What should governments take into account when they consider to involve private parties in regulation?

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Abstract

Based on a literature review, this paper addresses the questions under what conditions four different types of private parties (manufacturers, purchasers, private regulators, and civil society) are more or less likely to have an added value to governmental regulation and how public regulatory bodies can further this added value. It appears self-regulation by manufacturers or purchasers works better as branches have a more self-evident interest to counter market failure, are smaller and more homogenous, have more experience with self-regulation and as self-regulatory systems are less ambitious (and, hence, can achieve less); private regulators seem to be more effective as consumers and purchasers are more willing to pay for quality, as companies not only want to obtain certificates in order to improve their market position ('degree purchasing syndrome'*) but also to improve the quality of their production processes, and as certifiers and accreditors compete with each other on price as well as quality; regulation by civil society seems to work better when citizens or interest groups are more powerful in relation to business, are better able to balance risks, and are more concerned about companies violating public or private norms. Public regulatory agencies can positively influence the conditions determining the added value of private parties' contribution to the regulation of market failure by coordinating, facilitating, and intervening.*

Introduction

In the literature governance is sometimes defined in terms of the involvement of private parties with the realization of public goals, or 'beyond government' (Lynn 2012). Conceived of as such, governance is contrasted with the situation wherein solely public agencies are involved in the realization of public goals. Regulation can be conceived of as an instrument aimed at realizing public goals. It then pertains to the conscious and goal-directed attempts to influence behavior, by way of rules and the monitoring and enforcement thereof (Black, 2002). Consequently, regulatory governance concerns the furthering of public goals by setting, monitoring, and enforcing regulations directed at influencing behavior by public and private parties (Silbey 2013: 15). Companies are an important target of regulation because their activities can harm the safety, health, and wellbeing of employees, consumers, citizens, and their living environment. Four different

types of private parties can be involved in the regulation of companies: manufacturers or suppliers (first parties), purchasers or customers (second parties), independent private regulators such as certification and accreditation bodies (third parties), and civil society, consisting of residents and interest groups who do not have a direct economic exchange relationship with companies but who nonetheless want to be involved in the regulation thereof (fourth parties) (McAllister 2012).

During the last few decades many public regulatory agencies have experimented with delegating regulatory tasks and responsibilities to private parties. Besides, private parties have interfered with regulation on their own initiative. From a public policy perspective an important question is whether involving private parties in achieving socially desirable outcomes has added value compared to the counterfactual, i.e. the regulation of business by public agencies only (Cafaggi & Renda 2012). From this perspective the answer to this question is evaluated in terms of whether the behavior of private regulators is sufficiently aligned with the public interest regardless of the extent to which they are able to achieve their own goals. The findings with regard to the contribution of different private parties to the governance of companies are often contradictory: some studies report positive effects, others negative, and yet others insignificant effects. This suggests the added value of regulatory efforts by different private parties is context-bound. Therefore, the central questions of this review are under what conditions the four different types of private parties are more or less likely to have an added value to governmental regulation and how public regulatory bodies can further this added value. The goal is to provide an academic contribution to the political debate on the question when it is or is not sensible for public regulatory agencies to involve different types of private parties in the regulation of companies.

I have based this review on a fraction of the available literature only. I have primarily focused on studies dealing with the regulation of working conditions, health and safety, and the environment. These issues clearly involve public goals. Moreover, I have mainly used qualitative case studies for my review, which leaves unanswered the question whether or not the findings of these case studies can be generalized to other policy domains and other institutional contexts. This choice was unavoidable since systematic comparative studies of regulatory governance are virtually non-existent (Van der Heijden 2013). Furthermore, I have primarily focused on studies dealing with just one of the four types of private parties involved in the regulation of business. For this reason, I will not address the issue of the interaction between different private and public parties which often occurs in practice. Besides, I have restricted this analysis primarily to public

regulating agencies active on the national level. This implies I have paid scant attention to the activities of local and transnational public regulatory agencies. Because of the selectivity of the used literature, the limited availability of comparative studies, and the restriction of the analysis to the separate role of private parties and to national public regulatory agencies, this review has an exploratory character.

I will subsequently address the conditions influencing the contributions the four types of private parties can have on the regulation of business and how public regulatory agencies can best influence these conditions. I will finish with conclusions and discussion.

First and second party regulation: suppliers, manufacturers, and purchasers

What is first and second-party regulation?

I deal with first and second party regulation concomitantly, because they can both be subsumed under the more general heading of self-regulation. Self-regulation concerns the activities companies or purchasers undertake to comply with norms or regulations. First-party regulation is conducted by in-house compliance officers who work for professional departments which are responsible for the implementation of internal management systems and for the integration of such formal systems in the organizational decision processes (Short 2013): 24). Second-party regulation is conducted by professionals at a downstream company, referred to as purchasers, who regulate company's upstream suppliers (Lytton & McAllister 2014). Different forms of self-regulation can be distinguished varying in the extent to what companies act independently of government. For instance, Gunningham and Rees (1997: 365) make a distinction between 'voluntary self-regulation' – whereby companies set norms and enforce without any governmental interference –, 'mandated full self-regulation' – whereby government mandates and monitors the management systems companies design themselves, and, if necessary, intervenes in order to guarantee the effectiveness of such systems –, and 'mandated partial self-regulation' – whereby companies either draft or design the norms mandated by the government themselves, but not both (for other distinctions with respect to self-regulation, see Van der Heijden 2012; Börzel & Risse 2010).

What can first and second-party regulation add to governmental regulation?

Self-regulation is based on the presumption that involving companies in the drafting, implementing and overseeing regulations results in regulations that better fit the specific context wherein they are applied, are easier adapted to changes, and are legitimized to a larger extent than regulation that is imposed and enforced top-down by government (Vogel 2008). Moreover, it is a strategy to give companies more responsibility for the prevention of the externalities of their activities. However, empirical research has shown contradictory effects of self-regulation on compliance: some studies find positive effects, others find negative effects, and yet others find no effects whatsoever (Short & Toffel 2010; see also Van der Heijden 2012). Some companies participate in self-regulatory systems in order to keep government at bay and to free-ride on the efforts of other companies, others make sincere efforts to prevent market failure by participating in self-regulatory systems because they consider this to be their societal responsibility, or because they believe it pays off.

What conditions influence the added value of first and second-party regulation?

These contradictory findings show that the added value of self-regulation to governmental regulation is conditional. There is quite some consensus in the literature about what conditions play a role (Oude Vrielink 2011; Saurwein 2011; Short & Toffel 2010).

First, self-regulatory systems are more effective as companies have more experience with them. Participating in self-regulatory systems induces companies to perceive them a necessary element of the companies' identity and increases the chance they will believe such systems have financial gains (Bernstein & Cashore 2007).

Second, the likelihood that companies will implement self-regulatory systems increases as the minimum standards are lower. In the aftermath of one of the factory fires that has cost the lives of hundreds of laborers in Bangladesh during the last year, it was brought to light that one of the largest participants in a self-regulatory system – Walmart – had actively resisted an initiative to enhance minimum standards for fire prevention in factories because this would increase the costs of their products too much (Greenhouse 2012). This means a trade-off exists between the level of participation and the level of ambition of self-regulatory systems.

Third, self-regulation works better as producers perceive a more obvious self-interest in preventing market failure (Gunningham 1995). For instance, the aircraft industry has substantially contributed to the improvement of safety by means of regulation, because in this sector consumers

are potential victims of accidents, powerful elites fly more than average, pilots are well organized, and the risk of liability claims is high, while in the maritime industry self-regulation has hardly helped to improve safety because sailors are badly organized, insurers buy off risks, passengers are powerless, and national conflicts of interest preclude the implementation of international treaties (Perrow 1984).

Fourth, self-regulation has more chance of success as business sectors are smaller and more homogeneous. The smaller and the more homogeneous branches are, the easier it is for branch associations to counter opportunistic behavior – free-riding – during the implementation of voluntary self-regulation (Börzel & Risse 2010: 116). The implementation of ‘ Responsible Care’ – the self-regulatory system implemented in the huge and heterogeneous chemical industry sector – showed, for example, that small companies free-ride on the efforts of large companies because they are less convinced of the importance of self-regulation and find it harder to comply with the demands this system poses to their management operations (Gunningham 1995).[1]

Fifth, a ‘shadow of hierarchy’ helps convincing companies of the necessity to take self-regulation seriously (Verbruggen 2013: 2). Public regulatory bodies which stimulate self-regulation because they suffer from a chronic lack of means, often achieve the opposite of their goals. After all, the perception that public regulatory agencies are inactive and powerless incites free-riding and the neglect of public interests (Short 2013: 30; Börzel & Risse 2010: 118). Conversely, high levels of regulatory surveillance by public regulators at both the organizational and field level promote the implementation of self-regulation (Short & Toffel 2010). Furthermore, the perception that the implementation of governmental regulation is looming, has proven to be an important reason for business to participate in voluntary self-regulation (Borck & Coglianese 2012). A ‘shadow of hierarchy’ is needed more when companies are not prepared to comply with laws or private norms than when they lack the skills or the authority to do so, although a lack of skills or authority often also indicate political unwillingness (Short & Toffel 2010). In sum: an active, supportive role of public regulatory agencies contributes to the effectiveness of self-regulatory systems (Short & Toffel 2010; Saurwein 2011).

Hsueh and Prakash (2012) have shown that public regulatory agencies in the United States use different ways of actively supporting companies to participate in self-regulation. They

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[1] Conversely, self-regulation offers powerful market parties the opportunity to exclude less powerful manufacturers from the market by implementing rules the latter cannot meet (Krawiec 2003).

distinguish between tangible and less tangible forms of support. Tangible forms of support consist of giving legal or technical advice about the norms to be applied. Less tangible support consists of creating a positive image of companies that voluntarily participate in self-regulatory systems. Hsueh and Prakash have demonstrated that public regulatory agencies operative at the state level primarily give tangible information in terms of expertise, advice and information, while federal regulatory agencies predominantly give intangible support by naming companies that voluntarily participate in self-regulation. The reason for this difference is that federal regulatory agencies are able to offer companies a huge platform, while national regulatory agencies are knowledgeable of local economies, which is useful for companies. This means that the manner in which public regulatory agencies offer active support to companies participating in self-regulation depends on their resources.

Public regulatory agencies acting as backstops for self-regulatory systems, providing resources, or endorsing these systems engage with compliance officers or managers located at the interface where regulations meet the unruly materials they are intended to govern. This engagement between public regulators and personnel responsible for self-regulatory systems is often accompanied by negotiation and flexibility. The latter often use the advice or pressure of external bodies as leverage to implement changes within their own organizations. Internal professionals often must adapt an active role, wrangling both the regulations and those being regulated to bring them in a workable alignment (Heimer 2013). This means public regulators and business professionals often co-construct regulation and compliance. This process of regulatory meaning co-construction, involves alignment and disputes between regulators' and professionals' strategic framing of regulatory concerns with tangible consequences for the enactment of regulation (Gilad 2014).

Conclusion

The literature shows that the more public regulatory agencies use self-regulation as a substitute for governmental regulation, the less they can perform the active, supportive role that is necessary for effective self-regulation. After all, time and again, it has been shown that self-regulation in the literal sense has small chance of success, while it can be effective when it complements a robust system of governmental regulation (Short & Toffel 2010: 30). The less willing companies are to comply with official rules or private norms the more an active role of public regulatory agencies is

needed. Apart form monitoring and enforcing self-regulatory systems by public agencies, giving legal and technical advice about the norms to be applied and giving positive exposure to companies that participate in voluntary self-regulatory systems have proven effective. So, even when the right conditions for self-regulation are present, an active, engaged role of public regulatory agencies remains necessary.

Third-party regulation: Certification en accreditation

What is third-party regulation?

Third-parties can be called upon to test or to certify. For this, they are being paid by the companies they inspect. Private regulators control whether products, processes, systems, or employees comply with certain norms. These norms are set by experts in national or international settings, such as the 'International Organization for Standardization' (ISO). These experts come from organizations, professional associations, societal interest groups, governmental agencies, or certifiers themselves. The norms certifiers inspect can either pertain to voluntary or legally binding norms and companies can either hire private regulators voluntarily or are legally obliged to do so. Certifiers do not have the same authorizations as public regulators when it comes to applying administrative or criminal sanctions for norm violations, not even when they inspect legally binding norms and when companies are required by law to hire private regulators. However, private regulators are allowed, for example, to withhold or withdraw a certificate. Private regulators themselves are controlled by accreditors. Accrediting bodies test whether private regulators are competent to test or to certify. Accreditors are hired to do so by the certifiers they control. Accreditors can consist of national agencies, such as the Dutch Board for Accreditation ('Raad voor Accreditatie'), or transnational agencies, such as the 'International Accreditation Forum' (IAF).

What can third-party regulation add to governmental regulation?

Similar advantages ascribed to first and second-party regulation are also ascribed to third-party regulation (i.e. flexibility, legitimacy, self-responsibility by business). Furthermore, allegedly, in comparison to first and second party governance, third-party governance has the additional advantage of developing norms that transcend individual companies or branches and, therefore, to

provide better opportunities to standardize and harmonize. Another advantage particularly attributed to third-party regulation is that it supposedly offers governments extra opportunities to manage products and processes that cross borders and, hence, jurisdictions. After all, many certifiers are active in different countries and use transnational norms.

However, in practice the advantages concerning flexibility, legitimacy, and harmonization do not always occur. This applies to the whole policy cycle ranging from agenda setting, designing, implementing, and evaluating and adapting norms. Agenda setting and designing norms are sometimes problematic because the experts who participate in this decision-making process often represent different organizations with conflicting interests (Van Erp & Verberk 2004). For accreditors that originate from different countries and that have to deal with different jurisdictions, it is difficult to agree about the criteria they use to evaluate certifying bodies. Boiral (2012) has shown that the implementation phase has a highly symbolic and bureaucratic character resembling what in education is called the 'degree-purchasing syndrome'. This syndrome means that students are more focused on obtaining a diploma than on the knowledge the diploma represents, just like organizations are more focused on obtaining a certificate than on improving the quality of their production processes. An element of this syndrome is that private regulators occupy themselves more with controlling documentation than with controlling the implementation practice (McAllister 2012: 44). Private regulators often specialize in inspecting compliance with administrative requirements, it is faster, and it is easier:[2] 'In fact, for auditors, documentation represents a stable, standardized, predictable and reassuring element reinforcing the procedural aspect of auditing' (Boiral 2012: 646). The last phase of the policy cycle, which concerns the evaluation and adaptation of norms, frustrates the assumed advantages of certification in comparison with governmental regulation because private regulators are easily offended when criticized, hence react defensively to such criticism, and are inclined to keep their operations secret for their competitors (Zwetsloot et al. 2011a; Boiral 2012).

Not only do the advantages attributed to third-party regulation in comparison to governmental regulation often not occur, disadvantages can also be related to private regulation. The most obvious risk ascribed to private regulation is that third-parties are more inclined than public regulators to adjust their own norms to those of the actors they inspect ('capture'). The

[2] This inclination of focusing on administrative duties particularly applies to private regulators that control governmental regulations because they can use checklists to account to public regulatory agencies (McAllister 2012).

reason for this is that public regulators fulfill a public task, while certifiers and accreditors are commissioned by their clients. As a result, third-parties perceive themselves less as external inspectors whose task it is to detect norm violations and to enforce them and more as business partners paid to give advice on how clients can best apply the norms (Boiral 2012: 648/9; Lytton 2013; WRR 2013: 51). The dependence of private regulators on their clients can result in a situation wherein they do not or not sufficiently enforce norm violations – 'attachment bias'.

An infamous example of this concerns a salmonella outbreak in the United States causing nine casualties and 22.000 sick people. Right before this outbreak a certifier had scored the responsible Peanut Corporation of America 'excellent' for food safety, while in the aftermath of this outbreak public inspectors found dead rodents, holes in roofs, and puddles of stagnant water in two factories (Weise 2010).[3] However, whether or not third-parties are pressured to compromise their own norms, depends on their clients. After all, in the end third-party regulation is what clients want it to be: an instrument to improve ones market position, an instrument for quality improvement, or a combination of the two (Boiral 2012: 652). As such, the question whether or not third-party regulation contributes to public goals is context-bound, just as first and second-party regulation are.

What conditions influence the added value of third-party regulation?

Lytton (2013a) has derived five factors contributing to the high effectiveness of subsequently a certifier of fire protection and of kosher food.

The first factor concerns the willingness of consumers and purchasers to pay for independent product tests and audits. This explains, for example, also to a large extent why the certificate for durable wood inspected by certifiers that are accredited by the Forest Stewardship Council (FSC) are much more prevalent in the rich western world than in Africa and Asia where the largest part of the production and consumption of rainforest wood take place (Forrer & Mo 2013). Since consumers and purchasers in Africa and Asia are hardly prepared to pay extra for certified wood products, wood traders in those areas lack the incentive to solely sell certified wood and since the demand for certified wood is low, wood croppers are not rewarded for their efforts to

[3] Also in our own country a test commissioned by the former Inspectorate of Work and Income brought to light severe shortcomings to cranes approved by certifiers (Zwetsloot et al. 2011b).

obtain a certificate. Hence, according to Forrer and Mo (2013: 275), it is of no use to start with certification when there is no demand for this among consumers or purchasers.

The second factor concerns the mutual interdependence of parties who realize that their reputation depends on the functioning of their certificate. In case of the certification of fire prevention the precision of the height of the insurance premium depended on the reliability of the certification, while the added value of the certificate for business depended on the lower insurance rate that went along with it (Lytton 2013: 25).

The third factor concerns the co-existence of several certifiers that not only compete with each other on price but also on quality. This mutual competition urges certifiers to invest in professional training, codes of conduct, internal quality controls, and transparency.

The fourth factor is that the market is dominated by a few major certifiers. This facilitates the coordination and enforcement of norms. This factor explains, for example, why the ISO-norm 14001 for environmental protection has a lower participation level in the United States than in the European Union (Provost 2012). After all, in the United States private standard setting organizations are fragmented, compete fiercely, and share norms, results, and practices only with paying customers. In Europe private standard setting organizations more often operate under the umbrella of a central international organization and are more prepared to exchange standards. Consequently, in Europe standards diffuse more easily and new standards are more easily adapted to existing ones.

The fifth factor concerns the existence of a core of active and vigilant consumers who provide additional control, who give feedback on control, and who can initiate effective consumer bans. This factor has played a crucial role in the success of the certification of kosher food (see also Lytton, 2013b). Around eight percent consume kosher food out of religious conviction. This category of consumers often discovers problems and puts them on the agenda. It also diffuses warnings of certifiers via its own social networks. This proactive hard core of Kosher food consumers keeps certifiers to their toes. In order to keep their image as reliable certifiers, they are eager to solve problems, to inform consumers, and to pressure manufacturers to withdraw products from the market if something is wrong with them.

This implies the more consumers or purchasers are prepared to pay for quality, the more effort companies will make to comply with private norms and the more likely they are to hire private regulators that not only compete on price but also on quality. The more private regulators

compete on quality, the more inclined they are to develop a clear code of conduct and to professionalize. Finally, the more critical consumers and purchasers are, the more vigilant and transparent private regulators are.

What can public agencies do to enhance the added value of third-party regulation?

Public regulating agencies often take into account the risk that private regulators sacrifice their goals to those of their clients – 'capture'. However, the measures that public regulators subsequently take to prevent this risk can result in what is called 'reversed capture' (Van Erp et al. 2004; Evers 2004; Martinez et al. 2013: 245). This means that public regulatory agencies impose their own goals on private regulators. 'Reversed capture' can occur, for instance, when public regulators set higher limits to the acceptance of private regulators than they do when it comes to their own performances (Verbruggen & Havinga 2014). Reversed capture also occurs when public regulators force private regulators to function as their extension by making private inspection mandatory, as has happened in the Netherlands, for example, with respect to the regulation of cranes, asbestos removal, and health and safety. The consequence of making private regulation mandatory is that well-intended companies can no longer distinguish themselves on quality from those companies who just want to acquire a certificate to gain entrance to a market. Consequently, making private regulation mandatory encourages companies to hire certifiers in order to get advice about how to obtain a certificate with minimal efforts (Zwetsloot et al. 2011b). This means public regulatory agencies have to try to ply between the risk of 'capture' and of 'reverse capture'.

One way public regulators can do this, is by enlarging the demand for certified products they have faith in. For example, as regards wood crop and sea fishery, public procurement and subsidies have proven successful instruments for increasing the demand of products meeting the criteria set by governments (Gulbrandsen 2012).[4] The privileged treatment of governments to certifiers meeting their quality criteria induces competing certifiers to comply with those criteria as well. As a result, procurement and subsidy measures set in motion a process of 'trading-up'.

A second way for public regulators to ply between the risks of 'capture' and 'reverse capture' is by functioning as a backstop for private regulators (Verbruggen 2013: 14). This happens, for example, in the inspection of food chains and advertisement texts. In these sectors

[4] EU regulation prohibits governments to prescribe specific certifications, but instead allows the prescription of specific quality criteria (Scheltema 2014).

private inspectors deal with simple cases; they pass on complex or contested cases to public regulators. This implies public regulators operate as 'gorilla's in the closet'; they intervene when the expertise or authority of private regulators reach their limits. This form of collaboration offers private regulators the authority they need to engender compliance, while it offers public regulators the opportunity to determine where the allocation of their scares means remains necessary and where it can be missed. A study into the maritime industry has shown that this form of cooperation can also limit the risk of companies searching for the cheapest and most lenient private regulators (Breukers & Van Gestel 2004). After all, ship-owners are inclined to hire stringent private regulators – ('klassebureaus') – because they think stringent private regulators are more successful in preventing the Maritime Inspection from sanctioning rule violations than lenient ones are.

According to Verbruggen (2013), public regulators can only act effectively as 'gorilla in the closet' when four preconditions are met. First, sufficient overlap must exist between the norms, goals, and interests of public and private regulators. Second, public regulators should only collaborate with professional private regulators that are accredited. Third, private regulators should focus on evident, more or less innocent, and easy to solve norm violations, while public regulators should focus on the complex, fraud sensitive violations, which can have serious consequences.[5,6] Fourth, public and private regulators ought to exchange their knowledge of procedures, working practices, and the results of their inspection efforts (see also Martinez et al. 2013).[7]

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[5] However, a study into the regulation of working conditions of Brazilian cane workers has shown that this form of complementarity between public and private regulators can even occur without any coordination whatsoever (Coslovsky & Locke 2013). After all, the labor inspection deliberately kept its distance to private regulators. Still, each in their own way, both types of regulators have contributed to the amelioration of the working conditions of cane workers. The labor inspection has succeeded in decreasing excesses with respect to outsourcing chopping labor by stringently enforcing official regulations, while middle managers have used the consults of private regulators to improve the working conditions at cane plantations.

[6] This precondition is not unproblematic. After all, it is based on the presumption that public regulators have sufficient expertise and personnel to be able to oversee such complex and contested rule violations, while in fact this is precisely what is often missing in practice (Breukers & Van Gestel 2004).

[7] The last precondition is not without its problems either. After all, as a result of the so-called 'transparency paradox', companies are less willing to provide information to private regulator that pass on this information to public regulators that can sanction rule violations than to private regulators that keep this information to themselves (Breukers & Van Gestel 2004). In other words, the transparency paradox implies that private regulators are better able to detect norm violations as companies provide them with more information, while the willingness of companies to provide such information decreases as public regulators act more punitively based on such information (Svatikova 2011). The fact that public audits can be used in the United States to sue companies while it cannot in the EU, partly explains why ISO 14001 has reached a lower participation level in the United States (Provost 2012).

Conclusion

In summary, it can be stated that private regulators run the risk of being captured by their clients. This risk is smaller when critical consumers or purchasers press companies to improve the quality of their products and to hire private regulators that not only compete on price but also on quality. It is larger when consumers or purchasers are not prepared to pay extra for quality and when companies hire private regulators that only compete on price and that primarily advice companies on how they can obtain a certificate with the least amount of effort. When public regulatory agencies take over the control of regulation and private regulators simply act as an extension of public regulators, both forms or regulation can no longer complement each other – 'reverse capture'. Hence, public regulators ought to try to ply between the risks of 'capture' and 'reverse capture'. They can do this, first, by stimulating the demand of their preferred certified products. Second, they can primarily act as backstop for private regulators by focusing on the complex and controversial cases, while leaving the simpler and less controversial cases to private regulators. However, public regulators can only function effectively as 'gorilla's in the closet' when public and private regulators share more or less the same goals, coordinate their activities and exchange information, and when public regulators possess enough expertise and authority to intervene in complex and controversial cases passed on to them by private regulators.

Fourth-party regulation: citizens, consumers, and NGO's

What is fourth-party regulation and what can it add to public regulation?

Public regulatory agencies can also involve fourth-parties in the regulation of companies. Fourth-parties can consist of individual citizens and non-governmental organizations who demand companies to act socially responsible. A study into anti-cartel regulation among Australian companies has shown that although companies worry about the way stakeholders react to companies dodging anti-cartel regulation, this does automatically imply they will comply with regulation (Nielsen & Parker 2009). This shows it is not self-evident that involving fourth-parties in regulation is effective.

What conditions influence the added value of fourth-party regulation?

First, companies ought to perceive fourth-parties a force to be reckoned with. When citizens or interest groups can pose a serious risk to the reputation of companies, companies can be inclined to take their demands into account. This is what happened, for example, in the case of blood diamonds, wherein the entire international market for diamonds was about to receive a serious blow because the feel good aspect of diamonds was threatened by the clever addition of 'blood' to diamonds. It also happened when Shell decided to dismantle the off-shore platform 'Brent Spar' on land instead of sinking it in the ocean (Vogel 2005). Companies' often take the initiative to involve residents and NGO's in regulation by inviting them to start a dialogue about corporate social responsibility. On the one hand, this offers fourth-parties the opportunity to influence company policy directly. On the other hand, accepting this invitation entails the risk of being coopted. After all, a dialogue offers companies the chance to determine where and when communication takes place and to define the dialogue in terms of a partnership that ought to create win-win situations, which keeps measures off the agenda that forces companies to invest in their environment without getting anything in return (Mayes et al. 2012). Hence, on the one hand, it becomes more difficult for fourth-parties to carry out a critical vision on the self-evident importance of economical growth and to choose a confrontational strategy in their approach of companies, while, on the other hand, avoiding dialogue can cause self-marginalization.[8]

Second, fourth-parties ought to be motivated to come into action. They are more inclined to do so when they perceive rule violations as conflicting with socially accepted norms. This outrage was absent, for example, when the Dutch Financial Authorities published the names of companies convicted for cartelization. These forms of 'naming' and 'shaming' did not cause a media hype, no customers ran away, and the financial sector did not perceive the penalized cases as meaningful and norm setting, but as trivialities and food for technicians (Van Erp 2009). Fourth-parties are also less willing to come into action in case of invisible risks than in case of visible risks. For instance, residents more often complain about odor than about less visible forms of pollution (Thornton et al. 2003; see also Meijer 2008), or they play down invisible risks and blame themselves for not escaping them (Auyero & Swistun 2009). Journalists also have incentives to

[8] Residents and local NGOs are faced with a comparable dilemma when dealing with International NGO's (INGO's). On the one hand, INGO's can provide financial means, expertise, and legitimacy. On the other hand, relationships with INGO's can make it more difficult for local interest groups to put pressure on companies by organizing protests and to remain in touch with local problems (Beer et al. 2012).

emphasize egregious wrongdoing and large-scale system failure – both of which make for more newsworthy stories that validate the self-images of journalists as protectors of the broad public interest – and this may produce incomplete or insufficiently nuanced analyses (Lytton & McAllister 2014, Brants 2008). NGO's take into account the expected results of their actions: 'NGO's are selective in the causes they champion, depending less on the absolute scale of the problem than on how well it fits with dominant frames about blame, opportunities for media attention, and the organization of advocacy networks' (Beer et al. 2012: 327). For instance, Greenpeace aimed her campaign at Shell, but not against the more unknown Exxon, that was co-owner of the Brent Spar oil platform (Vogel 2005).

This implies fourth-parties are most inclined to get involved in regulation of companies which generate visible risks which violate socially accepted norms. Their actions are more likely to be effective as fourth-parties are more powerful in relation to the companies they try to influence.

What can public agencies do to enhance the added value of fourth-party regulation?

Two studies on very different policy domains show that without a facilitating, coordinating, and intervening government, fourth-parties effective involvement in regulation is highly unlikely.

Gunningham (2009) has studied under what conditions it is or is not possible to effectively involve civil society in environmental regulation. In order to do so, he has compared three initiatives in Australia. First, the involvement of the local community with establishing and monitoring environmental improvement plans. Second, involving polluters as well as residents in the regulation of complex, neighborhood related environmental issues. Third, the involvement of parties on different administrative levels in the regulation of natural resources. In the first initiative, government was allowed to intervene when collective goals were not achieved or when the local parties involved were unable to reach an agreement – in other words: 'bargaining in the shadow of the state'. This initiative resulted in improved environmental results as well as increased trust in the factory by the local population. The second initiative was ineffective because collaboration of the parties was based on voluntariness and because the government possessed insufficient means to apply sanctions and to impose collaboration. The effects of the last initiative were not crystallized yet, but here the federal government possessed strong financial incentives for collaboration and to withhold subsidies when goals were not reached.

According to Gunningham (2009), his comparative case study shows that active interference by government is a necessary precondition for success and that success stays away where governmental interference is wanting. Amongst others, government ought to describe and define the conditions of collaboration – 'definitional guidance', give positive incentives for active participation in networks and negative for not participating – 'participatory incentives', and to intervene when goals are not achieved – 'enforcement capability'. Gunningham concludes that government ought to be a *primus inter pares* in devolved networks: 'As we have seen, many of these roles are absolutely central to the success of new governance initiatives and it seems doubtful, at least from these case studies, whether the state can now be regarded as simply one amongst a number of actors, all of whom might be analysed "in more or less similar ways in terms of power, interests, responsibilities, accountabilities and resources"' (Gunningham 2009: 165/6).

Terpstra (2009) has studied the functioning of security networks which have developed from the 1980s onwards in the Netherlands. Apart from the police and municipalities, citizens, housing associations, social work, youth care and parole workers often also participate in these security networks. Many of these networks are created as a result of personal initiatives and remain dependent on those initiatives. Because of the informal nature of most security networks, they differ as to goals, structure, composition, practices, and magnitude. In practice such security networks are often only viable when municipalities and particularly the police visibly support citizens. Most citizens only dare to address residents when they believe the police will support them when danger arises and when the police is able to tackle free-riding.

This implies security networks cannot function well without the specific expertise, effort, support, symbolism, and backup force of the police. According to Terpstra (2009), the importance of the support of informal control by formal control at the level of the municipality is insufficiently acknowledged by advocates of security networks. He considers it naive to assume that private parties will more or less automatically contribute to public security as public good. Therefore, he also believes it a mistake to conceive of government as simply 'one node among many'. Furthermore, according to him, most proponents of security networks underestimate the still existing inequalities between public and private parties who are involved in security networks. This is exemplified, for example, by fear of aggression by civil servants, by high expectations of residents of the police, and by the conviction that maintaining order is still primarily the responsibility of the police.

Conclusion

We have seen that as citizens and interest groups are more powerful, better able to balance risks, and have a stronger developed sense of norms, they are more likely to play a significant role in regulation. However, even when citizens and interest groups possess these characteristics, public regulators are still indispensable in defining, facilitating, and steering the manner in which citizens and interest groups are involved in regulation. Therefore, it is necessary that public regulators occupy a dominant position in terms of power, interests, responsibilities, accountabilities, and resources when they collaborate with citizens and interest groups.

Conclusion and discussion

We have seen, first, that different conditions influence the contributions that companies, purchasers, private regulators, and civil society can make to regulation. It appears that self-regulation by companies and purchasers works better as branches have a more self-evident interest to counter market failure, are smaller and more homogenous, have more experience with self-regulation and as self-regulatory systems are less ambitious (and, hence, can achieve less); certification and accreditation seem to be more effective as consumers and purchasers are more willing to pay for quality, as companies not only want to obtain certificates in order to improve their market position but also to improve their production processes, and as certifiers and accreditors not only compete with each other on price but also on quality; regulation by fourth parties seems to work better when these parties are more powerful in relation to business, are better able to balance risks, and are more concerned about companies violating public or private norms.

Apparently, public regulatory agencies can actively manipulate the conditions influencing the contribution of companies, purchasers, private regulators, and civil society to regulation. They can provide tangible and intangible support to the implementation of self-regulatory systems; they can stimulate their preferred products via subsidies and procurement policies; they can act as backdrops for private regulators; and they can positively influence the participation of citizens and interest groups by describing and defining the terms of collaboration, by incentivizing participation and disincentive non-participation, and by intervening when goals are not met.

This overview can help public regulatory agencies to determine under what conditions it is more or less sensible to delegate responsibilities for regulation to other societal actors and what they can do to positively influence these conditions. However, apart from effectiveness, in terms of the value added by involving non-governmental actors in regulation, there are other important criteria involved in the choice between public and private regulation. Another important criterion is legitimacy. The governance model enables parties to exert direct influence on the regulation process without the obligation to account politically for it (Lynn 2012). This entails the danger that powerful parties influence the regulation process disproportionately and that private interests take precedence over public goals, which raises questions as to how legitimate such a regulation process is in terms of equality, freedom, and justice and how it can be accounted for (Black 2008). These doubts about legitimacy can make the choice for private regulation less appealing, even when the preconditions to do so effectively are present.[9] Moreover, considerations of efficiency are also important when choosing between different forms of regulation. For example, for years developing countries have stopped the implementation and tightening of international treaties with respect to harvesting rainforests and child labor by invoking free trade agreements. This counteraction has incited both NGO's and national governments to stimulate private regulation because this made it possible to circumvent free trade agreements (Bartley 2003). Efficiency considerations have also played a significant role in the rise and fall of voluntary environmental self-regulation in Germany from the 1980s onwards (Töller 2013). In the 1980s and 1990s self-regulation was popular in Germany because this made it possible to avoid the uncertainty that was connected to the testing of national legislation by the European Union, while its popularity decreased from 2000 onwards because as a result of the harmonization of the environmental legislation the uncertainty connected to the testing of national legislation by the European Union decreased, while the voluntary self-regulatory arrangements were legally not binding for the European Union. This means that in these instances, efficiency determined the popularity of private regulation in comparison to public regulation to a larger extent than effectiveness.

In sum, under particular conditions, companies, private regulators, or citizens and interest groups can effectively contribute to the regulation of market failure, just like public regulators can positively influence these conditions. However, public regulators also have to take into account

[9] Whereby one cannot assume that public regulation per definition is more transparent, accountable, and leaves less room for private interests. After all, it also happens that powerful lobbying by companies largely determines the legislative process (Wagner et al. 2011).

other criteria than effectiveness when choosing between public and private regulation and may feel the pressure to delegate responsibilities for the regulation of market failure even though the necessary conditions to do so are absent, as a result of the self-evidence the turn to governance has assumed within the neoliberal political climate of the last few decades (Van Waarden 2012; Van der Heijden 2013).

Literatuur

Auyero, J & Swistun, D (2009) *Flammable: Environmental Suffering in an Argentine Shantytown.* New York: Oxford University Press.

Bartley T (2003) Certitying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Products Field. *Politics & Society* 31(3): 433-464.

Beer CT, Bartley T, Roberts WT (2012) *NGOs': Between Advocacy, Service Provision, and Regulation.* In: Levi-Faur D (ed) The Oxford Handbook of Governance. pp. 325-338. Oxford, etc.: Oxford University Press.

Bernstein S, Cashore B (2007) Can Non-State Global Governance Be Legitimate? An Analytical Framework. *Regulation & Governance* 1(4): 347-371.

Black, J (2002) *Critical Reflection on Regulation.* London: London School of Economics.

Black J (2008) Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes. *Regulation & Governance* 2137-164.

Boiral O (2012) ISO Certificates as Organizational Degrees? Beyond Rational Myths of the Certification Process. *Organization Studies* 33(5-6): 633-654.

Borck J C, Coglianese C (2012) *Beyond Compliance: Explaining Business Participation in Voluntary Environmental Programs.* University of Penn Law School, Public Law Research Paper.

Börzel TA, Risse T (2010) Governance without a State: Can it Work? *Regulation & Governance* 4113-134.

Brants K (2008) Risico's, schandalen en publiciteit: De nieuwswaardigheid van een falende overheid (Risks, Schandals, and Publicity: The Newsworthiness of a Failing Government). *Proces* 247-54.

Breukers S, Gestel R van (2004) Grote klasse: Kansen en risico's bij het toezicht op de zeescheepvaart (Great Class: Opportunities and Risks at the Inspection of Maritime Shipping). *Bestuurskunde* 13(5): 223.

Cafaggi, F. & Renda, A. 2012, *Public and Private Regulation: Mapping the Labyrinth*, Center for European Policy Studies Working Documents.

Coslovsky SV, Locke R (2013) Parallel Paths to Enforcement: Private Compliance, Public Regulation, and Labor Standards in the Brazilian Sugar Sector. *Politics & Society* 41(4): 497-526.

Erp JG van, Peters K, Verberk S (2004) Het kabinetsstandpunt certificatie en accreditatie en de beleidspraktijk: Opbrengsten van een rondetafelgesprek (The Cabinet's View on Certification and Accreditation: Yields of a Roundtable Conversation). *Bestuurskunde* 13(5): 242-246.

Erp JG van, Verberk S (2004) Private normstelling: Alternatief voor publieke regulering? (Private Norm Setting: Alternative for Public Regulation), *Bestuurskunde* 13(5): 216.

Erp J van (2009) *Naming en shaming in het markttoezicht: Een onderzoek naar de openbaarmaking van sancties op de financiële markt (Naming and Shaming in Market Oversight: A Study about the Publication of Sanctions on the Financial Market).* Den Haag: Boom Juridische uitgevers.
Evers GJM (2004) De toepassing van certificatie in overheidsbeleid (The Application of Certification in Public Policy). *Bestuurskunde* 13(5): 205-215.
Forrer J, Mo K (2013) From Certification to Supply Chain Strategy: An Analytical Framework for Enhancing Tropical Forest Governance. *Organization & Environment* 26(3): 260-280.
Gilad S (2014) Beyond Endogeneity: How Firms and Regulators Co-Construct the Meaning of Regulation. *Law & Policy* 36(2): 134-164.
Greenhouse S (2012) Documents Indicate Walmart Blocked Safety Push in Bangladesh. *The New York Times* (December 5): .
Gulbrandsen LH (2012) Dynamic governance interactions: Evolutionary effects of state responses to non-state certification programs. *Regulation & Governance* DOI: doi:10.1111/rego.12005.
Gunningham N (2009) The New Collaborative Environmental Governance. The Localization of Regulation. *Journal of Law and Society* 36(1): 145.
Gunningham N, Rees J (1997) Industry Self-Regulation: An Institutional Perspective. *Law & Policy* 19(4): 363-414.
Gunningham N (1995) Environment, Self-Regulation, and the Chemical Industry: Assessing Responsible Care. *Law & Policy* 17(1 (January)): 57-109.
Heijden, J.v.d. 2013, *Looking Forward and Sideways: Trajectories of New Governance Theory*, Amsterdam Law School Legal Studies Research Paper.
Heijden Jvd (2012) Voluntary Environmental Governance Arrangements. *Environmental Politics* 21(3): 486-509.
Heimer CA (2013) Resilience in the Middle: Contributions of Regulated Organizations to Regulatory Success. *The Annals of the American Academy of Political and Social Science* (649): 139-156.
Hsueh L, Prakash A (2012) Incentivizing Self-Regulation: Federal vs. State-Level Voluntary Programs in US Climate Change Policies. *Regulation & Governance* 6445-473.
Krawiec KD (2003) Cosmetic Compliance and the Failure of Negotiated Governance. *Washington University Law Quarterly* 81(2): 487.
Lynn LEJ (2012) *Adaptation? Transformation? Both? Neither? The Many Faces of Governance.* In: Levi-Faur D (ed) The Oxford Handbook of Governance. pp. 49-64. Oxford: Oxford University Press.
Lytton T (2013a) Competitive Third-Party Regulation: How Private Certification Can Overcome Constraints that Frustrate Government Regulation. *Risk, Regulation, & Policy eJournal* 5(50): 1-39.
Lytton, T (2013b) *Kosher: Private Regulation in the Age of Industrial Food.* Harvard University Press.
Lytton TD, McAllister LK (2014) Oversight in Private Food Safety Auditing: Addressing Auditor Conflict of Interest. *Wisconsin Law Review* .
Martinez MG, Verbruggen P, Fearne A (2013) Risk-Based Approaches to Food Safety Regulation: What Role for Co-Regulation? *Journal of Risk Research* DOI: http://dx.doi.org/10.1080/13669877.2012.743157.
Mayes R, Pini B, McDonald P (2012) Corporate Social Responsibility and the Parameters of Dialogue with Vulnerable Others. *Organization* 20(6): 840-859.

McAllister, L.K. 2012, "Third Party Programs to Assess Regulatory Compliance", *Administrative Conference of the United States*.

Meijer, A (2008) *Openbaarmaking van handhavingsinformatie: Leren van de ervaringen van Deense en Limburgse toezichthouders (Publication of Inspection Information: Learning of Experiences of Danish and Limburg's Inspectors).* Den Haag: Boom Juridische uitgevers.

Nielsen VL, Parker C (2009) To What Extent Do Third Parties Influence Business Compliance? *Journal of Law and Society* 35(3): 309-340.

Oude Vrielink MJ (2011) *Zelfregulering en alternatieve regulering: Wat betekenen ze in en voor overheidsbeleid?(Self-Regulation and Alternative Regulation: What Do They Mean In and For Public Policy?)* In: Hertogh M and Weyers H (eds) Het recht van onderop.

Perrow, C (1984) *Normal Accidents: Living with High-Risk Technologies.* New York: Basic Books, Inc.

Provost C (2012) *Governance and Voluntary Regulation.* In: Levi-Faur D (ed) The Oxford Handbook of Governance. pp. 554-568. Oxford, etc.: Oxford University Press.

Saurwein F (2011) Regulatory Choice for Alternative Modes of Regulation: How Context Matters. *Law & Policy* 33(3): 334-366.

Scheltema M (2014) Assessing Effectiveness of Transnational Private Regulation in the CSR Arena. *Paper presented at the VSR jaarvergadering* .

Short JL (2013) Self-Regulation inn the Regulatory Void: "Blue Moon" or "Bad Moon"? *The Annals of the American Academy of Political and Social Science* (649): 22-34.

Short JL, Toffel MW (2010) Making Self-Regulation More Than Merely Symbolic: The Critical Role of the Legal Environment. *Administrative Science Quarterly* 55361-396.

Silbey SS (2013) Organizational Challenges to Regulatory Enforcement and Compliance: A New Common Sense about Regulation. *The Annals of the American Academy of Political and Social Science* (649): 6-20.

Svatikova, K (2011) *Economic Critera For Criminalization: Optimizing Enforcement In Case of Environmental Violations.* Rotterdam: Erasmus Universiteit Rotterdam.

Terpstra J (2009) Nodale sturing van veiligheid en lokale veiligheidsnetwerken: Over de beperkingen van een perspectief (Nodal Governance of Security and Local Security Networks: About Shortcomings of a Perspective). *Justitiële Verkenningen* 35(1): 113-126.

Thornton D, Kagan RA, Gunningham N (2003) Sources of Corporate Environmental Performance. *California Management Review* 46(1, Fall): 127-141.

Töller AE (2013) The Rise and Fall of Voluntary Agreements in German Environmental Policy. *German Policy Studies* 9(2): 49-92.

Verbruggen P (2013) Gorrilas in the Closet? Public and Private Actors in the Enforcement of Transnational Private Regulation. *Regulation & Governance* 7(4): 512-532.

Verbruggen P, Havinga T (2014) Meta-toezicht op voedselveiligheid (Meta-Regulation of Food Safety). *Tijdschrift voor toezicht* .

Vogel D (2008) *The Private Regulation of Global Corporate Conduct.* In: Mattli W and Woods,N (eds) The Politics of Global Regulation. pp. 151-187. Princeton: Princeton University Press.

Vogel, D (2005) *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility.* Washington: The Brookings Institution.

Waarden, F van (2012) *Was privatisering van het publieke domein wel in het publieke belang? Een kritische beschouwing over het Nederlandse privatiseringsbeleid van de afgelopen decennia (Was Privatizing the Public Domain in the Public Interest? A Review of the Dutch Privatization Policy of the Last Decades)* . Universiteit Utrecht.

Wagner W, Barnes K, Peters L (2011) Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Regulations. *Administrative Law Review* 63(1): 99-159.
Weise E (2010) *Food Safety Auditors Are Often Paid by the Firms They Audit.*
WRR (2013) *Toezien op publieke belangen: Naar een verruimd perspectief op rijkstoezicht (Inspecting Public Interests: Towards an Broadened Perspective on Governmental Oversight).* Amsterdam University Press, Amsterdam.
Zwetsloot GIJM, Hale A, Zwanikken S (2011a) Regulatory Risk Control through Mandatory Occupational Safety and Health (OSH) Certification and Testing Regimes (CTRs). *Safety Science* 49995-1006.
Zwetsloot GIJM, Zwanikken S, Hale A (2011b) Policy Expectations and the Use of Market Mechanisms for Regulatory OSH Certification and Testing Regimes. *Safety Science* 491007-1013.