8] The idea is that people hiring in staff should select an employment agency from this register,

[7] Regulations of RvA; "Reglement voor de Beoordeling en Acceptatie van Schemabeheerders"; RvA-R013; January 1 2008

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

thereby reducing the risk of being held liable. As was the case with the coach sector, the co-regulation regime is an initiative of regulatees, although this initiative was taken in response to pressure from the government. Without this initiative, a licensing system would have been introduced, which would have been particularly expensive for the sector. A legally independent foundation, the SNA, manages the scheme for inspection and harmonises the inspection bodies involved. The scheme is developed under the regime of the Dutch standardization organization NEN and is called NEN4400.[9] These inspection bodies are accredited by the Dutch Accredition Council RvA. The SNA organises a range of different consultations with the sectors and inspection bodies concerned.

There are three quite antagonistic industry associations, of which the biggest (ABU) has close contacts with politicians and higher civil servants. Their lobby is an important reason why self-regulation has had the chance. Involved public inspectorates are the Dutch Tax and Customs Administration (from now on Tax Administration, for convenience) and the Labour Inspectorate.

Issue 1: Accreditation of the awarding of hallmarks

The registration processes for employment agencies are also divided. The inspection phase is subject to accreditation, whereas registration is not. The main objection raised by the Accreditation Council is that an inspection reflects the situation at a given moment, whereas registration suggests a more long-term judgement. However, registration is essential for the sector, because a register reveals the quality of employment agencies to those hiring in labour, who are at risk if an employment agency turns out to be dubious.

The found solution is comparable to the coach case: separation of the registering process from the inspection process, the latter process being accredited and the first not. Like the situation in the coach-sector, this raises the question what guarantees accreditation offers to third parties. In this case as well, it is up to the sector, and more specifically the SNA, to convince the third parties that the registration process is sufficiently rigorous. Contrary to the coach case the registration process doesn't depend on information from public inspectorates. As a consequence, there is no quality commission assigning hallmarks based on such information. Main task of the SNA is to ensure that registration is indeed an acknowledgement of compliance identified with the help of an adequate inspection processes.

Issue 2: The encouragement of self-regulation by public regulators

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

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

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

Both of these issues result in a confrontation between regulatees and public regulators. The public regulators are hesitant, because they wish to draw a clear distinction between public and private. There is a fear of providing incentives to private quality systems because there is a chance that another, competing quality system may demand the same incentives. This is not completely unlikely, in view of the fragmentation within the sector. Intensive consultations with inspectorates and their ministries have so far only led to three limited covenants between the Tax Administration and SNA about the transfer of information and the provision of services to registered employment agencies. Furthermore, a statutory provision has been made suggesting support for certification.[10] Those deploying employment agencies can be held liable up to the level of a statutory minimum wage, if they have had dealings with a non-registered employment agency.

Further measures are being considered, but there are major legal obstacles potentially preventing them. A key question is with whom covenants should be entered into. The sector is made up of organisations that compete strongly with each other. There is a body that manages the standards system (which is SNA), but its legal status has been questioned within the ministries involved. Is this kind of body a neutral and fully-fledged representative of the sector, or merely a service provider working for the sector? In terms of policy, the former is preferable, but legally, the latter is more attractive.

Role evolvement of the secretariat

Just like SKTB, the SNA is growing in importance. In the first years after its foundation in 2006 SNA is gaining tasks and staff. I found four causes for this phenomenon.
First, just like the SKTB, the separation between the inspection process from the registering process reinforces the position of SNA, because they get a say in the registering part.

> An inspection report just reflects a single moment. That's why more authorities and decisions are shifting to SNA, because there are elements outside the NEN-standard that may result in registration or non-registration. That's why the role of SNA enlarges, while we haven't anticipated on this. We thought that inspection bodies would decide whether an employment angency would be registered or not. But that proved impossible. SNA now has contracts with inspection bodies. (Industry association)

These contracts encompass rules on harmonization and a peer-reviewed quality system for inspection bodies.

[10] This is Article 692 of the Netherlands Civil Code.

Second, because of the disharmonies between the three industry associations for employment agencies the SNA is a relatively attractive discussion partner for thirds. Public regulators, especially the Tax Administration, find many actors looking for indemnity of employer's liability. However, there is a lot of variety. There are three industry associations for employment agencies looking for indemnity for their members, all having different policies. Agreements with a single industry association are only valid for its members and not for others. SNA could speak on behalf of all associations and their members Against the will of industry associations the Tax Administration has made the covenants with SNA and not with individual associations. This reinforce the status of SNA as the private organization for compliance and provides them the opportunity to position itself more autonomously from the associations.

> We only change the norm if that's good for the norm and not in favor of any member of any association. (Secretariat)

Third, close contacts with public regulators make SNA pivotal for co-regulation. SNA is the main tie to the private regulator. They harmonize operations of the inspection bodies and they are the single discussion partner to the RvA. These mutual contacts safeguard the synergy between public and private regulation. This is deemed very valuable by involved organizations.

> SNA has good relations with the Ministry of Finance and the Tax Administration. They are capable of bridging their interests with ours. (Inspection body)

Finally, the co-regulation initiative is very visible to the public. The wrongdoings by employment agencies have enjoyed much attentions from politicians and media. That's why SNA and underlying industry associations has invested in visibility of their initiative. It was important for them to show politicians, media, and – last but not least, for they are their customers – employers, that there is one authoritative standard. This seems to result in some scopecreep of the issues discussed within SNA-institutions. The visibility of SNA provides incentives for actors to realize their own interests and ideals in an SNA-context. NEN4400 deals with tax issues and illegality, but that doesn't mean that SNA is tied to managing just this standard.

> I see SNA as a forum that addresses a number of societal issues such as housing foreign employees, and behavioral problems from employees. Consensus should develop between employers and employment agencies about how to deal with these issues. I would like to standardize this in a vehicle like SNA. (Employer)

Employers and employee emphasize the importance of non-statutory societal issues such as wealth and housing issues of employees and now insist on addressing these issues by institutions hosted by SNA. For employment agency associations this is unattractive, because extra standards detract from the motive of NEN4400, which is reducing liability risks for employers in the context of the law. What's more, extension of norms would also be at the expense of the association's say on compliance issues.

> (…) the odd thing here is that those at Randstad and Adecco (big employment agencies, hv) haven't thought of this. ABU just does what those big players make up. But now that is not essential anymore, but it is now essential what is being said at SNA's (Employer)

It seems that SNA, even more than SKTB, is growing in importance. Like SKTB SNA is hosting negotiation processes that tend to attract more and more actors and issues. Both SKTB and SNA are becoming hubs of quality and compliance.

Unlike SKTB, SNA is becoming more autonomous from underlying industry associations. They have become negotiators on behalf of the industry associations. There are also forces that may make SNA bigger than their underlying associations. Because of the employer's liability employment agencies become tied to employers. Employers are now committed to the compliance issues discussed at SNA's. But they want more. They want to use emerging SNA- networks for more issues than employment agencies want to discuss. The question here is who gets captured: SNA by the associations or vice versa?

7. Conclusions and discussion

To understand the 'potential' of self-regulation as mechanism for compliance to the law, an organizational perspective on self-regulation is fruitful. From such a perspective the roles and functioning of mediating institutions come into view. Mediating institutions face a multi-actor and a multi-value context. Their potential to mediate effectively depends on their ability to deal with such a context.

Scheme secretariats, originally founded as technical, operational bodies, are underrated as mediating institutions. Their natural roles are hosting and moderating multi-actor decision making, independent from single companies or single business groups. Hallström and Boström observe that these secretariats tend to gain importance in the course of time. These observations apply for transnational forms of self-regulation.

My cases deal with co-regulation on a national level. At first sight my findings are in line with Hallström and Boström's findings. Both secretariats under study had tendencies to grow in importance. They have close ties with important actors involved as they organize and manage networks. This way they facilitate problem solving.

What's more, the solutions found for these problems tend to reinforce the position of the secretariats in both cases. Here co-regulation seems to come in. First, as rule conflicts arise between different rule setters – public regulators, private regulators, regulatees – there is a need for an independent body to manage solutions. Secretariats are founded as independent bodies, as they have to bridge different interests among regulated industries. The bridge tend to get longer as it has to range public regulators and private regulators too. Second, scarcity of relations between public to private regulators emerges. In both cases public regulators favor a strict separation between the public and the private and have little contact with private regulators. Both secretariats under study develop a pivotal role between both kinds of

regulators. They have a unique tie to the national accreditation body. In one of the cases they have also a unique tie to public regulators, as they find secretariats attractive – relatively neutral - discussion partners.

Here a difference appears between both cases. Both secretariats are discussion partners for public regulators. However, the SNA (in the employment agency case) is relatively independent from the industry associations, contrary to the SKTB (coaches case). This has a very simple reason: the coaches case shows just a single association, while the employment agency case shows three antagonistic associations. That's why independence is an asset in the latter case. Besides hosting and moderating the secretariat gets an extra role, which is negotiating. This involves not only housing and organizing negotiations but also participating in them, representing industry.

The existence of more, disharmonized, associations seems to be a meaningful factor for the danger of capture. The more public regulators favor discussing with an independent partner, the more autonomy a secretariat may get from the associations and companies behind them, the less the probability of capture. The employment agency case also show a second factor that mitigates the chance of capture. In this case there is an incentive to involve a broad range of actors in the standardization process, under which employer's and employee organizations. The more actors involved, the more the likeliness of 'scope creep'. All kinds of societal issues get involved in the standardization issues. Some issues rise above the mandates of associations. Also here the secretariats as hosts and moderators get more autonomous from the associations that have founded them. Societal standardization discussions get centralized at the secretariat and the networks they manage, and not at the associations.

These first findings suggest that the organization of mediating institutions matters. An organizational perspective on mediating institutions sheds light on a complicated web of actors and values and the way they are brought together. Much work still has to be done. This study focused on secretariats of two national co-regulation initiatives and industry associations behind them. Factors such as the amount of associations, the conflict- potential and scope creep proved important for the evolvement of secretariat's roles and their vulnerability to capture. Committing broader studies on these factors could be a good idea. It would also be possible to involve more normative issues such as learning potential and learning barriers for co-regulation and the role mediating institutions may play for learning.

References

Baggott, R. (1989) 'Regulatory Reform in Britain: The Changing Face of Self-Regulation', Public Administration, vol.67, 435-455

Barnett, M. en M. Finnemore (2004) *Rules for the World; International Organizations in Global Politics*, Ithaca: Cornell University Press

Bartle, I and P. Vass (2005) *Self-Regulation and the Regulatory State; A Survey of Policy and Practice*, Centre for the Study of Regulated Industries (CRI); Research Report 17, University of Bath

Bass, T., R. Markopoulos, and G. Grah (2001) *Certification's Impact on Forests, Stakeholders and Supply Chains: Instruments for Sustainable Private Sector Forestry Series.* London: International Institute for Environment and Development

Bonnici, J.P.M. (2008) *Self-Regulation in Cyberspace*, The Hague: T.M.C. Asser Press

Boström, M. (2006) "Regulatory Credibility and Authority through Inclusiveness: Standardization Organizations in Cases of Eco-Labelling", Organization, vol.13 (3): 345-367

Cashore, B. (2002) "Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority", in *Governance: An International Journal of Policy, Administration and Institutions*, vol. 15 (4): 503-529

Cheit, R. (1990) *Setting Safety Standards: Regulation in the Public and Private Sectors*. Berkeley: University of California Press

Dorbeck-Jung, B.R., M.J. Oude Vrielink, J.F. Gosselt, J.J. van Hoof and M.D.T. de Jong (2010) 'Contested Hybridization of Regulation: Failure of the Dutch Regulatory System to Protect Minors from Harmful Media', Regulation & Governance, vol.4, 154-174

Furger, F. "Accountability and Systems of Self-Governance: The Case of the Maritime Industry" in *Law and Policy*, vol.19 (4), pp.445-476

Grabosky, P.N. (1995) 'Using Non-Governmental Resources to Foster Regulatory Compliance', *Governance: An International Journal of Policy and Administration*, vol.8 (4): 527-50

Gunningham, N. and J. Rees (1997) "Industry Self-Regulation: An Institutional Perspective", in *Law and Policy*, vol.19 (4), pp.363-414

Gunningham, N. and P. Grabosky (1998) *Smart Regulation*, Oxford: Oxford University Press

Hallström, K.T. en M. Boström (2010) *Transnational Multi- Stakeholder Standardization; Organizing Fragile Non- State Authority*, Cheltenham: Edward Elgar

Heijden, J. van der (2009) *Building Regulatory Enforcement Regimes; Comparative Analysis of Private Sector Involvement in the Enforcement of Public building Regulations*, Amsterdam: IOS Press

Hood, C., H. Rothstein en R. Baldwin (2001) *The Government of Risk; Understanding Rhisk Regulation Regimes*, Oxford: Oxford University Press

Hutter, B. (2006) *The Role of Non-State Actors in Regulation*, Discussion Paper 37, The Centre for Analysis of Risk and Regulation (CARR), London School of Economics

King, A.A. and M.J. Lenox (2000), "Industry Self-Regulation without Sanctions: The Chemical Industry's Responsible Care Program", in *Academy of Management Journal*, vol.43, nr.4, 698-716

King, A.A., M.J. Lenox, and M.L. Barnett (2002) "Strategic Responses to the Reputation Commons Problem", in A.J. Hoffman and M.J. Ventresca (eds) *Organizations, Policy, and the Natural Environment; Institutional and Strategic Perspectives*, Stanford: Stanford University Press

Martinez, M.G., Fearne, A., Caswell, J.A. and Hensen, S. (2007) 'Co-regulation as a Possible Model for Food Safety Governance: Opportunities for Public-Private Partnerships, *Food Policy*, vol. 32: 299-314

Patton, D.E. and S.S. Olin (2006) "Scientific Peer Review to Inform Regulatory Decision Making: Leadership Responsibilities and Cautions", in *Risk Analysis*, vol.26 (1), pp. 5-19

Potoski, M. en A. Prakash (2009) "A Club Theory Approach to Voluntary Programs", in M. Potoski en A. Prakash, *Voluntary Programs; A Club Theory Perspective*, Cambridge MA: MIT Press

Power, M. (2003) "Evaluating the Audit Explosion", in *Law and Policy*, vol.25 (3), pp.185-202

Rametsteiner, E and M. Simula (2002), "Forest Certification – an Instrument to Promote Sustainable Forest Management?", in *Journal of Environmental Management*, nr.67, 87-98

O'Rourke, D. (2003) "Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring", in *The Policy Studies Journal*, vol.31 (1), pp.1-29

Sinclair, D. (1997) "Self-Regulation Versus Command and Control? Beyond False Dichotomies" in *Law & Policy*, vol. 19, no.4

Taylor, P.L. (2005) "In the Market but not for it: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change", in *World Development*, vol.33(1): 129-147

Verbruggen, P. (2011) "Enforcement of Transnational Private Regulation of Advertising Practices: Decentralization, Mechanisms and Procedural Fairness" (unpublished paper)

Waarden, F. van (2011) "Varieties of Private Market Regulation: Problems & Prospects," in D. Levi-Faur, *Handbook on the Politics of Regulation*, Cheltenham: Edward Elgar

Wälti, S., D. Kűjbler, and D. Papadopoulos (2004) How Democratic is Governance? In *Governance: An International Journal of Policy, Administration and Institutions*, vol. 17 (1): 83-113

Walzer, M. (1996) *Thick and Thin: Moral Argument at Home and Abroad.* Notre Dame Ind.: University of Notre Dame Press