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Summary

This chapter on self-regulation in the Netherlands aims to give an overview of how self-regulatory mechanisms are embedded in the Dutch legal system. Part I explains the general legal framework for self-regulation, dealing with constitutional aspects, the public/private nature of self-regulatory bodies and acts and liability respectively. Part II looks at selected case studies, exploring the Dutch style of (self-) regulation of professionals, financial markets, sports, media, environment and the Internet.

The overarching picture emerging from the Dutch legal system and in particular its case law is the persisting strong division between public law regulation (unilateral and therefore bound by constitutional norms) and self-regulation (assumed to be bilateral and therefore positioned in the realm of private law).

Furthermore a growing popularity of public law mechanisms at the expense of (pure) self-regulatory mechanisms can be observed. This is partly because in the current legal structure the voluntary nature of many self-regulatory arrangements is not always protected or acknowledged. Due to the dynamics of the litigation structure (both in public and in private law) dissatisfaction with self-regulation or co-regulation does not often find expression in court rooms.

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This chapter on self-regulation in the Netherlands aims to give an overview of how self-regulatory mechanisms are embedded in the Dutch legal system. Part I will explain the general legal framework for self-regulation, dealing with constitutional aspects, the public/private nature of self-regulatory bodies and acts and liability respectively. Part II will look at selected case studies, exploring the Dutch style of (self-) regulation of professionals, financial markets, sports, media, environment and the Internet.

I The Dutch legal framework for self-regulation

In Dutch society, the private and public spheres have historically been closely intertwined and self-regulation has enjoyed a firm footing since long. This natural acceptance of self-regulation, however, translates by no means into a legal concept of self-regulation, let alone a clear legal demarcation of the boundaries of self-regulation. Similarly, the fact that self-regulation has been heavily institutionalised in the Netherlands does not mean that it has also been constitutionalised.

‘Self-regulation’ not being a legal category as such¹, any formal definition of self-regulation needs to be abandoned in favour of a substantive view. We speak of self-regulation *when an issue of public interest is addressed by standard-setting monitoring and/or enforcement carried out by private bodies vis-à-vis their members or affiliates who voluntarily subject themselves to this regulation*. The predominant strand in the academic literature views self-regulation mainly as an alternative to command-and-control regulation (public standards backed by sanctions). It is generally accepted that in order for self-regulation to flourish the following elements are relevant: a high level of knowledge within the sector, strong support for self-regulation within the sector, a sufficient degree of organisation, a subject matter without too many conflicting interests, equal protection of societal interests and guaranteed enforcement.

‘*Zuivere zelfregulering*’ (pure self-regulation) is characterised by the fact that the initiative rests with the regulatees themselves² and the state remains neutral as to the outcome of the self-regulatory process. Perhaps indicating a ‘top-down’ perspective, the general term ‘*zelfregulering*’ is quite often used when in fact there is a situation of cooperation between public and private regulators. Although in translated documents one finds the literal translation ‘*co-regulering*’ the original Dutch expression is ‘*wettelijk geconditioneerde zelfregulering*’ (‘statutorily conditioned self-regulation’). This form of ‘impure’ self-regulation occurs in different degrees and has three characteristics: 1) the legislator has a role complementary to that of private bodies and restricts itself to formulating preconditions 2) private bodies enjoy considerable freedom to implement this statutory framework and 3) the state has an important role in supervising the results of self-regulation. An example is the case of social service providers which have to regulate themselves to the extent that they comply with the statutory injunction on quality in health care.

¹ Paradoxically the only case which mentions the word ‘self-regulation’ is not about self-regulation but about internal regulation of a public agency. Supreme Court (*Hoge Raad*, translation Boele-Woelki & Van der Velde (1998)) judgement of 2 December 1988 RVDW 1988/210 and NJ 1989, 752 on the rules on access to files of the Municipal Medical Service (*Gemeenschappelijke Medische Dienst*, GMD).

² Eijlander & Voermans (1999), p. 71.

I.1 Self-regulation in a constitutional framework

This first part is centred on the question of whether there are constitutional mechanisms affecting the recourse to self-regulation in the Netherlands.³ Before proceeding to explain the constitutional framework, it needs to be emphasised that Dutch political tradition is characterised by active involvement of social partners⁴ more than anything else. This means that on the one hand there is a flourishing culture of private involvement in regulation, especially in areas like education and social security/labour law. On the other hand the culture of deliberation and consensus has been so heavily institutionalised and thereby brought under at least some degree of supervision by the state that regulation by these social partners is predominantly regarded as belonging to the public sphere. An example of the latter is the introduction of ‘trade and industry organisations’ (*PBO*)⁵, see I.2.1) in the Constitution in 1939, reflecting the idea that professional and other private organisations also have to take into account the public interest.⁶ The famous ‘*polder model*’, which is a rather loose variety of corporatism⁷, is another. The written Constitution is silent on the subject of ‘self-regulation’, but the Constitution in the wider sense certainly contains provisions and principles either encouraging self-regulation or limiting the possibilities for self-regulatory activities.

I.1.1 Soft law encouragement

Although self-regulation cannot be considered a legal category as such under Dutch law, there is one important ‘soft law’ official document that mentions self-regulation: the Guidelines for Legislative Drafting⁸. These guidelines offer some insight into the position self-regulation – ideally – occupies vis-à-vis statutory law. Guideline number 7 sets out the steps that have to be taken by policy-makers before the legislative option is chosen. One of these steps involves an inquiry into whether the chosen objectives cannot also be reached by relying on the self-regulatory capacity in the sector concerned (that can of course in some cases be supported or strengthened by state measures). Guideline number 8 is completely devoted to self-regulation. It stipulates that the type of regulatory intervention to be chosen should, to the largest extent possible, link up with the self-regulatory capacity in the sector. The explanatory note to this guideline states in general wordings that direct state intervention should only come into play when the self-regulatory capacity of society – supported/strengthened by state measures or not – cannot be expected to suffice. The Guidelines go on to remark that when state intervention is needed, however, linking up with the self-regulatory capacity is still possible by using standardisation and certification. The relevance of demands of European and international law when it comes to recognising foreign self-regulatory norms or certificates is mentioned explicitly in the explanatory note.

³ For a more elaborate account of the development of regulatory policy in the Netherlands see Van Gestel & Herthogh (2006). An English summary is available at http://www.wodc.nl/onderzoeken/onderzoek_1288.asp?soort=publicatie&tab=pub.

⁴ Meaning all representative socio-economic organisations.

⁵ ‘*Publiekrechtelijke bedrijfsorganisatie*’.

⁶ Dassen (1938), p. 134-136, cited by Koekkoek and Leenknecht (1994), p. 240, note 4.

⁷ See Andeweg and Irwin (2002), p. 145 for a detailed explanation of this Dutch model in English.

⁸ *Aanwijzingen voor de Regelgeving*. These guidelines have the legal status of ‘policy rules’ and they bind the governmental draftsmen but not the legislator as such, nor does the Council of State refer to them explicitly. There has been no or little research done on their impact on the legislative outcome and opinions on this matter differ.

In a recent report attempting to subject self-regulation as a phenomenon to cost-benefit analysis, the conclusion is drawn that in spite of the existence of these Guidelines, the choice between legislation and self-regulation is hardly ever explicitly made in the course of the policy making process.⁹

I.1.2 Constitutional obstacles for self-regulation

One reason why it might be difficult or impossible for policy-makers/legislators to resort to or leave room for self-regulation that is connected to constitutional law, is that the concept of self-regulation is only to a limited extent rooted in the mode of thinking of the *rechtsstaat*. The rule of law has a lot to say about preconditions for state action, but less about the boundaries between public action and private action. Although fundamental rights provide for some protection of self-regulation (see below), they primarily address the relationship between public actors and private actors and are less developed when it comes to private actors regulating themselves. The link between self-regulation and the concept of democracy is not straightforward either.

Rechtsstaat creating preconditions

In Dutch constitutional law the doctrine of the ‘primacy of the legislator’ seeks to ensure that all major legal-political choices are made by the legislator and the legislator only. A closely related and important principle of constitutional law, although not explicitly mentioned as such in the Constitution, is the rule of law, or, staying closer to the Dutch wordings, the principle of legality (*legaliteitsbeginsel*).¹⁰ This principle seeks to ensure that all interventions by the state are somehow tied to the general will as expressed by the general rules agreed upon by the legislator (primary legislation).

The written Constitution (*Grondwet*) materialises the principle of legality by demanding statutory regulation for certain topics. Examples of areas requiring primary legislation are military service, monetary matters, taxation, judicial organisation, criminal law and decentralisation. For these areas it is clear that no private initiative can replace legislation, simply because there is a legal obligation to legislate. These express limitations set by the Constitution are all obvious, because they relate to the ‘violence monopoly’ of the state. As far as the ‘greyer’ areas are concerned, there is some consensus on the (vague) standard that ‘drastic’ measures can only be taken by the legislator. When it comes to more concrete criteria to determine whether certain issues require a statutory basis are concerned, the proposals in the literature vary considerably. The most common way of phrasing it is to state that all legislative acts as well as all administrative acts ‘affecting individual rights and freedoms’ need to be based on a statute.¹¹ It is often argued that the ambit of the legality principle has been extended to encompass all governmental actions imposing unilateral obligations on citizens.¹²

⁹ SEO report (2004), p. 96. No research has been done into the reasons behind this. It could well have something to do with the limited impact that Guidelines such as these have on any policy making process if they are not enforced in one way or another. It could also be connected to the constitutional obstacles inherent in Dutch constitutional law.

¹⁰ Van Ommeren (1996).

¹¹ Supreme Court judgment of 22 June 1973, *NJ* 1973/386. In this case it was actually factual intervention (adding fluoride to drinking water) by the public authorities which needed a legal basis.

¹² Voermans and Van Bijsterveld (2000), p. 398.

For example even the granting of subsidies is considered to constitute an act which needs an express basis in statutory law nowadays.¹³

This rather strict interpretation of the legality principle restricts the scope for self-regulation to some extent, or so it would seem. The operational value of the legality principle and the doctrine of the primacy of the legislator is limited however: it is more or less clear which broad preconditions they stipulate, it is less clear what these constitutional standards require in each individual case. The government has stated that self-regulation is not desirable ‘when-ever the fundamental values of the democratic, constitutional state are at stake’, but it is not always clear what these norms encompass.¹⁴ The criterion of ‘public interest’ is not helpful in demarcating the boundaries between public and private tasks either. The Scientific Council for Government Policy defines public interests as “social interests of which the government takes of the promotion in the conviction that this interest will otherwise not come into its own properly”.¹⁵ To what extent a social interest becomes a public interest is thus inherently a matter of politics. There is no case law in which self-regulation is prohibited because of infringements with the ‘primacy of the legislator’ doctrine or the legality principle, nor are big cases likely to appear. There are two basic reasons for this.

The first reason why the legality principle is not really judicially developed is that the Netherlands has no constitutional court that can determine that the legislator has acted *ultra vires* by threading on the territory of other authorities, private or public. In fact, a defining feature of Dutch constitutional law is the absence of such a constitutional court and the prohibition of constitutional review of primary legislation. Article 120 of the Constitution instructs judges to steer clear of reviewing legislation (i.e. rules promulgated by the legislator, consisting of the government and parliament together, see Article 81 Constitution). This prohibition can be seen as an exception to the starting point of review for compatibility with higher norms, which is a logical counterpart of the Dutch constitutional doctrine on hierarchy of norms. By contrast, but in line with this doctrine, secondary legislation can be subjected to (constitutional) review. Also, it is possible to review primary legislation for compliance with ‘generally binding provisions of international law’, including most provisions of the ECHR (Article 94 of the Constitution).

The second reason is that the ambit of the legality principle is restricted to the public sphere and applied from a top-down perspective, making it unclear to what extent self-regulatory bodies are affected by it. Private law acts are deemed inherently two-sided in character and therefore escape the scope of the legality principle the applicability of which is linked to the one-sidedness of public action. Self-regulatory acts can have *some* effects outside the group of members imposing obligations or restrictions on people without their consent (e.g. the case on the BACO agreement in which the court used the self-regulatory code as an interpretative device when determining whether a tortuous act had been committed)¹⁶. Whenever this is the case, the courts still take a very formalistic approach and only let the legality principle come

¹³ Article 4:23 GALA.

¹⁴ *Kabinetsnota* 1998, p. 180 Although one example might be the worries about the exclusion of the regular courts when establishing an alternative dispute resolution system. (See case study on financial markets regulation,).

¹⁵ *WRR* (2001), p. 13. The report also analyses conditions to which the private actors are held (or should be held) in order to safeguard the public interest, such as expertise of the sector, transparency and rendering account of the governance of the sector. But as we stated before all these conditions are political conditions and not legal tools to define why and when delegability of public tasks or interests to private parties is possible.

¹⁶ see for a more detailed description.

into play when the nature of the body is public. This virtual immunity from the legality principle in theory leaves a lot of leeway for private regulators, including self-regulators. In practice however many self-regulatory bodies are considered public for the purpose of their regulatory tasks on the basis of their ‘public authority’ (see I.2.1). If courts want to apply the legality principle, they need to first qualify the self-regulatory body as a public body. In one case on the quality control of plants and seeds¹⁷ the court was willing to review for breach of the legality principle, but only after the public law nature (i.e. the more flexible ‘b-status’, see I.2.1) of the supervisory Dutch General Quality Agency Horticulture (*Stichting Naktuinbouw*) had been established. Because Article 104 of the Constitution protects citizens against taxes and fees without legal bases, the follow-up question was: is there a sufficient statutory basis for imposing these fees on members as required by the legality principle. The court acknowledged that an explicit legal basis was lacking but construed an ‘implicit statutory basis’.

Other case law dealing with constitutional limits on regulation by private actors deals with the type of private regulation that cannot be conceptualised as self-regulation in any meaningful way, because the public interest element is lacking or it is not ‘the own group’ that is being regulated (e.g. owners of large shopping malls enacting regulation prohibiting cycling inside the mall building).

Rules for delegation

Since constitutional review by ordinary courts of secondary legislation is not prohibited, a question more likely to come up in court is whether public powers derived from the Constitution can subsequently be delegated to self-regulatory bodies. First of all the Constitution uses a very specific terminology in order to make clear whether delegation is allowed. Second, according to the related doctrine on delegation (see also below), in order to delegate powers a public body must not just possess the power in question, it must also have been given explicit authorisation to ‘transfer’ those powers in a higher norm.

The above mentioned case on plants and seeds is not representative of this doctrine, for by construing delegation that never explicitly took place it creates the impression that delegation is a very loose concept in Dutch constitutional law. In reality, this case was heavily criticised for bypassing fundamental norms of the *rechtsstaat* and the rather rigid rules on delegation.

Dutch constitutional law distinguishes between delegation of rule-making powers on the one hand and delegation of executive powers (monitoring/enforcement) on the other. In most Dutch regulatory regimes, rule-making functions and monitoring/enforcing functions are conducted by separate bodies.¹⁸ There is strong doctrinal hesitation to delegate rule-making powers too far out of parliamentary reach. The American model of the strong regulator has by no means rooted (yet). The delegation of executive functions is regarded as less problematic. A clear statutory basis is always required however (Article 10:15 GALA), both for executive and for rule-making powers.

A public body cannot promulgate any binding rules without having been delegated the express power to do so in a statutory or constitutional provision. The legislator is an exception

¹⁷ Decision of the Administrative Law Division (of the Council of State) of 24 December 2003, *JB* 2004/82.

¹⁸ For example in the government communication (*nota*) on Standards, Certificates and Open Boundaries (*Normen, Certificaten en Open Grenzen*), *Kamerstukken II* 1994-1995, 21 670, nr. 7-8, p. 29 it was recommended to keep ‘private functions’ (quality control and certification) separate from the ‘public function’ (supervision).

in the sense that it has general legislative power on any subject under Article 81 of the Constitution.

Legislative powers are ‘attributed’ for the first time either in the Constitution or in primary legislation (statute) and can then be ‘sub-delegated’ at most twice down the line (a requirement developed mostly in the literature as the case law is slightly contradictory on this point) and only if the higher norm explicitly foresees in the possibility of delegation. The statutory norm will usually also prescribe to which authority the rule-making power can be delegated and this will usually be a ‘hard core public authority’.

Delegation of executive powers should also have a basis in statutory law (Article 10:15 GALA), but the conditions for delegability are less strict. Public tasks are awarded to private bodies in two different ways. The powers can be officially delegated; in which case the private body acquires a public status (see I.2.1) or the private body can factually exercise a supervisory function without any legal basis. This is however the black and white account; the reality is often more capricious as will become clear in I.2, which will deal with the issue of delegability in greater detail.

Occasionally questions about the limits of the delegation of executive powers arise, such as: can the legislator delegate monitoring and enforcement of statutory rules and licensing provisions to private certification institutes? These issues are often solved on the basis of ‘common sense constitutionalism’, which in regard to this latter question would lead to the conclusion that it would be in any case constitutionally unacceptable if all power would be placed in the hands of those paying the fees.¹⁹

Prohibitory aspects of fundamental rights

It could be argued that the more ‘social’ among the fundamental rights in the Dutch Constitution can lead the legislator/government away from choosing the self-regulatory option, because the provisions in which these social rights are laid down stress the public obligation to intervene. However, since these rights are hardly judiciable and not enforceable this reasoning is rather weak.

A more pressing question relating to fundamental rights is whether self-regulatory bodies need to comply with fundamental rights. Paradoxically, this question is only partially relevant. Fundamental rights apply first and foremost in relations between public bodies and citizens. As long as a *public* body is involved (in any kind of action, regulatory, factual or commercial) it may only breach fundamental rights if it is (in the limited system of the Constitution) empowered to do so. In the case of co-regulation however, the case law is based on the assumption that the involvement of private bodies cannot amount to a ‘license to breach fundamental rights’.²⁰

As concerns pure self-regulation, the general principle is that contracts which breach fundamental rights as laid down in the constitution constitute an illegality and are therefore null and void.²¹ Since the focus on public-private relations is reflected in the way the fundamental rights are drafted in the Constitution, contracts will not readily breach fundamental rights. This question comes up every now and then in practice, as is shown by the case study on ad-

¹⁹ De Moor-van Vugt and van Ommeren (1999).

²⁰ Supreme Court judgment of 3 November 1989, *NJ* 1991/168 and Supreme Court judgment of 26 April 1996, *NJ* 1996, 728 (Rasti Rostelli).

²¹ *Verbintenissenrecht deel II*, note 410.

vertising regulation (II.4.4) in which the purely private self-regulatory tribunal does not consider itself bound by Article 10 ECHR. The fact that this question has never come up in court (at least not in a serious way) can be seen as circumstantial evidence that the legal system follows the logic that citizens who choose to join a self-regulatory scheme are thereby ‘renouncing’ (some of) their fundamental rights. It seems indeed compatible with the concept of human rights that its holder may limit his own right as part of exercising that very right. Yet there have been attempts to challenge this starting point with the self-regulatory bodies themselves, on the argument that international human rights law should always be complied with. In a ruling by the Appeal Tribunal for the Advertising Code Committee (*RCC*, see also II.4.4) the attempt by an information office for tobacco to invoke the ECHR fails: since the companies associated with appellant have voluntarily committed to certain conditions when advertising through a self-regulatory code, they cannot invoke the freedom of expression when these conditions are enforced.²² This decision has been criticised in the literature for its reasoning (more than for its result).²³ The emphasis on voluntary character is mostly criticised on the basis of the argument that it can be an ‘empty’ concept if there is peer pressure to accede to the regulation or if the association/foundation in question is so predominant in the field that there is no way around it. Stricter competition rules have however made the latter situation vulnerable to challenges on the basis of unlawful anti-competitive effects.

The doctrine of ‘horizontal effect’²⁴ aside, pure self-regulation does not need to take the fundamental rights norms developed for public bodies into account. When the relationship between the parties is purely private and therefore voluntary, it is for the courts to decide on an ad hoc basis whether the self-regulatory body needs to respect the human right in question as if it were an organ of the state. Dutch courts apply a rather loose balancing test, using fundamental rights to ‘fill in’ private law principles.²⁵ The societal power of the body and the degree of voluntary nature of association are important factors. Horizontal effect is often defended by pointing at the fact that equality in the relations between citizens often lacks; they can amount to power relations not unlike those between the state and citizens.²⁶ And it is this dimension of constitutional rights which is potentially interesting for self-regulation. Especially unilateral actions of large associations and contractual relations between unequal parties can pose problems of power abuse. Yet the legal meaning of horizontal effect is by no means clear. The main conclusion of an essay collection dealing with ‘fundamental rights and self-regulation’ specifically²⁷ is that the impact of fundamental rights on self-regulation is an indirect one. Furthermore, the existence of constitutionally entrenched rights can impose a ‘duty to give reasons’ on purely private self-regulatory bodies, such as to ensure protection of privacy by a Registrations Office.²⁸ Lastly it is possible for courts to resort to the private law norms of ‘reasonableness and fairness’ as interpretative instruments for the concrete meaning of fundamental rights in horizontal relations. The only fundamental right with a full horizontal effect is the principle of non-discrimination (Article 1 Constitution). Here rather detailed ‘positive obligations’ for employers have been formulated by the Commission for Equal

²² Appeal on *RCC* decision of 14 January 1992; 7 April 1992, nr. 695 91 7131, 695 91 7132.

²³ Leijten (1997), p. 199.

²⁴ ‘*Horizontale werking*’ in Dutch or ‘*Drittwirkung*’ in German.

²⁵ See Supreme Court judgment of 30 March 1984, *AB* 1984, 366 (Turkish employee)

²⁶ Kummeling and van Bijsterveld (1997).

²⁷ *Ibid.*

²⁸ Kummeling and van Bijsterveld (1997), p. 92.

Treatment.²⁹ The obligation to install internal complaints procedures is the most far-reaching duty in this respect. No cases are known in which horizontal effect of fundamental rights has led to a duty to self-regulate.³⁰ Arguably, such a duty could easily be a breach of the freedom of association (Article 8 Constitution) itself.

Although constitutional obstacles are ‘top-down’ by nature, a few ‘bottom-up’ obstacles which are inherent in private law also deserve mentioning here. The very general provision of Article 3:14 of the Civil Code (*BW*) states that the exercise of private law powers may not breach codified or non-codified public law rules. Article 3:40 Civil Code stipulates that private law arrangements breaching mandatory provisions of public law are null and void. Therefore even pure self-regulatory rules have to stay within the statutory framework, e.g. internal rules of sports organisations may not breach provisions of competition law.

I.1.3 Constitutional elements encouraging self-regulation

Conversely, Dutch constitutional law also contains some elements that cultivate self-regulatory arrangements.

Private autonomy

Implicit yet obvious elements are that private autonomy acts as an underlying constitutional principle and that private law is the general, primary law, with public law being of a subsidiary nature, doctrinally speaking at least. Neither private autonomy in general nor the autonomy of the social partners have an explicit constitutional basis. Yet when reading the Constitution carefully one certainly comes across a constitutional conception of private autonomy. First of all Chapter 1 contains an elaborate collection of fundamental rights aimed at a demarcation of a sphere that is exclusively private. Secondly Chapter 7 on decentralised bodies mentions the autonomy of lower territorial bodies in Article 124. In private law private autonomy is granted since private parties can set agreements on the base of the law of contracts and can organise themselves as legal persons (such as associations, companies, foundations etc. Book 2 of the Civil Code).

Subsidiarity is known in the Netherlands as a catholic principle, not as an explicit constitutional principle as such. Some constitutional lawyers argue that it does implicitly underpin the Dutch Constitution.³¹ More widely shared is the conviction that subsidiarity and its protestant equivalent of ‘sovereignty in ones own circle’ have played an important role in securing a firm footing of societal organisations in politics and governance. After the ‘depillarization’³², the religious divisions withered away, but the organisations stayed, although their influence was subject to the caprices of the political climate. A remaining institutional oddity which at the same time can be seen as an explicit constitutional encouragement of delegated self-regulation is to be found in Article 134 of the Constitution, which calls for the establishment of the industry and trade organisations and allows delegation of regulatory powers in this field by a statutory provision. Once this delegation has taken place, self-regulation can be required

²⁹ *Commissie Gelijke Behandeling*, a tribunal delivering non-binding but authoritative decisions on non-discrimination law.

³⁰ Kummeling and van Bijsterveld (1997).

³¹ Koekkoek and Leenknecht (1994), p 240.

³² ‘*Ontzuiling*’, i.e. the falling apart of the strictly segregated politico-religious ‘pillars’ of which Dutch society consisted for many decades.

(e.g. some professional organisations such as the *KNB*, the notarial profession's organisation, are required to self-regulate).³³

Permissive aspects of fundamental rights

'Classical' fundamental rights

Generally speaking, fundamental rights codified in the Constitution and international treaties like the ECHR contribute to a demarcation of a private sphere free from governmental intervention. The Dutch constitution clearly stipulates for each right whether and how the state can limit the exercise of the right in question. For all limitations a statute must be the basis and in some cases the statutory provision can include delegation to public bodies which are lower than the legislator.³⁴ Furthermore limitations can only take place for certain purposes as specified in the constitutional provision itself. The fundamental right which is clearly of direct relevance for self-regulation is the freedom of association. Sometimes this fundamental right requires active cooperation from the state, as becomes clear from national case law³⁵ as well as a decision by the ECHR.³⁶ The Court states that there can be an obligation for the state to intervene between private parties to ensure the actual exercise of the freedom of association.

Although the freedom of association can be seen as an important bedrock for pure self-regulation it does not feature as prominently as one would expect in parliamentary debates (for instance it did not play an important part in the debate on submitting the notaries to public regulation). The criterion seems to be instrumental rather than of a principal nature: as long as self-regulation and self-supervision is satisfactory, pure self-regulation may exist, once a free-rider problem arises it is quite easily overruled, so one should not expect too much of these constitutional protection mechanisms especially since, as explained above, Dutch judges cannot review statutory provisions for breach of the constitutional principles.

In the media sector the fundamental right to freedom of expression (as laid down in Article 7 Constitution) protects against censorship and requires a statute whenever most other areas covered by the freedom of expression are intervened with and allows for delegation to lower authorities in certain circumstances.

Social rights

If one views – as some Dutch authors do – self-regulation in the Netherlands in the light of the overburdened welfare state³⁷, rediscovering the self-steering capacities already present in society – especially wherever 'civil society' is well-developed – can be a way for the state to live up to its constitutional commitment to social rights and to even address the internal tension they often contain.³⁸

There has been some discussion among academics as to whether Article 21 of the Constitution ('the care of the state is directed at the habitability of the country and the protection and

³³ These bodies are in fact public bodies, but we argue that there is a good case for considering their activities as self-regulatory nonetheless, see II.1.

³⁴ Whether or not delegation is possible depends on the exact terms used in the text of the constitutional provisions. To go into this terminology in detail would go beyond the scope of this report.

³⁵ Supreme Court judgment of 25 June 1982, *NJ* 1983/296, (*De Schans*).

³⁶ ECHR decision of 25 April 1997.

³⁷ *Sociale rechtsstaat*.

³⁸ Eijlander, van Gestel and Gilhuis (2000).

improvement of the environment’) precludes self-regulation in the environmental sector, because the state has exclusivity in this sector. One explanation for the ‘state-mindedness’ of the constitutional text is that the Dutch Constitution of 1980 was drafted in the seventies, just before the boundaries of the welfare state became visible, in an era when traditionally important societal organisations were set aside. However the consensus nowadays seems to be that a ‘dynamic perspective on fundamental rights’³⁹ warrants an active role for private actors. According to some authors⁴⁰, Article 21, in spite of being a ‘social fundamental right’ (fundamental right of the third generation) can even provide a normative framework, but they get no further than deriving some minimum standards and leading principles which are also laid down in international law. More interesting is the suggestion that Article 21 could contain certain procedural guarantees concerning participation of third parties⁴¹ and legal protection for those affected by environmental self-regulation; however these are recommendations not reflected in judicial practice so far.

A second relevant fundamental right is Article 8 ECHR (and Article 10 Dutch Constitution), the right to private life. Horizontal effects of this provision are – while not completely imaginary – not needed because the usual ‘standards of care’ from private law or the duty of care of Article 1.1a Environmental Management Act (*Wm*⁴²) can be used when dealing with private-private relationships. These duties need to be fleshed out in further rules or standards, but these standards need not necessarily be laid down in public rules; covenants, company plans for the environment and behavioural codes are also well-suited to perform this function.

I.1.4 Concluding remarks/summary

Despite the Dutch tradition of private involvement in regulation and an explicit encouragement to consider self-regulation in the Guidelines of Legislative Drafting, it is clear that Dutch constitutional law does not readily accommodate the design of self-regulatory structures. Although some objections to the use of self-regulation are similar to the objections to delegated legislation, the doctrine on delegation and the legality principle do not provide many clues as to the constitutional boundaries of self-regulation. Due to the absence of a constitutional court and the prohibition of constitutional review the constitutional mechanisms limiting and encouraging self-regulation are rather ‘soft’⁴³ and many questions are left unanswered.

I.2 The self-regulatory body and its activity

I.2.1 The nature of the body

Taking a closer look at the bodies engaged in self-regulation, an entire range of bodies is relevant. Although pure self-regulation is carried out by purely private bodies, these bodies can – for judicial review purposes – be considered ‘public’ if and in as far as they exercise ‘public

³⁹ Van Gestel and Verschuuren (1997), p. 127.

⁴⁰ Ibid., p. 144-152.

⁴¹ A real problem when covenants are used is that environmental organisations often feel neglected when the government concludes a ‘deal’ with, for instance, farmers on environmental targets.

⁴² *Wet milieubeheer*.

⁴³ E.g. in a recent case before the Administrative Law Division (of the Council of State) of 1 December 2004 it became clear that applicants could not claim to have legitimate expectations that the Minister would not come up with public regulation in the fisheries sector based on his implicitly approval of a covenant between an organization for Bird Protection and an association of Fishermen concluded earlier.

authority'. At the other end of the spectrum, bodies that are public on formal grounds, can materially speaking be engaged in regulating their own members and therefore possess some self-regulatory qualities.

Purely private self-regulatory bodies

According to Dutch company law, private bodies can have the following legal forms: association, cooperative, mutual insurance society, company limited by shares, private company with limited liability and foundation. The law applicable to legal forms relevant for self-regulation – being associations, foundations and companies – is described in this section.

Associations

Associations are entitled to self-regulation of their own members, based on the constitutionally entrenched freedom of association and the law of associations as laid down in the Civil Code (*BW*). Associations are governed by the articles (*statuten*) and bye-laws (*reglementen*) of the associations as well as the provisions Book 2 of the Civil Code (company law).

The association model is used in the traditional fields of (pure) self-regulation, such as the sport, media and liberal professions' sector.⁴⁴ In the sociological sense⁴⁵ this model enhances the possibility of self-regulation because of the freedom this model offers to organize oneself. An advantage of the use of the association model in co-regulatory relationships is the democratic character of associations. An important drawback when applying this model is that enforcement and compulsory membership do not befit the voluntary nature of associations and as a result free-rider conduct is a common problem.⁴⁶

Model of regulatory relationship:

The model of regulatory relationship of Dutch associations is membership. The freedom of association implies that associations should be able to decide on the admittance of their members. The articles of association may stipulate qualities that a person should possess in order to be admitted as a member. Quality demands do not constitute a breach of the prohibition on discrimination.

In some circumstances however the non-admittance of a member can be contrary to proper societal conduct (enacting liability on the base of tort). If it is very important for the prospective member to become a member of the association – for e.g. vocational purposes – and one could not speak of a reasonable and fair reason for refusal, the association can be held liable for the damage suffered as a result of non-admittance.

Members are bound by the articles (*statuten*) and bye-laws (*reglementen*), as well as resolutions (*besluiten*) of the association.⁴⁷ Members of an association are conjointly represented in

⁴⁴ In 1952 respectively 1999 the association of lawyers and that of notaries have been vested with public powers and transformed from private associations to public bodies. The distinction between (private) associations of liberal professions and the (public) professional organisation will be explained in the second part of the report.

⁴⁵ A group of people setting standards, monitoring these standards and imposing them on the (new) members of the group.

⁴⁶ Eijlander (1994), p. 151.

⁴⁷ And of committees, sub-committees and officials that have been granted decision making powers by the board. The board can only delegate decision making powers to sub-organs of the associations if the articles so permit.

the general assembly and have a right to vote on matters that concern the association. One could think that new members are bound by contract in joining the association, but legal scholars argue that the accession of members is a relationship *sui generis*.⁴⁸ It is a legal bond in which the members are held to comply with the rules of association through accession (a bilateral juridical act).

Governance structure

As observed all the members of an association together constitute the general assembly of the association. This general assembly appoints the board of the association. The authorities attributed to the board and the individual powers of the members of the board are stipulated in the articles of association.⁴⁹ Governance failures will have internal effects, while the association will be held liable for damage caused to third parties. Individual board members can only be held personally liable for damage occurred as a result of transgression of their authorities and bad governance (e.g. fraud).

While it is clear that when assigning public tasks to private associations the governance structure will play an important part in assessing the body's competence to be vested with public tasks, good governance is not a legal criterion for delegability. When awarding subsidies to private bodies – especially if the sector is dependent of governmental subsidies – the State does have an extra supervision tool to (indirectly) enforce good governance. The State can, when granting subsidies, demand that certain criteria be incorporated in the articles of these associations, such as good governance rules, as well as the respect of principles of democracy, emancipation and the equality of races.⁵⁰

Foundation

Another common legal form of self-regulatory (and co-regulatory) bodies is the foundation. The foundation model comes into play as a method to institutionalize cooperative structures. Independent bodies (having their own regulatory and governance structure) can accede to agreements with the overarching regulatory or supervisory foundation.⁵¹ Foundations are governed by company law on foundations and the foundation's articles and bye-laws. Examples of self-regulatory foundations can be found in the Internet and advertising sector. Most supervisory bodies also have the foundation model as their legal form (see § I.3.2)

Model of regulatory relationship

The foundation structure prohibits membership. Foundations can however have participants (to the articles of the foundation) or associates. These participants and associates are bound to the foundation by a contract of accession and derive their rights and duties from the articles of the foundation and the foundation's bye-laws. The acceptance of the applicable bye-laws and articles of foundation can be qualified as the acceptance of general terms and conditions in the sense of Article 231 Book 6 Civil Code.

⁴⁸ Amongst others Valk (2003) and Dijk & Van der Ploeg (2002).

⁴⁹ Book 2 of the Civil Code imposes mandatory legislation that cannot be altered by the board or the general assembly and must be complied with. Non-compliance enacts avoidance.

⁵⁰ These criteria (amongst others) are set for sport federations and associations applying for sport subsidies. The State divides sport subsidies amongst the municipalities that are on their turn responsible for the granting of subsidies to the sport federations.

⁵¹ Stille (1998), Article 2:285, note 4.

Governance structure:

Foundations do not have members, and as a result no general assembly. Most foundations have two bodies, being the board and a supervisory committee, the latter not being legally obligatory. Because of the lack of democracy in foundations, both the public prosecutor and judges in civil proceedings have additional powers to control foundations. If the public prosecutor feels that the articles of the foundation are not *bona fides* or the board is not handling according to its duties, it can demand inspection of the accounts and records of the foundation. Civil courts can deprive members of the board of their tasks (for abuse of their powers and fraudulent conduct) and have the authority to assist the board in attaining legal rights.⁵²

Democratic governance is not a legal criterion for the delegability of public authorities to private bodies (foundations nor associations), but there is a link with the doctrinal hesitation to award legislative powers to bodies other than ‘hard core’ public. The same comment stated above – when discussing the enforcement of good governance of association boards when awarding governmental subsidies – applies to foundations.

Company

In the context of self-regulation only a few civil law companies can be traced. The Dutch Assessment Institute *BV* and the *Kema Quality BV* – the certification institute for the electricity sector – are examples of public⁵³ supervisory bodies having the private company with limited liability (*besloten vennootschap, BV*) as their legal form. Two examples of self-regulatory bodies with the company limited by shares (*naamloze vennootschap, NV*) as their regulatory structure are the Cooperating Electricity Producing companies (*NV Samenwerkende Elektriciteits-Productiebedrijven*) and the Dutch National Bank (*Nederlandsche Bank NV*).

The National Bank – while having the company limited by shares as its legal form – does not derive its legal personality from private law and is somewhat of an oddity in Dutch legal persons law. The Dutch National Bank is considered to be a public body⁵⁴ deriving its legal personality from public law. A special statute invested the National Bank with legal personality and this same statute imposes the conditions for the governance and liability structure of the National Bank. Thus whilst the Dutch National Bank *NV* is a private body by structure, it is considered fully public excluding the applicability of (private) company law.

Eijlander points out that the company as an organisational structure of a regulatory body comes into play when financial assistance is needed.⁵⁵ One of the characteristics of a civil law company is the compulsory monetary contribution.

Model of regulatory relationship

Collectively the shareholders of a company constitute the general assembly of the company. Each shareholder has the duty of financial contribution and the right to take part in shareholders consultations. In these decision-making procedures the principle of ‘one share, one vote’ (as opposed to the ‘one man, one vote’ principle of the association’s general assembly) ap-

⁵² For example to attain property of immovable goods, in the case that the articles of foundation do not grant the board the authority to acquire registered property.

⁵³ They are independent administrative authorities: *ZBOs* (see table 2).

⁵⁴ GALA a-type, see table 1.

⁵⁵ Eijlander (1994), p.151.

plies, limiting the democratic character of companies at least to some extent as Mendel argues.⁵⁶

Eijlander reasons that when discussing self-regulation the traditional model of company relationship (a company and its shareholders) is not suitable. Instead he argues that the model of regulatory relationship for companies should be that of a company enacting civil law agreements with its regulatees.⁵⁷

Governance structure

The general assembly of shareholders and the board, are the most important bodies of limited liability companies and private companies limited by shares. The board is responsible for the governance of the company, it is held to carry out its governance tasks in the light of the statutory aim of the company and in the interest of the company. Members of the board are appointed and discharge by the general assembly.

Companies can also have a council of commissioners. Larger companies⁵⁸ are obliged to have such a council. In the latter case the legally compulsory council appoints and discharges members of the board. The general assembly, the board and the company council⁵⁹ have the authority to propose candidates for the council of commissioners. Only the Enterprise Division of the court of appeal of Amsterdam is authorized to discharge members of the council of commissioners.

According to Dutch company law the State has several control mechanisms to monitor companies. Articles 64 and 175 Book 2 of the Civil Code stipulate notarial involvement, ministerial certification and the control of draft articles as criteria for the establishment of civil law companies. Dutch company law also permits third parties – including the State – to appoint members of the council of commissioners.

GALA bodies

The General Administrative Law Act (GALA)⁶⁰ has been described as ‘a law with a nearly constitutional status’.⁶¹ Among other things, it codifies most ‘general principles of proper administration’ and lays down both the procedural and the substantive rules for judicial review of administrative decisions. Its regime is rigid in the sense that the applicability of GALA depends first of all on the qualification of the body involved as an administrative authority (*bestuursorgaan*). It follows from Article 1:1 GALA (see below) that there are two kinds of administrative authorities: those fulfilling the formal condition of belonging to an entity doted with ‘public legal personality’ (‘a-type’) and those who do not fulfil this condi-

⁵⁶ Mendel (1997), p. 48.

⁵⁷ This is true for the National Bank, its regulatees are not its shareholders, instead a statute determines who falls under its regulatory scope; but as we pointed out the National Bank is *sui generis*. Moreover Eijlander’s argument (the regulatory structure of enacting agreements in stead of company-shareholder relationship) is also true for the *Kema Quality BV* and the Cooperating Electricity Producing companies.

⁵⁸ The so-called *structuurvennootschappen*, having a company capital of at least 16 million euros, at least 100 employees and a company council appointed by the employees according to mandatory legislation to protect the employees’ interests.

⁵⁹ The company council is a body appointed by the employees to protect the employees’ interests. The establishment of a company council is compulsory for large companies (*structuurvennootschappen*) see note 56.

⁶⁰ An English translation of the GALA is available at http://www.justitie.nl/Images/11_7093.doc.

⁶¹ Van der Vlies et al. (2002).

tion but who do satisfy the substantive condition of being invested with public authority ('b-type'). The latter type entails bodies deriving their legal personality from private law and thus potentially encompasses the bodies described in the section above.

Article 1:1 GALA

1. 'Administrative authority' means:

- (a) an organ of a legal entity which has been established under public law, or
- (b) another person or body which is invested with any public authority

B-type bodies

There is no statutory definition of what constitutes an exercise of 'public authority'. Therefore a lot depends on the judicial interpretation of the phrase 'public authority'. It is whether a body is vested with 'any public authority', not whether it is making/monitoring/enforcing public law, although the presence of one of the latter activities would at the very least cause a strong presumption in favour of the body possessing 'public authority'. The case law on what constitutes an exercise of public authority is famously volatile. Furthermore a large part of the case law is not relevant for this chapter, since it is blurred by the fact that it mainly deals with foundations established to compensate groups of citizens.

Criteria often used in the case law are:

- whether or not there is a (strong) financial relation with the state;
- whether there is 'institutional influence' (e.g. the power to fire the chairman) by the state;
- whether or not the body has been expressly charged with a 'public task'.⁶²

A private regulator can even acquire a public law status based on its activity, but this case law is applied in a limited way (i.e. only to compensatory foundations) and is subjected to criticism on the ground that 'extra-statutory' public power should not exist. In many if not all cases, some degree of financial dependence on the state, especially when this financial link is structural, is deemed to be a necessary condition for classifying a private regulator as a b-type public body. However financial aid is not a sufficient condition (cf. sports sector where state subsidies do not make the bodies public). Additional criteria from case law are the governance structure (Wouters case⁶³) and 'possession of incidental public powers' (Schiphol case⁶⁴). Without one of these factors also pointing in the direction of a public body, a judge will not readily grant a public law status just because a public service is being provided.

Once delegation of a public law power takes place, the private body (e.g. an association or a foundation) immediately falls under the GALA regime. Another way of phrasing it would be that there are no limits to delegation to private regulatory bodies (other than the constitutional limits described in I.1.2); it just makes these bodies 'public' for the purposes of judicial review and the applicability of principles of proper administration. Most delegation provisions

⁶² This criteria is derived from a very important case in which the Council of State ruled that the lack of statutory basis for the activities of the foundation (handing out allowances to disabled miners) is not crucial. *Stichting Silicose Oud-Mijnwerkers*, ABRvS, 30 November 1995, AB 1996, 126. See for an overview of all the case-law on the subject Peters (2004).

⁶³ C-309/99 (Wouters c.s.)

⁶⁴ Decision of the Administrative Law Division (of the Council of State) of 3 October 1996.

moreover state explicitly to whom a certain power can be delegated and this is in many cases a purely public body belonging to the regular state structure.

Scope of GALA

In court, arguments from both sides on whether or not a private body should be regarded as a b-type public body in a certain case are often induced by strategic considerations. There are all sorts of disadvantages to being qualified as a public authority. One of them is that general principles of proper administration (*abbb*) have to be complied with. Another consequence of the legal qualification as a public law body is that the special judicial protection regime of chapter 6 GALA applies. Among other things, this means that the administrative courts are competent. This can be a ‘disadvantage’ because in this procedure, citizens are protected as the weaker party. To counterbalance this, the stricter time limits for applying for judicial review apply. Therefore whether falling under the ‘administrative courts’ jurisdiction is an advantage or a disadvantage would depend on the circumstances of the case. It should be noted that citizens can only apply for judicial review if and when there is a public law body and only (cumulative criteria) if this public law body has issued a public law act, called ‘order’ (*besluit* Article 1:3 GALA) which has a specific rather than a general ambit.

Article 1:3 GALA

1. 'Order' means a written decision of an administrative authority constituting a public law act.
 2. 'Administrative decision' means an order which is not of a general nature, including rejection of an application for such an order.
- (...)

‘Order’ is thus the concept triggering the jurisdiction of the administrative courts, which is then further limited by Article 8:2 GALA that states that ‘generally binding provisions’ (a term covering statutes, regulations and bye-laws) cannot be subject to judicial review. Subject to judicial review under the GALA regime are thus specific ‘administrative decisions’ (see paragraph 2 of Article 1:3 GALA) and a few ‘orders’ with a slightly wider ambit.

The question arises: are these b-authorities also ‘b’ in the sense that they need to comply with only part of the GALA obligations? The answer to this is that their status is prone to change with the hat the body is wearing: only when and in so far as it exercises public authority, it qualifies as a b-authority. Once the body is considered to be a b-type body in a certain situation, it has the same rights and duties under the GALA as a-type bodies do. The figure below presents an overview of the scope of the GALA provisions in different constellations.

Table 1 - Scope of the GALA

I. public authorities	A. public law bodies (art. 1:1 –1a GALA)	bound by all GALA norms.
	B. private law bodies or persons with public authority (art. 1:1 – 1b GALA)	bound by all GALA norms whenever acting as a public agency.
II. private actors	A. public law bodies acting under private law	still bound by general principles of proper administration if the nature of the act does not resist (art. 3:1 GALA).
	B. private law bodies, <u>unless</u> vested with public authority in as far as acting as a public body (then I.B)	only bound by private law and the general norm that no private law act may breach statutory provisions (art. 3:40 Civil Code). ⁶⁵

Self-regulatory a-type bodies?

Although a-type GALA bodies are generally synonymous with ‘hard core’ public bodies, there are two types of a-type bodies that can be said to possess self-regulatory qualities. If they were left out of the picture on the basis of their formal a-status, a piece of the analysis would be lacking, because they exercise regulatory functions which in other legal systems can be preformed by pure self-regulatory bodies or private bodies with a public status.

Article 134 bodies

‘Functional decentralisation’ (i.e. devolution of power not to lower levels of government but to central public institutions rooted in civil society) is a predominant characteristic of the Dutch constitutional system. Article 134 of the Constitution created the possibility to establish Public bodies for Businesses and Professions⁶⁶ (‘Article 134 bodies’ for the purpose of this chapter) and that they can be awarded rule-making powers in or through a statute.⁶⁷ These bodies stem from a tradition of profound corporatism and were mostly established in the 1950’s or rather, they were ‘build out through a refined web of private, public and administrative law’.⁶⁸ Although these organisations are indisputably public⁶⁹, some even possessing rule-making powers, the fact that most of them are privately financed lends a ‘self-regulatory feel’ to them. That is to say, the industries concerned often regard such a body as ‘one of us’.

⁶⁵ Some authors (van der Vlies, Stoter and Lubach (2002)) have wondered whether these principles may not have a even broader ambit. For instance in the context of privatisation, should not private organisations exercising a ‘publicly flavoured’ task with private instruments (without qualifying as a b-type authority), take these principles into account.

⁶⁶ *Openbare lichamen voor Bedrijven Beroep*.

⁶⁷ This is an example of the famous constitutional terminology indicating that further delegation is allowed.

⁶⁸ Van den Heuvel (1994), p. 9.

⁶⁹ In a recent case the question of whether the Dean of the National Bar could be regarded as an administrative authority was put before the Administrative Law Division (of the Council of State). Despite of the private air of this body, its formal public nature was easily established because the National Bar derives its legal personality from public law. Decision of 30 June 2004.

Whether this merely benefits from the advantages of self-regulation or constitutes a case of outright capture is impossible to say without in-depth research. In any case it is fair to say that the Article 134 bodies absorb interest groups to some extent and function as sector organisations with a public legal basis. The structure of the Article 134 bodies has received a lot of criticism, and in 1999 some responsibilities were given back to the government and the legislator based on a reform of the Article 134 bodies.

Article 134 bodies have been established in two main categories: ‘trade and industry organisations’ (*PBOs*) consisting of the Commodity Boards (*productschappen*) and the Industrial Boards (*bedrijfschappen*), and ‘other’ bodies, mainly for the professions. They can be qualified as ‘mixed’ because the board is compiled by ‘members’ but the governance structure is laid down in a statute. They are privately financed by contributions by members, but membership is obligatory.

Independent administrative agencies

Another category of public bodies that need to be scrutinised for overlaps and distinctions with self-regulatory bodies are the ‘independent administrative agencies’ (IAAs)⁷⁰. These can be defined as public bodies (in the sense of Article 1:1 GALA) at the level of central government, which are not hierarchically subordinated to a Minister (hence the ministerial responsibility does not or not fully apply) and are not advisory bodies. Just like ‘self-regulation’, the concept of an ‘IAA’ does not constitute a legally relevant category; instead the term is mostly used by those studying or practising public administration and sometimes by constitutional lawyers. To classify them legally, the formal GALA-criterion applies: IAAs deriving their legal personality from public law are a-authorities, those possessing private legal personality are b-organs. The ‘public authority’ criterion will normally not be an obstacle for the latter category: although these agencies are often ‘administrative’ in nature rather than regulatory in the full sense of the word⁷¹, their executing powers clearly constitute an exercise of public authority.

IAAs mostly have hard core public functions, but some possess self-regulatory features in the sense that they regulate their own members or group.⁷² More often existing independent administrative agencies are used when a kind of meta-regulatory supervision of pure self-regulatory institutions has to be arranged. IAAs can be ‘hard core’ public bodies which have gained some degree of independence from the government (e.g. the Dutch Competition Authority *NMa* was recently made into an IAA) or they can be bodies with private roots which have been drawn into the public realm (e.g. the Financial Market Authority *AFM*, see case study on financial markets regulation, II.2). For the latter category another term is in use: ‘Legal persons with a statutory task’ (*Rechtspersonen met een wettelijke taak/RWTs*). There is a large overlap between these two categories (as between most categories in the overview below) because they do not use the same parameters. The term *RWT* belongs to the realm of pri-

⁷⁰ ‘*Zelfstandige bestuursorganen*’, *ZBOs*.

⁷¹ According to the Guidelines for Legislative Drafting delegation of rule-making powers to independent administrative agencies may only take place if it concerns organisational or technical topics or in special cases, as long as the Minister keeps the power to approve the rule. The results of a recent research project commissioned by the Ministry of Justice however shows that about 40% of these independent administrative agencies⁷¹ possessed rule-making powers, in spite of the strict guidelines. See Kloosterman, Winter, Noordam and de Ridder (2002).

⁷² E.g. Association of National Professional Education Organs (*Vereniging van Landelijke Organen Beroeps-sonderwijs (COLO)*) and the College for Health Care Fees (*College Tarieven Gezondheidszorg (CTG)*)

vate law. In order to qualify as an *RWT* a body needs to have been constituted according to private law, have one or more tasks on the basis of a statute and be wholly or partially funded by the revenues of statutory charges. The legal consequence of qualifying as an *RWT* is that the Chamber of Audit (*Algemene Rekenkamer*) has certain competencies to control the finances of *RWTs*. There are over 3000 *RWTs*, many of them operating in the field of education or carrying out post-privatization tasks. However ‘to carry out a statutory task’ is not the same thing as ‘to exercise public authority’ and therefore not all *RWTs* are IAAs. Conversely, not all IAAs qualify as *RWTs*; some because they receive no public funding, but most because they derive their legal personality from public law instead of private law.

Table 2 - Overview of the different types of regulatory bodies

Definition	Statutory basis?	Legal personality	Governance Structure	Financing	GALA regime?	Public Powers?	Self-regulatory function?	Examples
<i>Gewone bestuursorganen</i> ('Hard core' public bodies)	Yes	Public	Public	Public	Yes, a-type	Regulatory (Legislative, executive, jurisdictional)	No	Ministry of Environment
<i>Openbare lichamen voor Bedrijf en Beroep</i> - PBOs (Public bodies for Business and Profession)	Yes	Public	Mixed	Private (contributions by members – membership obligatory on the basis of public law)	Yes, a-type	Regulatory (Legislative) Supervisory	Sometimes, in spite of public status, since the content and ambit of their regulatory capacities are restricted, only to their regulatees	There are two main categories: 'trade and industry organisations' (PBOs; e.g. the Product Board for Margarine, Fats and Oils) and 'other bodies', mainly for the professions (e.g. Dutch Bar NOvA)
<i>Zelfstandige bestuursorganen</i> - ZBOs (Independent Administrative Authorities: IAA)	Mostly	Public or private	Public or private	Usually (partially) public	Yes, a-type or b-type	Regulatory (executive + legislative only in exceptional circumstances)	Mostly not, but some are regulating their own group	AFM (b-type) Commissariat for the Media (a-type) See also http://www.zboregister.nl

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

I.2.2 The regulatory activity

Regulatory scope of purely private self-regulatory bodies

A problematic aspect of self-regulatory rules is their ambit: who do they bind? The voluntary nature of private legal persons and their associates does not tally with the idea of generally binding rules or obligatory accession. Keeping this in mind, private regulation is in principle only binding on those who wish to subscribe to it, but this can pose a free-rider problem.

The free-rider problem has often led to some public involvement in the regulatory process, for example the awarding of a public status to the notaries' and lawyers' professional organisations or the fact that most (if not all⁷³) Dutch supervision tasks have been awarded to public bodies.

Moreover civil courts have not hesitated in extending the scope of private regulation to have a generally binding force in practice. The Dutch Civil Code contains several open (and as a result vague) standards – such as reasonableness and fairness, the general duty of care, proper merchant conduct and proper societal conduct – that need to be developed in practice or in case law.

Open norms in the Dutch Civil Code:

The test applied in assessing whether the duty of care was complied with, the act was reasonable and fair or the merchant conduct proper (e.g. professional, supervision and sport injury liability cases) is: 'taking the conduct rules applicable in the field into account, can one speak of proper societal conduct?' That is to say, would a proper behaving professional/supervisory body/sportsman have done the same in the ideal situation? To address this type of questioning, courts need to assess **proper** conduct. The only way to test what is proper in a certain field is to take the applicable norms and conduct rules into account. Here is where present and accepted private regulation enter the stage.

Judges frequently assess cases on the bases of self-regulation and private regulation. Either judges 'consult' these norms in making a decision, they can also explicitly ground their decision on these rules. Both type of reasoning is not an oddity in Dutch case law.

Vranken (2005:89) denotes the act of filling in the open norms of the Civil Code as 'multiple stratification' (*meervoudige gelaagdheid*). The first layer is the norms incorporated in the Articles of the Civil Code. The second layer is – if present – the contractual layer (e.g. agreements, general terms and conditions). The third layer is the layer of the rules enacted by the civic society. This third layer is what causes the problem in a rather rigid legislation jurisdiction divide, traditionally there is no room for other regulation than legislation. Article 79 of the Judicial Organisation Act stipulates what is categorized as being law subjected to the interpretation and decision of courts. In the discussion how judges manage with the third layer in practice Vranken does not draw a distinction between self-regulation and private regulation.

Vranken illustrates three ways the Supreme Court has dealt with the third layer in case law:

The duty of care of the Rabo Bank case (Supreme Court judgment of 11 July 2003, *RvdW* 2003, 123 Kouwenberg/Rabo): The Supreme Court reasoned that the private regulation at hand could not be qualified as 'law' in the sense of Article 79 of the Judicial Organisation Act. In stead the court stated that the norms derived from the private regulation could be qualified as the *common norms* of the sector having some importance but not being decisive in nature.

⁷³ See Giesen's comment on Dutch supervisory bodies in § I.3.2.

Van Hoek (2006: 14) also stresses that the acceptance of (private) regulation emanating from semi-autonomous legal orders by courts or the state can be more of a practical nature and does not necessarily entail any recognition of these regulations as 'law'.

The medical protocol cases (Supreme Court judgement of 2 March 2001, *NJ* 2001, 649 Trombose and Supreme Court judgement 2004, *NJ* 2004, 307): The Supreme Court did not go into the nature of the private regulation vis-à-vis Article 79 of the Judicial Organisation Act. The court qualified the rules stipulated in the protocol contested as norms based on a consensus reached between the hospital and the medics that worked at that hospital. Those norms encompass what the medics and the hospital conceive as being *proper* medical care. The courts reason that the medics are thus held to uphold the rules of the protocol, unless the interest of the patients demand otherwise. In that case the medic should motivate why he dissented from the rules of the protocol. In this case the liability of the medic that had not handled according to the protocol was incurred on the basis of the breach of the protocol.

Disciplinary proceedings: For a long time there has been a wide divergence between the decisions by disciplinary bodies in disciplinary proceedings and the decisions of the civil court in the tort proceeding following the disciplinary proceedings. It was argued by legal scholars that disciplinary proceedings are of a different nature (upholding the standards of a profession or trade) than liability questions. Recently (Supreme Court judgement of 12 July 2002, *NJ* 2003, 151 A/B) however, the Supreme Court decided that the civil court that dissents from the decision of the disciplinary body must motivate in its decision why it decided not to follow the decision of the disciplinary body.

Slowly private regulation and self-regulation are paving a way through the traditional legislative-jurisdiction paradigm. Moreover, if there are rules present in a certain sector that are of such an importance that they can be considered as custom or 'the norm prevailing in the sector', courts have in the past used these norms for non-regulatees, in assessing whether the act was in accordance with proper societal conduct or to assess the reasonableness and fairness of the case. As an example we provide two cases in which the applicability of norms was extended to include third parties non-regulatees.

Case I:**BACO-agreement cases**

Van der Tuuk Adriani/Batelaan (Supreme Court judgment 15 March 1996, NJ 1997/3) & **Hulsman/Van der Graaf** (Supreme Court judgment, 2 February 2001, NJ 2001/319)

Do members of an association need to comply with rules based on an agreement concluded between two organisations even if the agreement was meant to only constitute rights and duties for the organisations and not for their members?

These cases dealt with the ambit of a self-regulatory agreement concluded between two professional associations in the medical sector.

In both cases a doctor wanted to receive restitution from a pharmacist that opened a pharmacy in the doctor's village, in which previously only the doctor's in-house pharmacy was established. The legal basis for the doctor's claim is an agreement between the *KNMP* (pharmaceutical association) and *KNMG* (medical association), the so-called BACO agreement. The BACO agreement was only applicable between the associations and did not constitute rights or duties for the associations' members, still the civil court extended the scope of the agreement so as for it to be binding on the members of the associations as well, because it can be seen as 'expressing the norm prevailing in the sector'. This resulted in the Van der Tuuk case in the pharmacist having to pay damages; in the Hulsman case the indirect binding nature of the BACO agreement was confirmed, but in that case – because of a different constellation of facts – it did not result in obligations to pay damages. The pharmacists association terminated the BACO agreement unilaterally a couple of years ago, allegedly because of the outcome of the Van der Tuuk case.

Case II:

Pharmaceutical advertising case (Judge in interim injunction proceedings, The Hague 26 July 2004, *JGR* 2004/34)

Is a pharmaceutical company that is not a member of the self-regulatory body regulating pharmaceutical advertising bound by the self-regulatory rules?

The producer of Levimir, one of the two certified medical products treating diabetes available on the European market, upon certification of the product distributed the product amongst physicians without asking for monetary compensation. Furthermore in the explanatory brochure the producer of the product claims that his product has effects that cannot be attributed to the product (and are vague) as the plaintiff claims. The complimentary distribution of medical products and vague assertions on the effect of medical products can be contrary to societal conduct (misleading) and are forbidden by the Decision on Advertisement of Pharmaceutical Product (*Reclamebesluit Geneesmiddelen*), the Code on Public Pharmaceutical Advertising (*Code voor de Publieksreclame voor geneesmiddelen*) and the Code of Conduct of Pharmaceutical Advertising (*Gedragscode Geneesmiddelenreclame*). Nefarma - the trade organisation of the pharmaceutical industry that is concerned with medicine available upon prescription - is the founder and one of the regulatees of the *CGR* (*Codecommissie van de Stichting Code Geneesmiddelenreclame*), the supervisory body competent in cases dealing with the advertisement of pharmaceutical products. In earlier case law the civil judge had already established that the test developed in practice by the *CGR* assessing the correctness of the claims of a producer of medical products stating that his product - in comparison with another medical product of another producer - has a certain effect (two independent studies must prove the producer right), is the same test to be used in civil proceedings. Earlier case law also states that the norms developed by *CGR* are to be interpreted as the act of filling in the general criteria (open norms) set in the Civil Code (i.c. of Article 194 Book 6 of the Civil Code), the Act on the Facilitation of Medical products (*Wet op de Geneesmiddelenvoorziening*; i.c. Article 3 paragraph 8) and the Decision on Advertisement of Pharmaceutical Product (i.c. Articles 3,4,11 and 12). Civil Courts have in several judgments used the norms of the *CGR* and case law supports the correctness of this practice.

What makes this case interesting for the present purposes is that the plaintiff is a member of the Nefarma trade organisation, but the defendant is not. Is the defendant however held to comply with the norms of the *CGR*?

The judge in interim injunction proceedings ruled that private regulation enacted by the *CGR*, the body self-regulating pharmaceutical advertising, should be considered as common norms of the pharmaceutical sector, because of the importance of the norms in the sector. The use of the norms by consumers and other actors in the sector was *so omnipresent* that the court adopted the private regulation as being the norm applicable in the pharmaceutical sector extending the scope of the private regulation to third parties. The court reasoned as follows, the defendant did not contest the practice that virtually the whole pharmaceutical trade complied with the conduct rules and decisions of the *CGR* whether they be a direct regulatee of the *CGR* or not. The civil judge concluded that taking all the circumstances of the case into account, it can not be seen why it is justified for the defendant, despite being a non-regulatee to the code, to fail to meet the norms of the *CGR* (including the two-independent-study-test assessing the correctness of comparative claims of a producer).

Although this is only a case by a Provisional Judge and appeal has been lodged, a number of other cases, including one from an appeals court, support the reasoning in the case.

In cases in which one could not speak of public involvement or court acceptance of conduct rules, the ambit of private regulation is determined by the regulatory scope stipulated by Dutch company law. In the following paragraph we will illustrate the regulatory capacity that Dutch company law awards to associations, foundations and civil law companies.

Associations, companies and foundations are governed by the internal law of the legal person which encompasses the articles of the legal person, the legal person's bye-laws and resolutions of officials of the legal person. The articles of association are formulated by the individuals establishing the legal person and encompass the alterations made since the establishment of the legal person.

The articles of the legal person should be in conformity with the law and encompass general rules that draw the sphere of action and the structure of the legal person as well as rules concerning the competent bodies of the legal person, their duties and authorities. Both the draft articles and alterations are subjected to review by a civil law notary.

Bye-laws can be enacted by the board or other bodies (sub-organs or officials) of the legal person if the articles so permit. The juridical value of bye-laws is not narrowed down, since the law mentions the bye-laws, but does not give a definition of or criteria for bye-laws of legal persons. Bye-laws may not breach mandatory legislation or the articles of the legal person. Matters that should be addressed in the articles of the legal person may not be addressed in bye-laws either. Legal scholars argue that the 'enactment of bye-laws structure' follows the public delegation structure, that is to say, only if the articles so permit can bye-laws be created. The articles of legal persons should appoint the body that has authorities to enact bye-laws and the topics that can be regulated in bye-laws. Scholars differentiate between compulsory bye-laws (the articles of the legal person encompass a duty to regulate) and voluntary bye-laws (the articles grant the possibility to regulate). Furthermore scholars feel that important rules such as dispute resolution clauses, authorities of the bodies of the legal person and the rights and duties of the affiliates (members in associations, associates and participants in foundations, shareholders for companies) should be regulated by the articles, to avoid abuse. Articles of a legal person should be publicised correctly (in the register of the chamber of commerce and industry) while no such obligation exists for bye-laws.

Resolutions (*besluiten*) of the board and of other bodies of the legal person with decision-making powers can either be generally binding or non-generally binding. Generally binding resolutions have a regulatory feel to them and can be concluded in or based on a by-law.

The extent in which regulatees are bound to comply with the legal person's regulation as well as the regulatory relationship between the legal person and its regulatees, vary from one legal person to the other, as we will illustrate in the following sub-sections.

Associations

Regulatees of associations (members) are bound by the association's articles and bye-laws through accession to the association, a bilateral juridical act that is *sui generis* (not through contract). Non-compliance with these rules can be invoked through disciplinary proceedings with the termination of membership as an *ultimum remedium*.

Resolutions (*besluit*) of the board can also incur the applicability of the bye-laws of another association or foundation. In this way the board can enact the applicability of bye-laws of arbitration associations (members are then held to settle their disputes through arbitration) or impose the compulsory membership of a federation (e.g. FIFA). The board can also decide to incorporate a reference to these codes (enacting their applicability) in the articles of association or in the association's bye-laws.

According to Article 46 Book 2 of the Civil Code, the board has the authority to constitute rights and duties for its members vis-à-vis third parties. Traditionally employers' and employees' associations have concluded collective labor agreements for their members. Such a third party agreement can be qualified as a third party clause concluded on the basis of an authorization by means of the articles of association (Article 253 Book 6 of the Civil Code).

Foundations

Regulatees (participants and associates) of foundations are bound to the foundation by a contract of accession and derive their rights and duties from the articles of the foundation and the foundation's bye-laws. The acceptance of the applicable bye-laws and articles of foundation can be qualified as the acceptance of general terms and conditions in the sense of Article 231 Book 6 Civil Code.

Foundations may approve of codes to which its regulatees (participants and associates) may become subjects by contract. Foundations can also impose the accession to such codes by incorporating provisions concerning the applicability of these codes in its articles or bye-laws.⁷⁴

Companies

As is the case for foundations and associations the shareholders of a company are bound by the company's articles, bye-laws and resolutions.

Because we have concluded that when discussing self-regulation the traditional model of company relationship (a company and its shareholders) is not suitable, but instead the model of companies enacting civil law agreements with its regulatees should be taken into account (see I.2.1), the regulatory scope for self-regulatory companies is standard setting through con-

⁷⁴ Changes of the articles and bye-laws are however subjected to the principle of reasonableness and fairness (because associates and participants do not have the right to vote). All of this to reduce the risk of abuse of powers by (the board of) foundations.

tract (and not through accession nor the applicability of bye-laws, resolutions and articles as is the case for regulatees of the other legal persons).⁷⁵

To sum up, internal rules of a legal person, such as the legal person's articles, bye-laws and resolutions constitute an internal order *sui generis* and cannot be qualified as contractual relations, excluding the applicability of general contract law. The bases on which this internal law of the legal person should be evaluated is company law as stipulated in Book 2 of the Civil Code. As a result, the incompleteness, incorrectness or illegality of the internal rules of a legal person cannot be contested through contractual breach. To invoke the illegality of the internal law of the legal person, regulatees should resort to the instruments of avoidance (as stipulated in Book 2 of the Civil Code) or tort.

Certain parts of the internal order of legal persons are qualified as contractual relationships, this is true for the third party clauses concluded by the board of an association for its members (invoking the applicability of Articles 253 and following Book 6), accession to foundations by its participants and associates (invoking the applicability of Articles 231 and following Book 6 on the acceptance of general terms and conditions) and the acceptance by regulatees of codes drafted by civil law companies and foundations as well as contracts drafted by companies enacting the applicability of general contract rules.⁷⁶

The liability arising from private regulation of a legal person, be they based on contractual relations or not, will be addressed in the third part of this chapter.

Regulatory scope of GALA bodies

GALA bodies can only engage in regulatory or supervisory activities once they have been explicitly authorised to do so by means of delegation (see I.1.2 for more information on delegation). Once they have this power a unifying characteristic is that public supervision or regulation is one-sided and does not require the prior consent of the regulatees. That being said there is of course a lot of variety in the regulatory scope of the different regulatory bodies, as will be explained below, focussing on the regulatory power to set standards.

B-type self-regulatory bodies

A first question arising regarding b-type bodies enacting regulations or codes would be whether they are classified as public or private. The plain answer is that this depends on whether a public law power to adopt the regulation or code has been delegated to this body. Real rule-making powers which go further than setting technical standards are usually only delegated to hard core public bodies (and IAAs even only in specific circumstances). Therefore, if a private regulator adopts a code that is binding on its members or affiliates, this will most likely be done on a private law basis. However, and this complicates things, sometimes it is foreseen in a statute that a hard core public body or an Article 134 body needs to approve of internal codes or regulations.

⁷⁵ Eijlander (1994), p. 15, see I.2.1.

⁷⁶ The regulatory relationship can be qualified as contractual if and when codes and contracts drafted by the regulators are not incorporated in the bye-laws of the association, foundations or companies. If the codes are incorporated in bye-laws the regulatory relationship is not contractual because the general rules on the internal law of the foundations come into play.

An example of the latter is a case brought before the Administrative Law Division of the Council of State (19 November 2003, *AB* 2004/49).

Sports specialism case: A b-type public body refused to recognise sports medical science as an official medical specialism. The Act on Professionals in the Individual Healthcare (*Wet BIG*) stipulates that one has to be registered as a medical professional before one can use the qualifications of doctor, dentist, nurse etc. Article 14 *Wet BIG* allows the Minister of healthcare to make use of self-regulatory bodies for norm-setting and decision-making on individual registrations. The Royal Dutch Medical Association (*KNMG*), an IAA, has been designed to be the relevant self-regulatory body. The *KNMG* norms have to be approved by the Minister. In this case a problem with the determination of a norm by an organ of the *KNMG* arose. This organ, the College for Medical Specialisms (*CCMS*), had refused to amend the Regulation on Medical Specialism so that sports medical science could be included. The Minister had granted his approval of this refusal. The question whether the refusal by the *CCMS* constitutes a public law act was crucial for the GALA judicial protection regime to apply. The Administrative Law Division of the Council of State ruled that the Regulation concerned was of a private law nature. However the Minister's approval attaches public law consequences to the ambit of the regulation creating a power under public law for the *CCMS* (formerly a private law body, nowadays an independent administrative authority *ZBO*). If and when the Minister applies the authority attributed to him by Article 14 of the Act on Professionals in the Individual Healthcare to attach public law consequences to the decisions of the *CCMS*, a power under public law is created for the *CCMS*.

This possibility to attach public consequences to the private regulation of the *CCMS* was provided for in the Act, because otherwise the norms set by the *CCMS* defining what is and what isn't a medical specialism could not be declared generally binding. By using this type of instrument (ex post attachment of public consequences) the legislator makes use of the private expertise in the sector while keeping the possibility to introduce public elements to (otherwise purely) private regulation. Therefore in this case, the plaintiff could apply for judicial review of the refusal with an administrative judge under the GALA regime.

Another example of how a public law status is rather easily spread to activities of b-type bodies can be found in the sector of plants and seeds (Decision of the Administrative Law Division (of the Council of State) of 24 December 2003, *JB* 2004/82).

Plants and seeds case: Self-regulation had existed for a long time in this sector, and has to some extent been recognised ex post by the Statute on Seeds and Plants (*ZPW*). Article 91 of this statute stipulates that the government, by means of a General Regulation (*AMvB*) can appoint a body for quality control and that without affiliation with this body no one will be allowed to exploit seeds and plants commercially. A General Regulation is a form of delegated legislation; the government can promulgate it on its own accord, that is to say without involving Parliament. This General Regulation has indeed been promulgated and the Foundation Dutch General Quality Agency Horticulture (*Stichting Naktuinbouw*), which is both an *RWT* and an IAA, has been designated. It has the power to set (mainly technical) standards. There is no doubt that this is a public law power, but the case centres around the question whether the contribution fee all members have to pay to the foundation are of a public or a private law nature. This question falls into two sub-questions: First of all, are decisions by the foundation about the contribution fee acts of public law in the meaning that GALA attaches to those words (see above). Again, this was only relevant for the type of judicial protection applicable. The foundation argues – no doubt for purposes of litigation strategy only – that these decisions are of a purely private law nature. The Administrative Law Division of the Council of State however states that the Foundation is a b-type public authority and that the fee is of a public law nature. It reaches the latter conclusion by construing the obligation to pay a fee as inherent in the affiliation obligation, which has a basis in public law.

A-type ‘self-regulatory’ bodies

Of the Article 134 bodies in the category ‘trade and industry bodies’ only some have been awarded rule-making powers but they are usually quite limited in substance. All 5 Article 134 bodies for the professions (in the category ‘other bodies’) have also been awarded rule-making powers, which are clearly public and truly regulatory in the sense that they go further than mere technical standard-setting. However their ambit is restricted to the members of these organisations (of which membership is obligatory). For instance, the *NOvA* and the *KNB* used to be associations established by lawyers and notaries in which membership was voluntarily, but they were granted public powers in 1952 respectively 1999, transforming them into *Article 134 bodies* (see II.1 for more detailed information). As a result all the (private law) professional rules that these bodies have created had to be converted into public law regulations. Several lawyer’s conduct and professional rules (formerly private regulation) have been converted into public regulation, some conduct rules are still of a private nature though. In the case of the notaries the transforming process coincided with the coming into force of the new Notaries Act and the following monitoring process (three years). All the notaries’ private law rules have been converted into public law regulation.⁷⁷

Ex-post recognition

Ex post recognized self-regulation has been seen to occur, e.g. in the case of collective labor agreements (CAO). These agreements have been declared generally binding (there is a specific statutory basis for this) after they were concluded. In the case of the registration of Internet domain names the state issued a ‘quality mark’ for the self-regulatory provisions, indicating that it approved.

In the case of quality marks the legislator has a choice: either the material norms can be transposed into legislation or the quality marks can as such be made obligatory. The organisation then loses its collective, voluntary nature and becomes mandatory. Making a quality mark obligatory comes down to awarding public law powers⁷⁸, because at that point the regulation is binding on public law grounds (e.g. the certification company *KEMA Quality BV* is considered a b-type public body for some of its activities and is mentioned on the list of IAAs⁷⁹).

The variety of regulatory bodies in The Netherlands is well illustrated by the *SKV cases*. This series of cases about a quality control body in the meat sector consists of a few rather recent cases, some of them by the Supreme Court and others judicial review cases, in which important decisions were taken on the boundaries between private and public regulation. At the same time the cases series illustrates the volatility of the case law in this area.

SKV (the Dutch abbreviation for the ‘Foundation for Quality Guarantee Veal’) is a quality control body established in 1990 by the common Veal Platform after several hormone-related scandals in the sector had been brought before court upon the request of stakeholders involved in producing veal. At the same time the foundation became imbedded in public structures because the public bodies in the sector recognised the *SKV* and its task in relation to quality control in their Quality Control Regulation 1991.

⁷⁷ GALA a-type bodies are subjected to ministerial review. Only those regulations that have been approved by the Minister (or in cases in which the *KNB* successfully contested the non-approval of the Minister before a GALA judge) can come into force.

⁷⁸ Peters (1994), p. 145.

⁷⁹ <http://www.zboregister.nl>.

Among the foundational goals of *SKV* is 'to promote the production of veal in conformity with the quality legislation/regulations in force'. One of the ways in which *SKV* tries to achieve this goal is by carrying out tasks commanded by the Product Boards for Cattle and Meat. Supervisory tasks include executing controls in order to monitor compliance with the *PBO* regulation (which by nature is public). Separately, the *SKV* carries out controls on the basis of its own private regulations, in the Netherlands but also abroad.

The governance of *SKV* has the following structure: the articles of foundation of *SKV* and the underlying regulations have been approved by the boards of both Product boards, which are also represented in the board of *SKV*. Although *SKV* is said to be privately financed, a close reading of the case law shows that the foundation received large subsidies from the Product Boards and the Agriculture Ministry. The *RVV*, a hard core public body (a-type) which is part of the Agriculture Ministry, carries out 'conformity audits' of the activities of *SKV*. There is no obligation for industry parties to be affiliated with *SKV*. This construction, in which a self-regulatory body is engaged in supervision, is often referred to as 'self-monitoring'.

The first *SKV* case¹, illustrating the path of official delegation, concerns the question whether *employees* of *SKV* can act as supervisors/inspectors in the sense of the GALA. An administrative court of appeal (*CBB*) declared that the law did not prohibit that persons employed by private law bodies were awarded *supervisory powers*. The decision also reminds us of the limits to this practice decided in earlier case law: *regulatory* power cannot be delegated to a private law body without any statutory basis explicitly authorising this. Also a private law body cannot operate a complete enforcement system of sanctions, when there already is a public law (criminal law) sanction in existence. Of interest is the remark in the legislative history of the GALA that although there are no legal objections to bestow enforcement powers on private bodies, private supervision is less suitable when the legal provisions to be enforced are of greater societal importance.

Whereas the first *SKV* case was about the kind of powers employees can be awarded, a series of three Supreme Court cases on *SKV*¹, concern the status of the *SKV* enforcement methods. Although the facts are slightly different, the thrust of the cases is similar. They deal with the question how to legally qualify a private body which factually *enforces* public law regulations or statutes, without explicit delegation having taken place. If the latter had been the case, the conclusion that this private body is a b-type body would be drawn easily by any court. But since the case law on 'extra-statutory powers' is so specific and controversial, things become a bit blurred when a body seems to base its enforcement powers on private law.

In the 1997 case, which will be examined here in more detail than the other two, *SKV* had ordered one of its affiliated farmers to destroy all his 228 calves at his own expenses and to pay a fine because 2 of the calves had been found to have a prohibited growing hormone in their blood. The *SKV* Foundation was also asking the lower civil court to grant an injunction prohibiting the breach of the regulations on growing hormones. The Supreme Court upholds the decision of the lower court that these sanctions aimed at enforcing provisions of public law instead of enforcing internal rules (as the *SKV* Foundation had claimed). (Public) Delegation by the board of a *PBO* to another organ of the *PBO* is prohibited. In this case no formal delegation has taken place, but the exercise of the tasks assigned to *SKV* involves powers belonging to the *PBO*. Even if *SKV* possesses these powers (for a good part) also on the basis of its private law sanctions regulation, this amounts to an illegal use of private law. The *SKV* can *de facto* be qualified as an extension of a public body, namely the Product Boards, which according to the court go out of their way to feed the impression that *SKV* has a strong rooting in public structures and that have representatives on the *SKV* board. Therefore the reasoning that the association/affiliation contract and the agreements flowing from it are of a purely private law nature does not hold. Since *SKV de facto* belongs to a public law body, other means of enforcement, based on public law, would have been open to the *SKV* foundation. Therefore, in this case, to use private law enforcement mechanisms constitutes an illegality and the lower court was right to refuse the injunction.

Since one conclusion to be drawn from the case above was that it is unlawful for the contract between *SKV* and the affiliate to contain a provision that it is prohibited to act in breach of the public law rules, *SKV* decided to enact a more ‘private law flavoured’ formulation in its internal regulation. Therefore the novelty of the 2002 case was that now the *SKV* regulation itself, instead of the public law regulation by the Product Board stated that veal calves may not be produced without a quality certificate. However this does not make a difference to the Supreme Court.

The 1997 *SKV* case does not state explicitly that *SKV* is a GALA public body (this case was decided within the private law court system and GALA issues did not arise), but to many observers it seemed clear that for the purpose of future litigation *SKV* would have to be considered a b-type body, or perhaps even an a-type if one weighs the *de facto* ties with the Product Board very heavily, and probably also an IAA. However, and this shows the lack of predictability of the case law on b-type bodies, the administrative law division of the district court of Leeuwarden decided otherwise on 28 August 2001 when an owner of calves who had been fined by *SKV* because prohibited hormones had been found in the blood of his calves applied for judicial review. The court explicitly stated that the mere fact that the *SKV* has been considered a *de facto* extension of a Product Board does not mean that it is a public body in the sense of GALA.¹ The relevant criteria here are whether public law powers have been awarded and as far as the sanctions at stake here are concerned, this has not taken place, for *SKV* derives all powers used from private law. The administrative court then goes on to declare that it does not have jurisdiction in this case. To what extent this outcome is due to the specific circumstances of the case and the concrete sanction at hand, does not become clear. It seems though that foundations like *SKV* that are self-regulatory on the one hand but part of a public institutional chain on the other, have a choice to make: either they embrace their public affiliation and opt for the IAA status¹ or they cut their public law ties as much as possible and try to steer clear of GALA. That the latter way is still an option becomes apparent from the *SKV* saga, but it is also clear that this is a road full of hurdles and uncertainties.

I.2.3 Concluding remarks/summary

The starting point of this part has been that self-regulatory bodies and rules are based in private law, because regulatees commit to them on a voluntary basis. This regulatory relationship is either *sui generis* or has a contractual basis. The structure of private self-regulatory bodies takes three forms, the bodies are either associations, foundations or –in a very few cases – civil law companies. It seems like the association structure is used in the traditional sectors of self-regulation. This democratic legal form enhances the possibility to organise and self-regulate oneself, but poses a free-rider problem. The regulator has in the past solved this free-rider problem by imposing the transformation of private associations into public bodies by nature and form (Dutch notaries and lawyers cases see II.1). In the case of foundations however the regulator has not been seen to impose such a far-reaching public intervention. The legal form of foundation is at hand when one wants to enhance cooperation in a sector without wanting to alter the organisational structure of the already existing actors in the field. This legal form is also common for supervisory authorities. The use of the company model as a legal form for self-regulatory bodies is somewhat of an oddity in Dutch law; this model can only be found in sectors in which financial participation is a necessity.

The pure private and voluntary nature of private regulation is only one side of the story. As observed the legislator has been seen to attribute public authorities and public tasks to private bodies or has transformed private self-regulatory bodies into pure public self-regulatory bodies altogether. Judges have also broadened the scope of pure private regulation so that – in specific circumstances – it can be binding on a group of regulatees wider than just the members. When private regulation admittedly has a wider ambit, courts have to make the choice: they either stick with the ‘private autonomy’, voluntary adherence-type reasoning, or they

completely squeeze everything into the public law straightjacket. The *SKV* cases however show that it is a fine line to be walked and different courts may go in different directions in different circumstances. This is facilitated by the fact that the GALA b-status is not absolute but relative to the kind of activity the private law body is actually engaged in. Because of this relative nature of the b-status a body that enacts a code on the basis of private law but that is seen as a b-type public body for other purposes does in principle not need to comply with the general principles of proper administration.

Again, there are many open questions⁸⁰, for example about the legal status of norms issued by the Netherlands Standardisation Institute (*Nederlands Normalisatie-instituut, NEN*) when statutes refer to those. Does this confer the status of ‘generally binding provisions’⁸¹ on these self-regulatory norms?⁸² Just like in the *SKV* cases, inevitable friction over whether the adherence is still voluntary and how much that should matter for the legal qualification of the body and its activities arises here.

Private regulators engaged in regulation in the public interest can be treated by the courts in two ways: either it is assumed that the body is deriving these powers from private law (for instance because the regulatees are members of the body) but happens to have a public law inspired goal in their articles of association or the court chooses to treat it as a case of *de facto* delegation. Note however the difference between the *SKV* cases and the case on plants and seeds quality control. In the former the word ‘delegation’ was avoided which led to a refusal to qualify *SKV* as a b-type public body in a later case; in the latter the judge quite eagerly granted public law status.

An important particularity of the Dutch institutional landscape of self-regulation is the phenomenon of the Article 134 bodies as we have called them (Public bodies for Business and Profession). Many of these bodies have existed for many years and used to be private legal persons. Nowadays they are public bodies, GALA a-type even, because their legal personality is based on public law, but the self-regulatory element of regulation by and for members only is retained.

I.3 The liability of self-regulatory bodies

In this section we will address the issue of liability for regulation of and supervision by self-regulatory bodies. We will illustrate the liability for regulation and supervision separately because in the Netherlands the task of supervision is usually seen as separate from the task of regulation (also because the overarching concept of regulation is alien to the Dutch legal system⁸³).

When discussing the Dutch liability regime we will distinguish between the regime applicable for pure private self-regulatory bodies and public self-regulatory bodies. Distinction will also be made between standing and remedies of regulatees on the one hand and affected third parties on the other. We will illustrate both the contractual and the non-contractual liability regimes. In doing so we will address the models of regulatory relationship and governance of the different legal persons (see I.2.2).

⁸⁰ Eijlander, van Gestel and Gilhuis (2000), p. 76.

⁸¹ *Algemeen verbindende voorschriften (avv)*, an expression also used in the GALA. These norms (laws in the material sense of the word) are immune to review by administrative courts. An action before a civil court to get an *avv* quashed is still an option however.

⁸² See Elferink (1998).

⁸³ Meuwese (2004).

Before we engage in the liability of regulatory and supervisory bodies a short outline of the basic principles of Dutch liability law is provided.

Contractual liability⁸⁴ is invoked if one of the parties fails to perform (a non-, late or inferior performance) according to its contractual obligation. According to Article 74 Book 6 of the Civil Code the compensation of damages can result in a claim of performance (if possible), alternative compensation (when duties to perform are waived by the opposing party) or additional damages (pecuniary).⁸⁵ If the contractual relationship can be qualified as a bilateral juridical act, non-performance also gives the party not being in the default the right to (partly or wholly) set aside the contract (Article 265 Book 6 of the Civil Code).

If the civil agreement (contract or internal rule of legal person) is illegal it can be annulled. In Dutch law two criteria are set for avoidance (Article 40 and 41 Book 3 of the Civil Code). Juridical acts conflicting – by content or necessary implications – with public morals or public order are void. Juridical acts in violation of mandatory legal provisions can be nullified.⁸⁶ Avoidance does not constitute a right to the compensation of damages, since the aim of avoidance is to declare the civil agreement null. Parties can however start tort proceedings to compensate the damage suffered. Moreover payments (sum of money or transfer of goods) made, have to be restituted because these payments were not due (*‘onverschuldigde betaling’* Article 203 Book 6 Civil Code). Special avoidance rules concerning the internal law of legal persons are incorporated in Book 2 of the Civil Code as will be illustrated when addressing the liability for private regulation.⁸⁷

The law of torts (Article 162 Book 6 Civil Code) applies to both private and public bodies. Tort is a *breach of right* (a violation of a subjective right) and an *act* or *omission* violating a statutory duty or a rule of unwritten law pertaining to proper social conduct (often referred to as the ‘general duty of care’). Liability arises if an unlawful act can be imputed to its author as a result of the author’s fault or a cause for which he is answerable according to the law or the generally accepted view. There has to be causality between the damage suffered and the tortuous act or omission. The same general tort rules apply for both public and private bodies, while extra norms to assess the liability of public bodies have been developed in case law. These criteria are referred to as the ‘governmental tort doctrine’ (*‘onrechtmatige overheidsdaad’*⁸⁸) whereas the regime applicable to private law entities is referred to simply as ‘tort’ or ‘private law tort’ (*‘onrechtmatige daad’*). Remedies include the compensation of damages (pecuniary and non-pecuniary damages)⁸⁹ or another form of compensation stipulated by the

⁸⁴ Both *public* and *private* bodies can engage in civil agreements, they can enact contracts and acquire registered property.

⁸⁵ Loss, loss of profits and reasonable expenses incurred to limit or prevent damage can be qualified as pecuniary damage (Article 96 Book 6 Cc).

Damages can be only compensated if the debtor is in default after not having performed before the date stipulated in the default notice (if it is clear that performance is not possible a default notice is not necessary).

⁸⁶ Void juridical acts are considered void from the beginning. Juridical acts that can be nullified have legal force until annulled by an extrajudicial or judicial decision. Annulment works retrospectively.

⁸⁷ Of great importance are Articles 14 and 15 Book 2 Cc dealing with the avoidance of resolutions.

⁸⁸ Introducing the applicability of general principles of good administration. Furthermore acts of public bodies and public officials are considered as acts of the government itself.

⁸⁹ In the case of non-pecuniary damage resulting from physical injury, infringement of privacy or injury to honor or reputation (according to Article 106 Book 6 Cc) non-economic damages can be claimed. Loss, loss of profits and reasonable expenses incurred to limit or prevent damage can be qualified as pecuniary damage (Article 96 Book 6 Cc). Both pecuniary and non-pecuniary damages have to be compensated with money unless the court stipulates another form of compensation (Article 103 Book 6 Cc).

civil court (Article 103 Book 6 Civil Code). The injured party can also claim injunctive relief (a prohibition or a court order being either a declaratory judgment or a rectification; Articles 167 and 168 Book 6 Civil Code).⁹⁰

The liability regime solely applicable to public bodies is the GALA liability regime (judicial review). This regime applies when a concrete public law act (a ‘decision’ *besluit*) has been issued by an administrative authority (GALA body). Addressees of the decision and interested parties can put these decisions before an administrative court for judicial review and ask for their quashing. Damage resulting from a decision of a public body should usually be brought before an administrative court (except in cases where the contested decision contains a ruling on the damages to be awarded and in a very limited number of other cases).⁹¹ When performing judicial review the administrative court (in lower instances often the administrative law division of a regular court) has to decide on the legality of the decision. Grounds for quashing the decision are violation of the law or a breach of principles of good administration. If the court quashes the decision, it is considered unlawful and can enact liability of the public body. The judge can decide on the compensation of damages. If he does not grant compensation for damages parties can – with a GALA judgment stating the unlawfulness of the decision in their hands – ask the civil judge for the reparation of damages through tort proceedings.

It should also be mentioned that the GALA regime introduces ministerial review for regulation enacted by administrative authorities GALA a- and b-type. Chapter 10 of the GALA stipulates the rules for ministerial review. Regulations issued by public bodies can be subjected to the approval of the Minister responsible. The decision of the Minister not to approve of the regulation can be brought before an administrative court by the administrative authorities that have enacted the regulation. The final decision concerning the coming into force of the regulation rests within the hands of the administrative judge. This instrument has extensively been used by the Minister of Justice in transforming private regulation enacted by the Notaries’ Professional Association into public regulation. The Notaries’ Professional Association has been awarded a public status in 1999 and has been converted from a private association into a public body, the Notaries’ Professional Organisation, subsequently its regulation had to be altered from private into public. The ministerial review regime was also invoked when the Dutch National Bar (an association itself) decided to modify its regulation to introduce the (formerly prohibited) ‘no cure no pay’ remuneration clause.⁹²

⁹⁰ Note that a claim for injunction is only possible in tort cases and not in general contractual liability cases. *Legi specialis* can however impose injunctive relief as a form of compensation (e.g. the authority of the court of appeal of the Hague to prohibit the use of the general terms and conditions, prohibit the stimulation of the use of such terms and order the publication of the judgment stating the nullity of such terms as stipulated in Article 241 Book 6).

⁹¹ Judicial review by an administrative court prevails if both private law and public law provisions are available.

⁹² *Kamerstukken II* (Parliamentary Documents) 2004-2005, 29 800 VI and the concept disapproval as rendered to the Council of the State concerning the altered Practice Rules Regulation of the *NOvA* of the 25th of March 2005. The Minister of Justice in the end quashed the regulation. The ministerial review for lawyer’s regulation is of a special nature. Article 30 of the Act on Advocacy (*a lex specialis* vis-à-vis the GALA) stipulates a repressive review mechanism. The Minister can annul or suspend decisions (including regulation) of the bodies and officials of the Bar for non-conformity with the public interest.

I.3.1 Liability for regulation

Regulatees

When assessing the criteria for liability resulting from unlawful or inadequate regulation distinction should be made between public and private regulation, because each type of regulation enacts different judicial proceedings.

Public regulation

Public regulation referred to as ‘regulation’ or ‘decrees’ (*verordeningen*) can be enacted by GALA a- or b-type bodies with rule-making powers. If a regulatee wants to challenge a concrete decision of a GALA body based on public regulation, the regulatee can request judicial review of the decision by an administrative judge (see comments on GALA liability regime above). The administrative judge is only allowed to assess the unlawfulness of this concrete decision and cannot declare the regulation null and void. If the unlawfulness of the decision is determined the judge can decide on the reparation of the damages suffered by the regulatee. If the judge does not grant damage compensation the regulatee can apply for the compensation of damages through tort procedures at a civil court.

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

The only way for regulatees to contest public regulation, in the sense of general rules, is through tort proceedings. The civil law judge will decide on the lawfulness of the regulation assessing the conformity with statutory legislation (and other judicial norms of a higher hierarchical value, but not constitutional provisions see I.1.2) or general principles of good administration. In the rare cases in which the regulation is found to be unlawful it can be annulled and this can give rise to governmental liability and compensation for damages suffered by citizens.⁹³ Civil law judges can also prohibit or prescribe administrative authorities to apply norms stipulated by the contested regulation.⁹⁴ The competence of the court to ‘prohibit’ or to ‘dictate’ the coming into force of regulations is however not widely accepted.⁹⁵

Private regulation

As explained in chapter I.2.2 the regulatory scope of private regulatory bodies with their regulatees is either contractual (general contract law, third party clauses or general terms and con-

⁹³ Van Maanen (2005), p. 132.

⁹⁴ Supreme Court judgment 11 December 1987, *NJ* 1990,73. In this case the standard laid down in the ‘Cable Decree’ (*Kabelverordening*) was contested. This norm was not in accordance with Article 7 of the Dutch Constitution. The Supreme Court prohibited the public body involved to impose the norm set in the Cable Decree.

⁹⁵ The only case in which a judge has commanded the enactment of a regulation is the court of appeal of The Hague judgment of 10 September 1987 (*KG* 1988, 10). The judgment still stands because the case was not contested before the Supreme Court, but legal scholars debate on the question whether such a court judgment is in conformity with Dutch liability law and public law. Because the case was not brought before the Supreme Court it is not clear what the standpoint of the Supreme Court is either (in this case the court of appeal ordered the ‘Central Authority for the Tariffs in the Health Sector’ (*COTG: Centraal Orgaan Tarieven Gezondheidszorg*) to render a decision).

ditions) or based on the internal law of legal persons (the bye-laws, articles and decisions in force).

Internal regulation

The regime in force to contest the inadequacy of the internal law of legal persons is stipulated in Book 2 of the Civil Code (company law).

Bye-laws may not breach the articles of the legal person, nor may matters that should be addressed in the articles of the legal person be addressed in bye-laws. Bye-laws should be in conformity with the law and the articles of the legal person, otherwise they are not binding.⁹⁶ Because the bye-laws are non-binding their illegality needs not to be invoked. If a regulatee suffers damages because of a non-binding by-law it can contest its non-binding nature when applying for the compensation of damages in tort (associations: membership is not a contractual relationship) or contractual (foundations and companies) proceedings.

Resolutions of the legal persons conflicting with the law and the articles of the legal person are void. Generally binding resolutions based on a non-binding by-law (see above when discussing bye-laws) are void as well (Article 14 Book 2 Civil Code). Resolutions that are not generally binding as well as generally binding resolutions not concluded in a by-law can be nullified if they contradict the rules on reasonableness and fairness or they constitute a breach of rules of the legal person (Article 15 paragraph 1 sub c Book 2 of the Civil Code). Interested parties, members of the board as well as the legal person itself (legal personality includes the capacity of litigating party in judicial proceedings) can ask a civil indictment to declare the resolution void.⁹⁷

Articles of legal persons should be in conformity with the law. If the objects laid down in the articles breach the public order, the dissolution of the legal person can be requested. The legal person gets the opportunity to alter its articles in order for the articles to be in conformity with the law. The dissolution (*winding up*) may be ordered upon application of any interested party or of the public prosecution service (Article 21 sub 3 Book 2 Civil Code).

Contract

The contractual relationship between legal persons and regulatees can take three forms as we observed earlier when addressing the regulatory scope of private regulators.

General contract rules apply to the acceptance of regulatees of codes drafted by civil companies and foundations.⁹⁸ Interested parties (both parties to the contract and persons who have an interest in the annulment of the contract) can either send the counterparty a declaration stating that the contract should be void or can start civil proceedings for the annulment of the agreement (the judge declares the contract void).⁹⁹ Norms for avoidance are set in the Articles 40 and 41 Book 3 of the Civil Code. Acts conflicting – by content or necessary implications – with public morals or public order are void and acts that are not in conformity with mandatory legislation can be nullified.

⁹⁶ Avoidance does not constitute a right to compensation of damages. See general comments on avoidance.

⁹⁷ Articles 14 and 15 Book 2 Cc.

⁹⁸ If and when such codes are not incorporated in the associations bye-laws (then the general rules on the internal law of the foundations come into play).

⁹⁹ Articles 50 and 51 Book 2 Cc.

Third party clauses concluded by the board of an association for its members are governed by Articles 253 and following Book 6 Civil Code in conjunction with Article 46 Book 2 of the Civil Code. Third party clauses should be beneficial for the third party and are only enforceable if the third party accepts the clause; a member cannot be forced to accept the clause.¹⁰⁰

The accession to a foundation by regulatees and the acceptance of the internal rules of the foundation can be qualified as the acceptance of general terms and conditions. The regime of section 6.5.3 Civil Code protects persons (mainly consumers) against the applicability of general terms and conditions because of their restricted knowledge of these terms and their inability to influence the content of these terms. Section 6.5.3 Civil Code stipulates the consultation of interested parties on the content of the terms (Article 240), provide legal security concerning the applicability (Article 232) and the permissible content (Article 233) of the terms. General terms and conditions can be nullified if they can be considered unreasonably onerous, as well as in cases in which the user (the foundation) has not given the other party (the regulatee) a fair opportunity to take note of the general terms and conditions (Article 233). Articles 236 and 237 contain lists of clauses that are either unreasonably onerous by nature or that are assumed to be unreasonably onerous in practice. Both articles are only applicable in consumer cases¹⁰¹, but the fact that the clause is mentioned in one of the two lists will play a part in assessing the ‘unreasonable onerous’ nature of the clause invoked.¹⁰² The general rules on avoidance – as explained in the previous section – apply, that is to say, interested parties can either send the counterparty a declaration stating that the contract should be void or can start civil proceedings for the annulment of the agreement. Apart from the general remedies in avoidance cases, in cases concerning general terms and conditions the court of appeal of The Hague can also stipulate injunctive relief. The court can prohibit the use of the clause, prohibit the stimulation of the use of the clause and order the publication of the judgment stating the nullity of the clause (Article 241 Book 6).

Section 6.5.3 Civil Code contains provisions which are a *lex specialis* of the general rules on reasonableness and fairness, so if for whatever reason Article 233 cannot be invoked one can resort to the general rules on equity (Articles 2 and 248 Book 6), stating that the general terms are not answerable to reasonableness and fairness and as such is not applicable between parties.

Vranken (2005) sees the general terms and conditions as a hybrid between old and new instruments of private regulation in the Civil Code. Hondius (2003) typifies consumers’ general terms and conditions as self-regulation. Vranken feels that these type of rules will gain importance in the future, because they encompass the best of both worlds. Not only are general terms and conditions set up by the experts (the civic society) they also have legal force in practice. Vranken goes on arguing that their societal importance cannot be underestimated because both in number and in quality they are of the most important private regulation. In The Netherlands the coming into force of general terms and conditions are institutionalise within the Socio-Economic Council (*Sociaal Economische Raad, SER*), guaranteeing the representation of consumers and supervision by the Council.

¹⁰⁰ Stille (1998), Article 2:46, note 2.

¹⁰¹ Hondius (2003), p. 2.

¹⁰² Valk (2003), Article 6: 233 BW, note 2.

Tort

In those cases in which the regulatory relationship between parties is not contractual (e.g. membership) and if a regulatee wants to invoke the unlawfulness of private regulation, tort proceedings can be enacted. Regulatees can only resort to tort proceedings if they have suffered damages, if there is causality between the damage suffered and the unlawful regulation and if the unlawfulness of the regulation can be imputed to the legal person. Because most private self-regulatory bodies have internal dispute resolution systems, tort procedures will not be the first dispute settling mechanism at hand. If and when regulation has financial importance however tort proceedings have been invoked, for example in the sport sector. The civil judge has to test breach of private regulation with mandatory legislation and is held to test for expectations of parties and the applicable codes in the sector. A marginal and distant review of private regulation is at hand because of the private autonomy of private legal persons and the voluntary nature of the regulatory relationship between regulatees and the legal person. Regulatees have however been successful in invoking breach of EU law (e.g. restriction or distortion of competition).¹⁰³ Another ground that has been accepted to incur liability is the abuse of powers by the legal person. In some socio-economic fields accession to a foundation is almost a necessity, (e.g. accession to a quality test and successive certification in the *PBO* sector) making the foundation's rules extremely important for the sector, if the unlawfulness of these rules could not be invoked and assessed in depth, these legal persons would be able to acquire a semi-monopolistic status.¹⁰⁴

Third parties

Public regulation

Third parties (that cannot be considered as interested parties¹⁰⁵) are not competent to start proceedings before the administrative judge, because the decision of the administrative body is simply either not addressed to them or they cannot be qualified as interested third parties for the GALA. Third parties that suffered damage because of a decision of an administrative authority or the enactment of a public regulation, can start tort proceedings. In contesting the unlawfulness of the decision or regulation, the regime applicable is the same as explained above when discussing the (tort) liability for public regulation. The issue of imputation and casual link between the damage suffered and the unlawful regulation will, in the cases of third parties, be addressed more capaciously, because a general principle of Dutch private law is that every person ought to repair the damage they inflict, unless societal conviction would imply otherwise. The fact that the nature of unlawful regulation contested is public, can give reason to believe that such a societal conviction is at hand. The standing of third parties in imputing the liability of public regulation will be assessed on a case to case basis.

Private regulation

Avoidance of both internal rules and private regulation based on contract can be invoked by all interested parties (not just regulatees) that have an interest in the annulment of the regula-

¹⁰³ E.g. court of appeal of Amsterdam, 1 August 1991, the case will be explained in the analysis of the sport sector.

¹⁰⁴ ECJ decision 3 February 1983, ECJ13 December 1983 and Supreme Court judgment of 28 February 1997, NJ 1999,732 and 10 December 1999, NJ 2000, 8.

¹⁰⁵ Parties that have been affected directly in their interest as a result of a decision of a public body addressed to another party. The interest should be personal, direct, to be determined objectively and substantial.

tion. For the applicable regime and the consequences of avoidance we refer to the explanation provided above when discussing the liability of private regulation.

The unlawfulness of private regulation can also be contested at a civil court through tort proceedings. Third parties must prove the causality between the private regulation and the damage suffered. An extra complication is that the regulatory scope of private regulation only extends to the parties that voluntarily commit to them. Third parties must prove that however not being in a regulatory relationship with the legal person the regulation of that person has a great (financial) impact on them. In situations in which there is a dominant private regulatory body in the sector, abuse of powers of that body through regulation that causes damage to third parties can be invoked. The effects of self-regulatory norms on third parties have been addressed by civil law courts in cases in which a self-regulatory code is dominant in the sector and thus can be qualified as shaping the general duty of care that actors in the sector can expect from one another, extending the scope of the self-regulatory norm to actors in the sector that are not parties to the code. Two examples of the latter can be found in case law dealing with the norms applicable in the medical sector. These cases were addressed in § I.2.2.

I.3.2 Liability for supervision

The Dutch term for supervision, *toezicht*, encompasses a wide variety of enforcement, control and monitoring measures such as *education*¹⁰⁶, *assessment and supervision on assessment*¹⁰⁷, *control and tests*¹⁰⁸, *examination* and subsequent *certification, classification* or the *issuance of diplomas and licenses*, as well as *registration, financial support* and *financial supervision* and last but (certainly for our project) not least *supervision of regulation*.¹⁰⁹

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

Regulatees

Public supervision

The assessment on the liability for public supervisory bodies under the GALA regime depends on the question whether there is a concrete decision of the public supervisory body. If there is a decision of an administrative authority the GALA liability regime as explained above is applicable.

When assessing the GALA liability of supervisory bodies it is good to mention that a decision not to enforce (or a policy on non-enforcement of certain sectors) or failure to take a decision upon application for one can also be qualified as a decision of a public body in the sense of the GALA, implying the applicability of the GALA judicial regime. These types of decisions

¹⁰⁶ E.g. the Foundation on the Bread and Pastry Education.

¹⁰⁷ E.g. the Dutch Assessment Institute that evaluates the assessment of businesses that have implemented company control mechanisms

¹⁰⁸ E.g. *Keboma* (control of mobile cranes and tower cranes).

¹⁰⁹ E.g. Business Fund for the Media (*Bedrijfsfonds voor de Pers*) and the Commissariat for the Media (*Commissariaat voor de Media*).

not to enforce have lead to extensive case law. Enforcement is seen is an obligation of the state, to which the state can make temporarily and well considered exceptions, if and when the state provides for guarantees for the infringements of the interests of third parties. If legalization of the situation is at hand, the judge will not punish the decision not to enforce, because the interest of enforcement is not so important in cases in which the supervision of the subject/sector will not be necessary in the near future (the ‘faulty behaviour’ will be legalised making enforcement unnecessary). In these cases the administrative judge weighed the interests of the parties seeking to quash the decision not to enforce and the interests of the State (Article 4 Book 3 GALA). But if the situation is urgent, the supervisory body cannot reasonably invoke its possibility to decide not to supervise/intervene. If damage is foreseeable, the supervisory organ is held (supervision becomes a duty) to intervene and prevent damage from occurring.¹¹⁰

As mentioned earlier when addressing the implications of the GALA liability regime for regulations, if regulatees fail to start GALA proceedings invoking the unlawfulness of the decision, they will not be able to start civil law proceedings. The decision of the supervisory body will be qualified as having ‘binding force’ (because it was not contested) and subsequently as ‘lawful’, ruling out the possibility to incur liability. This is what happened in the Enschede case¹¹¹. Legal scholars have much debated the issue of governmental liability for supervisory failures of public bodies with theirs hopes set on the trial case against the State in the aftermath of the Enschede firework disaster. Although in this case the court ruled that the State could not be held liable, it cannot be ruled out that public authorities (or the State) may be held liable for supervisory failure in the future, because in this case juridical technicalities prevented the appellate court to give a ruling based on the merits of the case.

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

Be the supervisory failure either insufficient or inadequate, based on tort or contractual relations, the same ground for assessing liability applies: did the supervisory body at stake breach the ‘duty of care’ it was held to? The test is based on the ideal situation and is an abstraction of the reality: how does one expect that a reasonable acting supervisory body would have acted in the situation at stake? The civil law judge is held to take the margin of discretion of public supervisory bodies into consideration. One cannot be expected to monitor everyone everywhere.¹¹² Taking the margin of discretion (usually incorporated in policy rules) into account, the civil law judge can subsequently assess whether the body failed to fulfill its duty of care. If liability is incurred the remedies will in tort cases as well as in contractual liability cases, most likely be monetary.

It is good to mention that the rules applicable for the assessment of the liability of public supervisory bodies have never been applied in case law. As mentioned before the civil court

¹¹⁰ E.g. famous case of a robbery: the police did not intervene in the robbery but was waiting to catch the robbers. The liability for the death of a victim of the robbery was attributed to the State.

¹¹¹ Court of appeal of The Hague judgment, 24/12/2003, *LJN* AO0997, 01-2529

¹¹² Hartlief (2005) and Van Rossum (2001: 80). See Supreme Court judgment 19 april 1996, *NJ* 1996 727.

could not engage in assessing the merits of the Enschede case because the case stranded on procedural aspects. The only cases in which liability for supervision was incurred are three cases dealing with monetary supervision (and not supervision of regulation).¹¹³ Liability was incurred in these three cases because the supervisory failure was apparent and possibly the fact that the damage caused was so overwhelming also played a role. The bodies involved were well-informed about the malpractices, they had authority to act against these malpractices, but failed to intervene. The compensation of damages was monetary. Legal scholars are careful in concluding from these three cases that liability for the failure of non-monetary supervision and in other circumstances could also be incurred.

Private supervision

The only way for third parties to contest supervisory failures of private supervisory bodies is to bring complaints before a civil court and incur liability based on tort (no contractual relationship). As mentioned earlier the question whether a supervisory body can be held liable for supervisory failures is evaluated on the same grounds for both public and private regulatory bodies. If the liability of a private supervisory body is invoked the applicability of public principles is excluded so the margin of discretionary powers of private supervisory bodies is narrower.

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

We do emphasize that the liability rules applicable to private supervisory bodies are of a theoretical nature, because as we have mentioned before in the Netherlands most if not all supervisory bodies are public bodies. Moreover we have not found case law dealing with the complaints of members based on the provision of Article 46 of Book 2 of the Civil Code nor on supervisory failures of private bodies (as mentioned before only two cases in Dutch history have dealt with monetary supervisory failure).

Third parties

Public supervision

Third parties that are not addressees or interested parties in the sense of the GALA, do not have standing to start proceedings before the administrative judge. Third parties are free to start civil law proceedings against supervisory failures of public bodies. The civil law judge will assess the case on the merits as explained above when dealing with public supervisory failure contested by regulatees. As is the case for liability resulting from regulatory failures the causality criteria (is the damage suffered a direct result of the supervisory failure) and the extent to which the tortious act can be imputed to the public supervisory body, will play an important part in assessing the liability of supervisory bodies for third parties.

¹¹³ *Vie d' Or* case (court of appeal of The Hague 27 May 2004, *JOR* 2004,206) and *Nusse Brink* Case (court of appeal of Amsterdam judgment 7 July 2000 *JOR* 2000, 153). In these cases the control over the financial institution was too superficial and signals from the field were ignored while control was the supervisory body's main task (Giesen 2005: 134). In the *AFM*-case (district court Amsterdam 14 September 2005, *LJN-AU2638*) the court applied a proportionality liability test.

Private supervision

The same applies for supervisory failures of private supervision authorities as explained above when illustrating the regime applicable for regulatees when discussing private supervision.

I.3.3 Concluding remarks and summary

The illegality of private and public regulation as well as private and public supervision can be invoked by regulatees and in some cases by third parties. The applicable liability regime follows the rigid public-private divide that we have drawn in section I.2. The liability of private and public regulators can be contested through GALA, avoidance or tort proceedings. Depending on the nature of the regulation at hand, one is held to invoke one of these dispute settlement mechanisms.

In private regulation cases both avoidance and injunctive relief are possibilities to contest improper regulation. According to the nature of the private regulation, be it *sui generis* (membership) or contractual (third party clause, general terms and conditions or common contracts), the procedural route to be followed is stipulated by the *legi specialis*. In Dutch civil law avoidance of regulation can be invoked by parties that have an interest in the annulment of the regulation. This is thus a broad norm covering both regulatees and third parties. This is different in tort liability cases. Because of the private autonomy of private legal persons and the voluntary nature of the enactment of private regulation, the extension of the scope of private regulation and liability for the latter has to be treated more capaciously. Dutch private law assumes that every person ought to repair its damages, unless ‘the prevailing norm in the sector’ would imply otherwise. The fact that the nature of unlawful regulation contested is public can give reason to believe that such a societal conviction is at hand. In private regulation cases such an assumption is however not likely. Standing of third parties in cases concerning private regulation thus needs to be assessed on a case to case basis.

The GALA liability regime provides for an accessible mechanism for citizens to have decisions by administrative authorities quashed. Both addressees and interested parties affected by such a decision can exert to an administrative judge. In cases in which such a decision has not been issued, regulatees and third parties can ask for the annulment of the regulation in tort proceedings before a civil law judge. Here again a more modest approach is at hand, the civil judge needs to take the public nature of the regulation into account. Furthermore issues of causality and imputation play an important part. Extensive case law however suggests that the liability of public regulation (secondary legislation) – according to which civil judges decide on the reparation of damages or prohibit and prescribe administrative authorities to apply the contested regulation – is not an oddity in Dutch law.

This is certainly not the case for case law concerning supervisory failure. Only two cases dealing with the failure of money supervision have been brought before civil courts to the date. Liability was incurred in these two cases because the supervisory failure was obvious and possibly also because the damage caused was overwhelming; the compensation of damages was monetary. The careful conclusion that public authorities (or the State) may be held liable for supervisory failure in the future seems justified however.

II Case studies of sectors

II.1 Professions

The definition of liberal professions is a sociological and not a legal one. In the sociological definition, a set of characteristics is provided for on the basis of which certain professions can be considered as liberal professions. If the CEPLIS definition and the EU professions' quality criteria are taken together¹¹⁴, the following definition of liberal professions can be deducted.

The liberal profession is conducted on an *individual and (economically) independent* base, on which the individual professionals render *intellectual services* for which they are *responsible (professional autonomy)*. The services are rendered in accordance with the professions' *particular authorities*, the *interests of the clients* involved and the *public interest* (e.g. national health, legal aid). The professional conduct is subjected to national *legislation* or *self-regulatory rules* drafted by the professions' associations that guarantee the *quality, professionalism* and the *fiduciary relationship* between the professional and its clients. The professionals are *monitored* by disciplinary proceedings and are sometimes subjected to governmental supervision. Professionals have completed an *academic education* (and in some cases an additional professional education) and are subject to *permanent education* programs.

Over the past decades professionals started to work in bureaucratic organisations (such as big multinational law firms or big hospitals), which makes the term 'liberal' (as in 'practiced *individually*') rather confusing. Sociologists have developed extra criteria that illustrate the shifts in liberal professions' organisations (the increasing *governmental* and *market influence*, the *diminishing public confidence* in professions and the *bureaucratization, commercialization, specialization* and *internationalization* of the professions), in order to refine the 'liberal professions definition'.¹¹⁵

For the purpose of this chapter we will focus on some of the liberal professions that are represented in the national Council for the Liberal Profession, an association that has shifted its object from an official governmental consultative body to an association of *undertakings* (the professional organisations of 27 liberal professions) aimed at catering for common interests of the professions.

The professions' organisations that are represented in the Council are - in the commercial services sector - those of the court ushers, accountants, tax lawyers, advocates, civil law notaries, judicial advisors, translators, PR- and communication advisors, pilots and EDP-auditors. The professional associations of (para-) medics, such as dieticians, physiotherapists, veterinarians, pharmaceuticals, speech trainers, chiropractors, exercise therapists (Cesar and Mensendieck), Medical specialists, general practitioners and obstetricians are also represented in the Council.¹¹⁶

¹¹⁴ This is the definition the Council for Liberal Professions (*Raad voor het Vrije Beroep*) uses on its webpage, www.vrijeberoepen.net.

¹¹⁵ Arts, Batenburg and Groenewegen (2001), p. 13-15.

¹¹⁶ These are the professional organisations that have been accepted in the political arena as representatives of the individual professionals. Most of these professionals are monitored by judicial disciplinary proceedings (funded by the government). Apart from these judicially monitored (judicial disciplinary proceedings), mainly (para-) medical professions are also organized in pure self-regulatory medical associations monitored by non-judicial disciplinary proceedings (e.g. the 'Dutch Institute of Psychologists' (*Nederlands Instituut van Psychologen*) and the 'Dutch Association for the Promotion of Dentistry'; the *Nederlandse Vereniging ter bevordering van de Tandheelkunde*). Kleiboer & Huls (2001), p. 107.

II.1.1 Private or public self-regulatory bodies?

As mentioned in the ‘liberal professions definition’ provided above, liberal professions can either be regulated by state legislation or by self-regulation. A combination of both governmental regulation and self-regulation is also possible.

A. Public professional organisations:

In the past, the Dutch legislator has provided a legal base for those professions that it considers of importance to monitor. Examples of Dutch legislation granting professions a legal base and judicial monopoly are, advocates (exclusivity of legal aid, although their autonomy is less present in cases brought before the subdistrict and administrative courts), notaries (the judicial monopoly to draft notarial deeds in important parts of the law of biens, commercial law and the law of persons and family) and medics (one has to be registered before one can use the qualification of (para-) medic).

Notaries and lawyers:

The Royal Dutch Notaries Profession’s Organisation (*KNB*¹¹⁷) and the Dutch Bar (*NOvA*¹¹⁸) used to be private associations with the authority to enact private regulation to which members could voluntarily commit themselves by accession of the association. To overcome the free rider problem and to enhance the importance of the public tasks that have been awarded to these legal professions (ensuring legal protection and legal certainty¹¹⁹) these professions’ organisations have been transformed from pure private associations with voluntary membership into public professional’s organisations with public regulatory powers and compulsory membership.

The status of both the *NOvA* and the *KNB* has shifted from private associations to public bodies for professions (Article 134 bodies, see table 2 in I.2.1 on different bodies) enacting the applicability of the GALA¹²⁰, its judicial and ministerial review¹²¹ as well as the applicability of principles of proper administration. The public status also granted the professional organisations the possibility to draft additional or supplementary public regulation (*verordeningen*) as well as the powers to impose levies binding on their regulatees¹²². As a result of this transformation from private into public the existing private regulation needed to be converted into public regulations¹²³. Note that the ministerial review for regulation of the Dutch Bar is re-

¹¹⁷ *Koninklijke Notariële Beroepsorganisatie*.

¹¹⁸ *Nederlandse Orde van Advocaten*.

¹¹⁹ Lawyers have been attributed the public task to ensure legal aid and legal protection while notaries have the task of enhancing legal security through the drafting of notarial deeds.

¹²⁰ The *KNB* and *NOvA* are GALA a-type, because they derive their legal personality from a public statute (the Act on Advocacy (*Advocatenwet*) and the Notaries Act; *Wet op het Notarisambt*).

¹²¹ Title 10 GALA, regulations issued by public bodies can be subjected to approval of the Minister. On the basis of ‘repressive supervision’ the Minister has the power to suspend or declare the regulation and decisions of the professions association null and void for incompatibility with the law or the general interest. For lawyer’s regulation see also Article 30 of the Act on Advocacy.

¹²² Hellingman (1993), p. 151.

¹²³ Several lawyers’ conduct and professional rules have been converted from private to public regulation, some conduct rules remain private though. In the case of Notaries’ regulation the conversion process (from private to public) coincided with the coming into force of the new Notaries act and the following monitoring process (three years). Thus all the notaries’ private law rules have been converted into public law regulation, only and insofar as the Minister of Justice gave his approval. Those rules that did not receive the approval of the Min-

pressive. The Act on Advocacy attributes the Bar to enact public regulation in the general interest in assuring a good practice of the Lawyer's profession in so far as the regulation does not obstruct competition. Public regulation can be annulled by the Minister (after the regulation comes into force) on the basis of non-conformity with the public interest. As opposed to ministerial review of regulation of the Bar, ministerial review of regulation of the *KNB* (and regulation of the Usher's Professional Organisation also an Article 134 body) is preventive; the Notaries Act (and the Ushers Act) stipulates the exact topics that can be regulated by the *KNB*. The Minister can prevent the coming into force of public regulation of the *KNB* if this regulation is not in conformity with the law or the public interest.

Although the governance structure of the *NOvA* and the *KNB* give a private feel to them (both bodies are governed by a board appointed by the general assembly of the profession's organisation), the public status of these bodies and their regulation is omnipresent.¹²⁴ One should however keep in mind that the regulation is drafted by the profession's organisation in the interests of the individual professionals and that of the profession as a whole, irrespective of the 'public' status that they have been granted.¹²⁵ Furthermore the disciplinary bodies, despite the fact that they have a judicial status, are still (partially) manned by peers.¹²⁶ This is also true for the *NOvA*, as a result of which the ECJ stated in its Wouters decision, that the *NOvA*, however vested with public duties¹²⁷, cannot be considered as fully public because the subsidiary bodies of the *NOvA* are not appointed by the State and governmental involvement is more of a formal than a practical nature.¹²⁸ Furthermore the ECJ - in the same line of reasoning - declared the *NOvA* to be an association of undertakings for the purpose of the EC Treaty.

The *NOvA* and the *KNB* are good examples of compulsory self-regulation dictated by the public legislator as an alternative for rigid and centralistic (public) legislation.¹²⁹ These legal professions have been considered gatekeepers for the Dutch government and have been imposed (together with accountants and banks) the governmental obligation - under the Act on the Report of Unusual Transactions (*MOT*¹³⁰) and Act on Identification of Persons (*WID*¹³¹) - to report financial transactions (of a certain amount) and to correctly identify their clients before rendering services.

ister (because they are not in conformity with the law or the public interest) had to be altered or abolished. The decision of the Minister could be (and has been) contested and brought before an administrative court. Thus in the end the administrative judge decides on the abolishment or approval of the Notaries' rules.

¹²⁴ In the Notaries Act the *KNB* is delegated rule-making powers for specific purposes.

¹²⁵ This status has been granted in 1999 with the coming into force of the new Notaries Act. The professional organisation was granted a public status to be able to draft public regulation (decrees) that can bind all of the members. A private character was not suitable, since only those voluntarily joining the association could be bound.

¹²⁶ Even so that notaries and even members of disciplinary bodies, complain of the dominance of the notaries members of the disciplinary bodies. Laclé, Krop & Huls (2005), p. 32.

¹²⁷ Decision and rule-making powers are granted to the *NOvA* in the Act on Advocacy.

¹²⁸ C-309/99 (Wouters c.s.), § 64.

¹²⁹ *WRR* (2004), p. 248.

¹³⁰ *Wet Melding Ongebruikelijke Transacties*.

¹³¹ *Wet Identificatie Dienstverlening*.

Accountants

The Dutch Institute of Register Accountants (*NIVRA*¹³²) and the Dutch Order of Administration Accounting Consultants (*NOVAA*¹³³), the two professional organisations for accountants, can also be qualified as public bodies for professions (Article 134 bodies) having public regulatory authorities to draft decrees.

Medics and paramedics

The certification process for medics has been uniformed and codified in the ‘Act on Professionals in the Individual Healthcare’ (*Wet BIG*). The ‘Royal Dutch Medical Association’ (*KNMG*¹³⁴), an overarching federation (association) of several professional medics’ associations, has been designated to set standards on the basis of which individual certification must take place. The *KNMG* norms have to be approved by the Minister. The decision on the admittance of individual registrations also belongs to the tasks of the *KNMG*. The *KNMG* is in existence since 1849 and has, with the attribution of public tasks in 1993, been awarded a public status. The *KNMG* is considered an independent administrative authority (IAA), an *RWT* (legal person with statutory tasks, see I.2.1) and a b-type public body when it is exercising its public norm setting duties.

The ‘College for Medical Specialisms Foundation’ (*CCMS*¹³⁵) - a sub organ of the *KNMG* - has been established to be the body registering medical specialisms. The *CCMS* is an independent administrative authority (*ZBO*).

The Act on Professionals in the Individual healthcare also stipulates the monitoring procedure of medics through judicial disciplinary proceedings and enacts the competence of the Inspection for the Health sector (*Inspectie voor de gezondheidszorg* an independent administrative supervisory body).

B. Private professional organisations and public legislation:

Medics and paramedics

Medics are organized in different associations and foundations specialized per medical profession.

Apart from the (public) judicial control mechanism and the certification mechanism introduced by the Act on Professionals in the Individual Healthcare, several medics’ associations have private enforcement and monitoring mechanisms mainly non-judicial disciplinary proceedings and peer review. Because the various medics’ associations have not been awarded a public status, their ambit (organisational and governance structure as well as regulation) remains private.

C. Pure private professional organisations:

Professional associations of professions that are not regulated by a statute can be qualified as purely private. These bodies have been established by peers wanting to professionalize their organisation and aiming at drafting common norms to enhance the quality of the profession.

¹³² *Nederlands instituut van registeraccountants.*

¹³³ *Nederlandse orde van accountants-administratieconsulenten.*

¹³⁴ *Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst.*

¹³⁵ *Centraal College Medische Specialismen.*

Examples are the professional organisations of PR - and communication advisors, and those of pilots and EDP auditors.

II.1.2 Standard-setting

The nature of deontological rules is aimed at protecting the status of the profession as a whole in securing that all individual professionals act in accordance with that which behoves a proper professional. As each group of professionals has developed its rules separately and since these rules have been interpreted in extensive case law (disciplinary proceedings) a uniform code of conduct for all professions is not in existence. However a rough typology can be made of different type of rules.

Figure 2: typology of professional rules¹³⁶

rules concerning the organisation of the profession : rules dictating the supervision and rule-making powers of the professions' organisation and other supervisory bodies
rules concerning the authorities of professionals (professional monopoly) : the exclusive rights of professions (such as the exclusivity on (certain areas of) legal aid for lawyers and the criteria of the Act on Professionals in the Individual Healthcare to be appointed as (Para)medics)
rules concerning the regulation of entry : quantitative and qualitative restrictions for entry to the profession (e.g. <i>numerus clausus</i> , university degree, apprenticeship and additional professional education)
rules concerning the regulation of conduct : rules regulating the conduct of individual professionals, such as: <ul style="list-style-type: none"> - regulation of fees - regulation of publicity - regulation on cooperation of professionals - regulation of client-professional relationship (e.g. impartiality, - factual and financial - independence and secrecy rules) - regulation of professional conduct vis-à-vis colleagues - regulation of the services market (e.g. consumers entry for professional services and preclusion of abuse by criminal organisations)

In each professional statute of the different professions one finds these categories of rules, although the specific conduct rules vary from one profession to the other. Some professions have several statutes (e.g. the regulation of civil law notaries includes professional conduct rules, and other special decrees on financial administration, legal education, multidisciplinary practice etc.) others have just one principle based document, as a result of which conduct rules of some associations are quite regulated in detail (e.g. statutes of physician stipulating process rules) whilst others are broad and vague.

¹³⁶ This typology was used in the Law and Economics analysis of regulation of professions (attorneys and physicians) in different countries. Faure, Finsinger, Siegers & Van den Bergh (1993).

According to the private or public law status of the profession's organisation and the way in which conduct rules are drafted (statutes or principle based), the legal status of professional regulation can range from public decrees¹³⁷ to private regulation concluded in the organisation's¹³⁸ internal law (bye-laws, articles and decisions of the board or the organisation's officials see I.2.2).

II.1.3 Enforcement and supervision

The professions have traditionally been monitored by disciplinary proceedings (peers monitoring peers). The enforcement of professional rules has always been monitored by bodies of the organisations or the disciplinary bodies themselves. Because of the commercialization of several professions, recent scandals¹³⁹ and the overall diminishing public confidence in the self-steering capacities of the professions, several new forms of supervision, such as complaint procedures, certification, peer review and audits, have entered the stage. Growing governmental supervision, such as the transformation of non-judicial disciplinary proceedings into judicial disciplinary proceedings¹⁴⁰ and the appointment of independent public supervision authorities, is also a noticeable trend.

This development towards more governmental control is even more striking in those cases in which the associations have been granted a public status, because this subsumes the introduction of the GALA liability regime (and even the competence of the Ombudsman) for sectors for which the regime was not initially drafted (e.g. notaries¹⁴¹ and the *CCMS* see II.1.1).

This public nature has led to extensive case law, such as the *CCMS* case¹⁴² in which the nature of the regulation of the *CCMS* (a sub-organ of the *KNMG* see II.1.1) was contested. The Administrative Law Division of the Council of State¹⁴³ ruled that the *CCMS*'s regulation was of a private law nature. If and when the Minister applies the authority attributed to him by Article 14 of the Act on Professionals in the Individual Healthcare to attach public law consequences to the decisions of the *CCMS*, a power under public law is created for the *CCMS*. This possibility to attach public consequences to the private regulation of the *CCMS* was provided for in the Act, because otherwise the norms set by the *CCMS* defining what is and what isn't a medical specialism could not be declared generally binding. By using this type of instrument (ex post attachment of public consequences) the legislator makes use of the private

¹³⁷ E.g. notaries' and lawyers' decrees.

¹³⁸ In the professions sector we have only traced regulatory bodies with either a *PBO* (public) status (a- type GALA) or –if it concerns private bodies- with the association and foundation as their legal form (no company structure).

¹³⁹ Of the biggest importance was the Enron-case that led to the bankruptcy of the Dutch affiliates of the Arthur Andersen company (Arthur Andersen legal and the Wouters law firm).

¹⁴⁰ Introducing in most cases the compulsory intervention of civil law judges. Some judicial disciplinary bodies are even a special chamber of an ordinary court. For an overview of judicial and non-judicial disciplinary bodies and the role of civil courts see Laclé & Huls (2004).

¹⁴¹ At this point eight supervisory organs are competent to monitor notaries and the *KNB*. *BFT* (*Bureau Financieel Toezicht*; the Institute for Financial Supervision) Annual report 2003, p. 3.

¹⁴² The Administrative Law Division (of the Council of State), 19 November 2003, *AB* 2004/49.

¹⁴³ The highest administrative law court.

expertise in the sector while keeping the possibility to introduce public elements to (otherwise purely) private regulation.¹⁴⁴

The debate on competition in the pharmaceuticals industry has recently led to discussions in Parliament with regard to the supervision of the industry. The Parliament decided to draft a proposal in which the exchange of information between the insurance sector, the medics and the pharmaceutical agents would be improved. Medics should report their prescription conduct towards patients, in order for pharmaceuticals to test whether the correct medication was prescribed (and to supervise if medics complied with the directive on economical and correct prescription of medication). The pharmaceuticals and the insurance sector were very pleased with the proposal since this would make their decision-making more effective and efficient. The medics however felt that the proposal would be a breach of their professional autonomy. Parties are now deliberating which form of supervision is optimal and can be accepted by all parties.¹⁴⁵

Apart from increasing state intervention, other external influences such as the applicability of Eu-legislation on competition¹⁴⁶ and the free movement of persons and services¹⁴⁷ are becoming more and more relevant in the norm-setting and supervision of professions. One could say that the pure self-regulatory character of professions' association is diminishing

II.2 Financial markets

The most striking common characteristic of different areas of financial markets regulation is a retreat – partly EC-induced¹⁴⁸ – from self-regulation in recent years. Before 2002 financial markets regulation in the Netherlands was organised per sector. Since 1 September of that year, supervision of financial markets became divided into two categories: prudential supervision (regulation for financial safety of financial institutions) and supervision of conduct (market integrity regulation and consumer protection). In 2002 the Dutch National Bank (*DNB*¹⁴⁹) and the Pensions and Insurance Supervisory Authority of the Netherlands¹⁵⁰ merged. Now they act together, under the name of the former, as the 'prudential supervisor'. The other regulatory authority in the financial markets sector, responsible for 'conduct supervision' is the private law body Netherlands Authority for the Financial Markets (*AFM*¹⁵¹), a foundation (without the goal to make profit¹⁵²). This successor of the former Securities Supervision

¹⁴⁴ That is why in this case the plaintiff complaining that his medical specialism (sport medical care) has not been accepted by the *CCMS* could apply for judicial review of the refusal with an administrative judge under the *GALA* regime.

¹⁴⁵ Arts, Batenburg and Groenewegen (2001), p. 12.

¹⁴⁶ The *NOvA* has been qualified as an association of undertakings by the European Court of Justice in the Wouters case Case C- 309/99 (Wouters c.s.), furthermore the Monti-report (COM (2004) 83 final) and subsequent competition policy documents stress on the abolishment of all competition obstructing professional rules.

¹⁴⁷ Liberal professions have been declared of great importance in enacting the Lisbon agreement and a proposal for Directive on services aimed at stimulating quality, transparency and dispute resolution in EU services market is being prepared by the European Commission and Parliament (COM (2004) 2(02)).

¹⁴⁸ The Financial Services Action Plan and the directives it produced.

¹⁴⁹ *De Nederlandsche Bank*.

¹⁵⁰ *Pensioen- en Verzekeringkamer*.

¹⁵¹ *Autoriteit Financiële Markten*.

¹⁵² Dutch associations and foundations are entitled to make profit, but they are prohibited to strive for profit maximization or to distribute the profit amongst the legal person's officials, members (associations) or affiliates and participants (foundations).

Foundation (*STE*¹⁵³) is a public authority (GALA b-type) and an independent administrative authority. The responsible Minister (Finance) also appoints the board members of the *AFM* and the budget and any future amendment of the statutes is subject to his approval. Ties between the board members and the regulated companies are prohibited by the *AFM*'s statutes. As regards the governance of the *AFM*, a remarkable self-regulatory initiative has been taken. Recently a code for corporate governance called 'Code Tabaksblat' has been adopted in the Netherlands. In spite of the fact that this code is not applicable to public bodies such as the *AFM*, the *AFM* declares on its website that it will use this code as a source of inspiration and will even implement those elements of the code that can be applied to its own governance. In conformity with the so-called 'apply or explain' provision in the Code Tabaksblat, the *AFM* will explain in its annual report why it has not adopted certain other elements of the code. The financial supervision 'new style' is governed by a single unifying statute: the Financial Supervision Act (*Wft*¹⁵⁴) which entered into force in January 2007.

II.2.1 Financial services / banking

The latest move towards a statutory framework for a traditionally self-regulated area has taken place in the financial services area. As a reaction to several financial scandals which have received wide coverage in the press, the government initiated a bill on financial services concluding that self-regulation had failed. A bill called the Financial Services Act (*Wfd*¹⁵⁵) was adopted on 12 May 2005 and entered into force on 1 January 2006. but has now been incorporated by the new unifying *Wft* (see above).

According to the new legal framework, financial services providers have to apply for a permit and comply with standards of reliability and expertise as well as commit to informing consumers properly and advising them carefully. The *AFM* will be supervising (monitoring and enforcing) the new statute. When carrying out these tasks, the *AFM* may make use of the following powers, laid down in the new Act and the GALA: request information, give directions, impose fines and penalties, publish information and possibly revoke an authorisation.

The question of how to sustain self-regulation in the area as much as possible has been on the table throughout the legislative process.¹⁵⁶ The most important step is establishing a private law body to promote self-regulatory initiatives aimed at upholding the standards mentioned above. Building on the Financial Services Platform (*PF*¹⁵⁷), the Financial Services Foundation (*StFD*¹⁵⁸) in which regulatees are represented, has been established on 10 June 2005. Its tasks are to consult with the *AFM* about the supervision of the regulatory framework and to support the *AFM* to carry out its regulatory tasks. The *StFD* is of a strictly private law nature (no GALA b-type body because not exercising public authority). Although one of its aims is to contribute to the implementation of the regulatory framework, this is a purely private goal in the sense that no public mandate for this exists. The *StFD* is also purely privately financed. On 23 January 2006 the *StFD* and the *AFM* concluded a covenant governing their cooperation in the enforcement of the *Wfd*. This agreement does not include any transferral of powers.

¹⁵³ *Stichting Toezicht Effectenverkeer*. The transition is a consequence of the policy document 'Review of the supervision of the financial market sector' of the Ministry of Finance.

¹⁵⁴ *Wet op het financieel toezicht*.

¹⁵⁵ *Wet financiële dienstverlening*, Staatsblad 2005, 339.

¹⁵⁶ Socio-Economic Council-advice and cabinet letter "Bemiddeling in Financiële diensten".

¹⁵⁷ *Platform Financiële Dienstverlening*.

¹⁵⁸ *Stichting Financiële Dienstverlening*.

As to intermediaries, there is some self-regulation, mainly consisting of ‘noncommittal’ codes of conduct from branch organisations, but this was deemed to be insufficient because not all intermediaries are members of those organisations and (meta-)supervision of compliance with the codes is lacking. With the argument that consumer interests were not sufficiently protected against commercial interests and that there was no level playing field, the Minister of Finance has succeeded in having the intermediaries included in the ambit of the *Wft* as well.

Despite its private legal personality and its commitment to the corporate governance code ‘Tabaksblat’, the *AFM* is clearly a public regulator with certain command-and-control style powers. For the moment the tasks of the purely private Financial Services Foundation seems merely advisory, in spite of the covenant mentioned above. Whether it could in the future obtain a formalised co-regulatory role remains to be seen.

II.2.2 Securities / stock markets

The Amsterdam Exchanges *NV* used to self-regulate¹⁵⁹ (the regulatees being the admitted investment and securities institutions), but as a result of ‘reregulation’¹⁶⁰ now also falls under the public regulatory regime. These institutions are now regulated by the *AFM* on the basis of the *Wft*, which has replaced the old Investment Institutions Supervision Act¹⁶¹ and the Securities Supervision Act¹⁶².

One aspect of the new regime has stirred constitutional worries¹⁶³, namely the obligatory membership of an alternative dispute resolution tribunal which excludes the regular courts. Some argue that this breaches the right to access to court as laid down in Article 17 of the Constitution.¹⁶⁴ If one construes a parallel with the collective employment contract (*CAO*¹⁶⁵) which can be declared generally binding by the government – a common practice in Dutch labour law – one can readily see the problem. By becoming a member to a *CAO* party em-

¹⁵⁹ An example from the case law of the old days: One body supervising the Amsterdam securities market was the Association European Options Exchange (EOE). The conduct of the EOE and its members (banks and commissioners) were governed by the Trade Rules. This regulation is primarily of a private law nature. Because these self-regulatory rules were aimed at protecting the investors and the financial stability of the sector, it did have a public character however. The Rules stipulated an obligation to set a ‘margin’ according to the financial profile of the client before making transactions. If and when the transaction could be considered as a minimum risk procedure the EOE did provide a dispensation of the margin-rule.

The grievant in this case claimed that he had suffered damages because neither he or his bank knew about the possibility of dispensation of the ‘margin rule’. The court of appeal of Amsterdam held that the EOE failed to fulfil its duty of care to inform both the public as well as the EOE-members (banks and financial institutions) of the possibility of dispensation of the ‘margin rule’. Because of the inequality resulting from the possibility to broaden the margin by some EOE members knowing the dispensation clause and the impossibility of other members by not knowing the clause. Even though the EOE is not a public organ it did have the duty to promulgate the existence of the dispensation clause of the ‘margin rule’ in a fair and proper manner. The EOE was not held to pay the grievant’s damages because the grievant could not prove that his damages were causally linked with his bank not knowing the dispensation clause.

¹⁶⁰ Describing this process in detail: Oppelaar (2004), p. 74.

¹⁶¹ *Wet toezicht beleggingsinstellingen*.

¹⁶² *Wet toezicht effectenverkeer 1995*.

¹⁶³ The prohibition of constitutional review of statutory legislation laid down in Article 120 Constitution does by no means imply that the legislator has no obligation to comply with constitutional provisions.

¹⁶⁴ van Dijk (2004), p. 41.

¹⁶⁵ *Collectieve Arbeidsovereenkomst*, an important concept in Dutch labour law: agreement between employer and employee stipulating payment and other labour conditions, which can under certain conditions be declared ‘generally binding’ (an example of self-regulation in labour law).

ployees are deemed to have accepted the generally binding declared agreement voluntarily. However the element of the binding dispute resolution is excluded from the governmental power to declare the *CAO* generally binding, because this is considered problematic for constitutional reasons.

II.2.3 Other self-regulation in this area

Covenants (see case study on environmental regulation II.5 for an explanation of the term) have also been used in financial markets regulation. The *AFM* and the Dutch Securities Institute (DSI) concluded an agreement that securities institutions can fulfil their statutory obligation to check the professionalism and reliability of their future employees ('pre-employment' screening) by asking the DSI for a 'reference declaration'. DSI is an initiative of Euro next Amsterdam and the securities sector organisations and has no statutory basis. The main goal of this covenant is to lend the DSI reference more authority. Otherwise the covenant is highly symbolic and mainly serves as an occasion to underline private parties' own responsibility in safeguarding integrity and professionalism in their sector.

II.3 Sports

The sport sector is a traditional sector of pure self-regulation without governmental involvement. Specific statutory provisions regulating sports do not exist, nor do other statutes regulating the implementation or monitoring of self-regulation by sport associations or committees. The Dutch government has on occasion explicitly proclaimed that it did not want to be involved in sport issues, since the sport sector is dominated by private law and is not a sector that can be described as 'public'¹⁶⁶.

Moreover the Dutch government has always maintained a distance towards sport associations.¹⁶⁷ Even when very important issues arise such as and the use of drugs to improve athletes' performance, the Dutch legislator and the Public Prosecutor have been very cautious in interfering. Only in so far as the national safety is at risk the State has in the past accepted some governmental influence in the sport sector (e.g. vandalism).

The legal form 'association' was introduced in 1855. Since then sport associations had a large freedom to structure their organisation, to draft and monitor their own rules with a legal status and without governmental involvement. The coming into force of the new Dutch Civil Code with new rules regarding the law of associations in 1976¹⁶⁸ did not curtail the freedom of the associations. Associations were granted a three to four year period to adapt their bye-laws, articles of association as well as their governance and organisation structure to the new rules stipulated in Book 2 of the new Dutch Civil Code. Associations are now bound to comply with mandatory legislation of the Civil Code, but still have a wide ambit of self-regulatory and monitoring authorities. Sport associations as all other legal persons need to regulate and act in accordance with reasonableness and fairness set in Article 8 of Book 2 of the Civil Code and with mandatory legislation (see I.2.2). Other legislation – however not specific for sport – that can affect the rules of sport associations and the athletes are tax rules (e.g. fiscal

¹⁶⁶ Kollen (1992), p. 47.

¹⁶⁷ Ibid.

¹⁶⁸ Book 2 of the new Dutch Civil Code (company law) came into force in 1976, the provisions in this Book were revised and altered to fit the Books 3, 5 and 6 of the new Civil Code that were introduced in 1992.

revenues for cafeteria of associations and for sport competitions¹⁶⁹), rules concerning the liability of members of the board of legal persons (e.g. no liability for amateur clubs), environmental rules (e.g. nuisance) and advertising rules (e.g. advertising during competitions). For professional athletes labor law and tax law can be relevant. Because of the specific problems arising with different types of rules the legislator has – in collaboration with sport associations – established a Statute for Professional Athletes.

The (overarching) ‘Dutch Sport Federation’ (*NOC*NSF*¹⁷⁰) consists of 93 sport associations that represent over 36.000 sport clubs (either associations or foundations themselves). International sport federations only accept one national sport federation per sport so that monopoly structures may exist.

II.3.1 Standard-setting

Rules of the game

As stated above the sport sector is regulated by pure self-regulation. The rules dominating the game have been formulated and adapted during several decades. These rules dictate the game ‘on the field’ and the sanctions that can be imposed by a referee.¹⁷¹ The rules can be considered as ‘internal rules’ monitored by the referee. In some sports this supervision can only take place *during the game* and the decision of the referee is final and binding (e.g. soccer) even if the referee’s decision is clearly not in accordance with the rules of the game.¹⁷² The rules of the game are incorporated in the association’s articles or bye-laws.

Regulations

The regulation governing the sport organisations ‘off field’ (competition rules, rules concerning the bodies of the organisation; committees etc.) are codified in the private regulation of sport associations (e.g. in the association’s articles and bye-laws) or can be concluded by decisions of the board or other bodies¹⁷³ of sport associations. The national self-regulatory character of the sport sector is however dominated by international sport regulation (e.g. FIFA). In some cases the Dutch sport associations’ rules do differ from the international rules; this may imply consequences for the admission of members of these associations to international competitions. In joining a sport club or association members are bound by the national and international articles of association and rules of the sport regulated by the sport association they

¹⁶⁹ According to Dutch governmental policy Dutch sport competitions are not qualified as ‘sport’ but as ‘events’ introducing the applicability of VAT-rules and other legislation concerning the organisation of events. The Dutch government in its sport policy thus accepts that the sport sector is a profit sector

¹⁷⁰ *Nederlands Olympisch Comité***Nederlandse Sport Federatie*.

¹⁷¹ In most sports four categories of rules of the game exist: 1) organisational rules: quantity of players, measurements of field e.g., 2) Technical rules: the authorities of the keepers, offside rules etc. , 3) authorities of the athletes and 4) conduct rules (a breach of this rule can enact disciplinary sanctions during the game or disciplinary sanctions against the whole team).

¹⁷² The reasoning being that if the decision of the referee can be (judicially/disciplinary) contested after the game, the game would have to be repeated. This can cause difficult situations and uncertainty, especially when the finals are near.

¹⁷³ If the statutes provide for a possibility of delegation of powers, volunteers or other members may have the authority to set rules. This is the case if and when the club has a great number of members that perform weekly or even daily. The board cannot be expected to set all rules ‘formally’. Because of the professionalization of the top sport sector, there is a great call for rules of good quality.

are joining; as explained in I.2.1, accession and acceptance of the private regulation of associations is a *sui generis* bilateral juridical act.¹⁷⁴

II.3.2 Enforcement and supervision

The rules and regulations enacted by the sport associations are usually contested through disciplinary procedures by disciplinary bodies constituted for each sport association (sometimes one disciplinary body is competent in issues of several associations). Whereas these disciplinary proceedings used to have an informal character, nowadays it is very common for plaintiffs (athletes) to be legally assisted. This has effects on the demand for professionalisation of disciplinary bodies. Disciplinary procedures have been adapted in order to secure the rights of the members without losing the flexibility of self-regulatory monitoring. It is common practice that lawyers and judges will take part in a disciplinary body if it is good organised.¹⁷⁵

International sport regulations frequently stipulate the prohibition of judicial proceedings (e.g. FIFA and UEFA)¹⁷⁶. The ‘Dutch Soccer Association’ (*KNVB*¹⁷⁷) has however abandoned this rule in 1976¹⁷⁸ and this has led to several cases in which civil and penal courts were competent.

¹⁷⁴ And cannot be qualified as a contractual relationship.

¹⁷⁵ Dutch judges are represented in thirteen disciplinary bodies of different sport associations, such as the *KNVB*, the Dutch Hockey Federation (*Nederlands Hockeybond*) and the Dutch Swimming Federation (*Nederlandse Zwembond*). See Z.D. Laclé and Huls (2004), p. 13.

¹⁷⁶ Van Hoek denotes this as the ‘less than voluntary’ submission to private resolution systems. Another good example of the latter can also be found in the internet sector. Van Hoek (2006), p. 13.

¹⁷⁷ *Koninklijke Nederlandse Voetbalbond*

¹⁷⁸ The UEFA claims that by abandoning the prohibition of judicial proceedings in its rules, the *KNVB* is not acting in accordance with the European soccer rules stipulated by the UEFA. Kollen (1992).

Afterbooth case, Supreme Court judgment of 28 June 1991:

One of the best known cases concerning the liability of athletes vis-à-vis each other, dealt with a soccer player causing physical damage to another player during a soccer game. The civil court held that the question whether tort liability was at hand in assessing whether the sportsmen had acted according to their duty of care, had to be interpreted in terms of rules of the soccer game, since the sport sector has a specific character with specific rules and expectations (filling the open norms in the civil code see § I.2.2). The rules of the game are important in assessing which conduct players could expect from one another, to evaluate the foreseeability of a certain conduct. In this particular case one of the athletes injured his opponent when kicking him at the moment that the opponent did no longer possess the ball (*natrap* = afterboot). The court held that this conduct did not fall within the scope of the rules of the game and thus could not be expected by the injured athlete (liability was incurred).

Court of appeal Amsterdam decision of 1 August 1991:

In other cases the liability of sport associations as such has been assessed. Members of a sport association not being selected for an international competition or not receiving in their view the proper labor treatment have contested the regulatory activities of sport associations. After supporters besieged the soccer field during a national final competition, it was decided that the competition would be called off. The *KNVB* declared the team that had scored during the competition as the winner. FC Den Bosch, the team that had lost the game, contested the liability of the *KNVB*, claiming that the decision of the *KNVB* was unjust and unlawful. The civil law judge of the district court declared the score of the competition null and stated that the competition needed to be played over starting at 1-0. Eventually the game was never replayed because the court of appeal overruled the judgment and UEFA excluded FC Den Bosch from international competitions for half a year (for breaching the UEFA regulation stipulating the prohibition of judicial intervention). FIFA announced in 1992 that it would hold all national soccer federations liable for judicial proceedings incurred by national sport associations or athletes. The *KNVB* tried to convince FIFA that the FIFA prohibition violated Dutch Law, but

Koch, Walrave and sisters Caesens:

In other cases concerning the liability of sport associations not only the rules and regulations of the sport associations at stake were employed, the EC Treaty and the European Convention on Human Rights were referred to as applicable to rules of sports as well. Because of the commercialization of certain sport sectors and the rise of sport as a profession, the personal interests of individual athletes can collide with interests of national and international sport federations as well as the interests of the majority of the members of the association (mostly amateurs). To protect their interests as professionals, professional athletes have brought complaints before civil law courts. Two striking Dutch cases are the 'Koch Walrave vs. UCI' and the 'sisters Caesens vs. 'Dutch Hockey Federation' (*NHB Nederlands Hockeybond*) cases. Both cases dealt with nationality requirements during international competitions. In the Koch Walrave case two racing cyclists wanted to collaborate with a cyclist of another nationality, but they were obstructed by the UCI. Koch and Walrave stated that the composition of the team was not of an economic importance but solely important for the sport as such (therefore Article 7, 48 and 49 EC Treaty were not applicable). Their reasoning was accepted by the ECJ and national courts, but the UFI threatened to call off the cycling competition (clearly insinuating not to accept the ECJ decision) so the athletes resigned themselves to the UCI decision. In the other case two Belgian sisters wanted to play for the Dutch Hockey team but the Dutch association did not allow them to, because they didn't comply with the rule that foreigners should have resided in the Netherlands for at least four months before joining a competition. The Dutch judge decided that the interpretation of the EC Treaty, however helpful, was not applicable in this case since the sisters were not professionals but merely amateurs (the EC Treaty does not

II.4 Media

In the media sector self-regulation has enjoyed a long tradition. This is at least partly due to the fact that the freedom of expression, protected by several international treaties and the Constitution (Article 7), requires a certain amount of abstention from the state. What the state can do, however, is to promote self-regulation in the field. Therefore ‘*vervangende zelfregulering*’ (literally ‘substitute self-regulation’, but perhaps more appropriately translated as ‘promoted self-regulation’) is very popular in the media sector, in which we include advertising because of the many crossovers: regulation by private organisation, but actively encouraged by the state. Because many public interests are at stake the state remains in the background as a ‘substitute’, ready to regulate if needed. As we will see this ‘substitute-regulation’ remains problematic though: every time the issue comes up, arguments related to freedom of speech immediately silence the debate.

II.4.1 Press mergers

In Dutch law there is no such thing as ‘press law’¹⁷⁹, the way there is for example ‘environmental law’ or ‘telecommunications law’. Certainly ‘media law’ is an existing species, the Media Act¹⁸⁰ being the main statute, but it mainly covers broadcasting (see below), not the written press. All past attempts to enact legislation to regulate the press have failed and the sector is organised and regulated on a purely private basis nowadays.

The one issue that has led to somewhat stronger pressure for public regulation is mergers between publishing houses. Because press diversity is generally considered an important public value, there have been repeating calls on the government to initiate regulation to protect it. The government has always refused; explicitly stating as a reason for this refusal the ‘lack of constitutional space’.¹⁸¹ The text of Article 7 paragraph 1 of the Dutch Constitution is unusually strongly formulated when it comes to expression through the printing press, and includes an absolute prohibition of not just censure but any preventive measure potentially touching on the substance. According to the government scrutiny of planned press mergers would quite easily amount to review of the content of the newspapers concerned. Instead the government asks the *NDP*, an association of publishers to come up with self-regulatory rules on this issue. In 1993 the behavioural code for press mergers was announced, taking the legal form of an agreement between publishers to submit any merger plans to a special commission (the Commission for Press Mergers). The government officially is not a party to this code, but is strongly present in the back. It is important to note however that with the coming into force of the new Competition Act 1998¹⁸² press mergers have also been brought under scrutiny of the Dutch Competition Authority (*NMa*¹⁸³). The *NMa* has decided that a press merger needed a license in one case, that of publishing house VNU which wanted to sell all of its regional newspapers.¹⁸⁴

¹⁷⁹ Grosheide (2000), p. 73.

¹⁸⁰ *Mediawet*.

¹⁸¹ Grosheide (2000), p. 81.

¹⁸² *Mededingingswet 1998*.

¹⁸³ *Nederlandse Mededingingsautoriteit*.

¹⁸⁴ *NMa* decision of 13 January 2000, case 152 (Wegener Arcade NV and VNU Dagbladen BV)

II.4.2 Editor-publisher charters

In order to preserve its public function as messenger of objective information, the press sector makes use of yet another self-regulatory instrument: the editor-publisher charter. This is a contract between the publisher and the editorial staff fixing the identity of the newspaper and protecting its public function against commercial interests. The contract obliges the editors to contribute to the publication of the newspaper or magazine and commits the publisher not to interfere with the daily decision-making. These charters are the result of years of negotiation between employees (journalists and editors) and employers (publishers). Many ‘collective employment contracts’ (*CAO*¹⁸⁵) include the obligation for press companies to enact such a charter. The obligation is also codified in the Media Act, but the relevant provision does not contain any information on what the content of those charters should be. That is why this form of self-regulation could be qualified as promoted self-regulation, but not as co-regulation (or ‘*wettelijk geconditioneerd*’) because the state does not set out any substantive conditions (it would be unconstitutional to do so). There have been calls for a substantive statutory endorsement of this practice, but so far the arguments against this (again mainly based on Article 7 of the Constitution) have won the day.¹⁸⁶ As a self-regulatory alternative a model version of the editorial charter, drafted collectively by the *NVJ* (Dutch Association of Journalists) and the *NDP* (Dutch Association of Newspaper Publishers) is available and has a uniforming and standardising effect.

II.4.3 Audio-visual media

The Dutch broadcasting system is a mixed one: there are public broadcasters¹⁸⁷ as well as commercial ones, although the latter type was not formally introduced until 1992, with some Dutch commercial broadcasters already operating from Luxembourg by then. Broadcasting is regulated by a public authority with an independent status (*ZBO*): the Commissariat for the Media¹⁸⁸, which derives its powers and its legal personality from a statute, the Media Act (*Mediawet*), and is therefore an A-type GALA authority. These powers can best be described as ‘regulatory’ both with regard to the public broadcasters as to the commercial ones. Among the more far-reaching powers of the commissariat are the assignment of broadcasting time to the public broadcasting associations, the monitoring of their compliance with programming provisions (e.g. whether they reach their target of educational programmes) and the admittance of new commercial broadcasters. Besides the Media Act, a governmental Media General Regulation (*Mediabesluit*) and many sets of Guidelines (soft law rules that can be adopted by public bodies with regard to their powers) regulate the media sector. The Commissariat also has the power to impose fines, and although it has no formal rule-making powers, its guidelines can – under certain conditions – have the material effect of legal rules.

There is self-regulation to be found in the broadcasting sector too: the *NICAM*¹⁸⁹ (Netherlands Institute for the Classification of Audio-Visual Media) is a self-regulatory body endorsed by the government in which all broadcast-related associations are represented. It is mainly known for designing the ‘*Kijkwijzer*’ (‘Watchguide’) which is a classification system for tele-

¹⁸⁵ See II.2.2 for explanation.

¹⁸⁶ Mediaforum 1995, nr. 9 and 10.

¹⁸⁷ They are not ‘public’ in the sense that they have a statutory basis – they do not, they are associations – but in the sense that they receive public money.

¹⁸⁸ *Commissariaat voor de Media*.

¹⁸⁹ *Nederlands Instituut voor de Classificatie van de Audiovisuele Media*.

vision, video (games) and film using symbols to help parents protect their children from witnessing violence etc.

Another self-regulatory element is the enforcement of advertising rules. In the first place, private parties can enforce these rules themselves by going to a civil law court and filing an action for unfair competition, but for one reason or another it is not common practice to do so.¹⁹⁰ In the second place a complaint procedure in front of the special tribunal, the *RCC*¹⁹¹ (Advertising Code Commission) is in force. We will deal with this procedure in some more depth below.

An image emerges of regulation with a light touch compared to other sectors but of a command-and-control type when compared to the press, since public law standards backed by sanctions are used a lot. This image makes sense if one looks at how the Dutch Constitution treats broadcasting. It falls under the second paragraph of Article 7 of the Constitution, which prohibits censure but not ‘any preventive measure’ and which, unlike the first paragraph allows limitation on the freedom to be laid down in delegated legislation.

II.4.4 Advertising

The self-regulatory regime for advertising (both commercial and charity) is particularly well developed in the Netherlands. The Advertising Code Foundation (*Stichting Reclame Code/SRC*) is a purely private regulator (no b-status in the sense of GALA). Membership is voluntary except for those who are broadcasting licence holders on the basis of the Media Act. This foundation has adopted the Advertising Code as well as certain sector-specific codes (e.g. on alcohol). The Advertising Code Committee (*Reclame Code Commissie/RCC*) is the tribunal enforcing this code on the basis of complaints submitted to it. The members of the *RCC* are one independent member appointed by the *SRC* and four others appointed by different stakeholders (consumer organisation, the *BVA* (advertising sector), the *VEA* (communication advice) and the media participating in the *SRC*).

The Advertising Code Committee (*RCC*) has stated in one of its decisions that it does not consider itself bound by Article 10 ECHR (see also I.1.2). According to the commentator this is a rather meaningless statement if one considers that any judicial judgement on appeal from an *RCC* case has to take into account the ECHR anyway. However, assuming that the *RCC* does need to respect the provisions of the ECHR would trigger all sorts of problems, such as that the Advertising Code does not qualify as ‘law’ in the sense of ‘prescribed by law’ which is a precondition for a lawful interference with the freedom of expression (Article 10 paragraph 2 ECHR).¹⁹²

Advertising on television is an example of a field where the state has left implementation of its Community obligations to self-regulation.¹⁹³ In some cases the interesting question of the relationship between the sector-specific self-regulatory code (*Voorschriften voor Nederlandse Etherreclame / VNE*) and EC law has come up. In one case, this question is unfortunately left

¹⁹⁰ Grosheide (2000), p. 121.

¹⁹¹ *Reclame Code Commissie*.

¹⁹² IER 1993/10 CvB, 18 January 1993

¹⁹³ Another example is the implementation by The Netherlands of the EU-directive on package travel, package holidays and package tours through self-regulation. The Foundation Warranty Fund Travel Travel Expenses (*Stichting Garantiefonds Reisgelden*) was designed so as to comply with the demand to provide for a warranty structure when implementing the directive.

unanswered by the Advertising Tribunal¹⁹⁴, but another decision is hinting that self-regulation cannot breach EC law (when directed towards Member States; competition law for instance is a different matter) because it does not emanate from the government. Here the Advertising Code Foundation was challenged before a court of first instance. The appellant argues that the judgement by the Code Commission of the Foundation constitutes a tortious act because it breaches the free movement of goods (Article 30 EEC Treaty). The court finds that there cannot be quantitative restrictions on imports or negative impacts on trade between Member States, since the method of assessment employed essentially is a complaints procedure achieved by means of self-regulation. First of all this procedure has not been established by the state, nor does the state manage it. Second of all the procedure aims to prevent misleading advertising without taking the origin of the product or the nationality of the producer into account. Because of this twofold argumentation by the court it is unclear whether this court decision should indeed be read so as to mean that self-regulation can, as a matter of principle, never breach EC law.¹⁹⁵

One also finds examples of *de facto* ‘mandatory self-regulation’ in this area: the Minister for Health Affairs forced the alcohol industry to self-regulate, threatening he would legislate unless they would adopt a stricter ‘voluntary’ code of conduct.¹⁹⁶

II.5 Environment

In the environmental sector self-regulatory initiative have often arisen out of difficulties with compliance of traditional style legal obligations.¹⁹⁷ In the Netherlands different alternative instruments, self-regulatory and otherwise, are in existence: certification schemes, eco-labeling systems, corporate codes of conduct, ‘removal fees’, experiments in the context of the policy ‘Town and environment’¹⁹⁸ and of course environmental agreements (the renowned ‘covenants’). Remaining completely neutral in the self-regulatory process is not an option for the State in the environmental sector, simply because the risk of market failures (e.g. ‘public goods’) is too great. Most examples therefore display clear features of co-regulation.

II.5.1 Pure self-regulation

There is however one example of more or less pure and at least spontaneous self-regulation to be found in the environmental area: the voluntary development of initiatives to avoid harming environment: internal environmental care systems.¹⁹⁹ This instrument, even if it concerns just one firm setting up some internal system, can be looked upon as ‘self-regulation’.²⁰⁰ There have been calls for statutory support of the internal environmental care systems, but so far nothing has happened. Although the literature sometimes calls it co-regulation, one can speak of ‘promoted self-regulation’ because the government exerts soft pressure on sector organisations and financially stimulates these care systems. The Government would like to make a link with the permits on the basis of the Environmental Management Act (see II.5.3), but this is difficult because this statute only allows for inclusion of conditions relating to environmental care directly and not for example those relating to organisational aspects. The question

¹⁹⁴ IER 1991/59, *RCC*, 26 July 1991. All arguments based on EC law were dismissed on preliminary grounds.

¹⁹⁵ Court Amsterdam, 12 October 1994, *IER* 1994/31.

¹⁹⁶ Weyers and Stamhuis (2003), p. 9.

¹⁹⁷ Eijlander, van Gestel and Gilhuis (2000), p. 77

¹⁹⁸ See Drupsteen, Gilhuis, Kleijs-Wijnobel, de Leeuw and Verschuuren (1998), p. 217-260.

¹⁹⁹ *Bedrijfsinterne milieuzorgsystemen*.

²⁰⁰ Gilhuis and Verschuuren (1999).

arises whether a flexible legislative policy focussed on self-regulation conflicts with Article 21 of the Constitution, which contains a duty of care for the government as far as the protection and improvement of the environment is concerned (see I.1.2). This question has been answered negatively in a recent study which argues that this social fundamental right often requires restraint on the part of the legislator combined with pro-activeness on the part of businesses and citizens as long as certain limits of this autonomous responsibility of non-state actors are respected.²⁰¹

II.5.2 Promoted self-regulation

Another self-regulatory instrument, which has been characterised in the literature as ‘self-regulation with a statutory boost’, a variation between ‘promoted self-regulation’ and ‘mandatory self-regulation’ can be found in the waste sector. Certain industries declared themselves willing to establish a structure for environment friendly removal of their used products, provided that the state would find a solution for the free rider problem. As a result Article 15.36 Environmental Management Act (*Wm*) supports the self-regulatory initiative by empowering the Minister for the Environment to declare self-regulatory agreements on removal fees generally binding. The reason why we would not call this co-regulation is that the self-regulation *as such* is not legally entrenched. The reason why it is not ex-post recognised self-regulation is that the condition of a public solution to the free-rider problem was put on the table *beforehand*.

II.5.3 Co-regulation through flexible licensing

The Dutch Ministry of Housing, Spatial Planning and the Environment has developed a flexible licensing policy that leaves maximum freedom of choice to the licensee to prevent the adverse effects of (industrial) installations.²⁰² The so-called ‘framework licence’ can be said to be of a co-regulatory nature because, building on the existing open standards in the Environmental Management Act, it determines which objectives the company has to meet and not so much how it has to meet them. Eligible for the framework license are installations with an EMAS registration or with an ISO14001 certificate, combined with an approved corporate environmental plan and an annual environmental report. Furthermore, if a company is rejected for the Framework license because of non-compliance or inadequate stakeholder communication, it can still apply for a ‘customized license’ which includes more detailed requirements where needed. Research has shown that the difference between a normal license and a framework license has faded. The Environmental Management Act Evaluation Committee has warned against reducing the differences between framework licenses and customized licenses because to ‘reward’ the companies that do not have a better environmental performance than average might have adverse effect whereas already it is often claimed that the incentives to do something extra are not sufficient.²⁰³

²⁰¹ Van Gestel (2000).

²⁰² See also the ‘Circular on the framework license and the customized license’, developed by the Ministry of Housing Spatial Planning and the Environment together with the Ministry of Transport, Public Works and Water Management, The Hague, November 1999, <http://www2.vrom.nl/docs/internationaal/w2-10.pdf> (English version).

²⁰³ Van Gestel (2005).

II.5.4 Private-public cooperation: covenants

Within the context of self-regulation the State can act in three different capacities: benefactor (awarding subsidies), regulator (monitoring) and negotiator²⁰⁴, the latter part is the one played by the government in the case of covenants. A ‘covenant’ has been described as ‘a gentlemen’s agreement between the public administration and private partners’.²⁰⁵ A more or less official definition can be found in the ‘Guidelines for Covenants’: “A (set of) agreement(s), in writing and signed, between the government and one or more parties, which (also) relates to the exercise of public law powers or is aimed at the realisation of central government policy in some other way.”

The legal status of these covenants is not always clear. More than one author expresses the opinion that the ‘hard rules on contract’ are not applicable, if the form of gentlemen’s agreement has explicitly been chosen²⁰⁶, although there can be certain, more limited, legal consequences (a suggestion not supported in any case law). It is important to note however that many covenants that are not explicitly ‘gentlemen’s agreements’ are judicially enforceable, making them no longer ‘voluntary’ once they are concluded, just like normal agreements. Since the covenant is formally concluded bilaterally or multilaterally²⁰⁷ and therefore does not comply with the GALA requirement of unilateral decision-making, courts see covenants as a matter of private law. Strictly speaking, covenants are an example of private participation in governance rather than a form of self-regulation as such, since one of the parties is public.²⁰⁸

The use of covenants²⁰⁹ became popular in the mid-eighties, mostly so in the environmental sector. Because the word ‘covenant’ had an aura of the right mixture of effectiveness and responsiveness, the label became used more and more often for an ever growing variety of agreements, even agreements on compliance, which are a long way from the comprehensive agreements based on standards stemming from the sector which originally are called ‘covenants’. Part of the popularity of covenants with politicians can be explained by the fact that it allows them to emphasise the results which have been agreed upon, even if they lay far in the future and realization is far from certain. Covenants moreover can have an experimental function: it is much quicker to conclude them than to make a new statute or regulation.

Disadvantages of covenants are their lack of enforceability and the risk of shutting out stakeholders.²¹⁰ Examples include the 1987 agreement between the Minister for Environment and the soap industry²¹¹ and the 1993 covenant on tropical timber. Often these covenants contain provisions stating that the government may take unilateral actions if the goals of the covenant have not been reached at a certain point in time.

²⁰⁴ Van Driel (1989), p. 15.

²⁰⁵ De Moor- van Vugt and de Waard (1999).

²⁰⁶ Van Driel (1989), p. 16.

²⁰⁷ Even if in reality there is a real exercise of power on the part of the government, because it is clear to all parties that unilateral measures are the next step if one does not agree to become a party to the covenant.

²⁰⁸ The choice of words in certain semi-official publications reflects this distinction too. See e.g. *WRR* (2004), p. 248.

²⁰⁹ In Baarsma, Felsö, van Geffen, Mulder and Oostdijk (2004), p. 97 covenants are described as a Dutch phenomenon, although the report acknowledges that Germany, Denmark and Austria make use of the instrument as well.

²¹⁰ Van den Heuvel (1994), p. 15.

²¹¹ *Fosfaatcovenant*, TK 1985-1986, 19342, nr. 2, p. 34.

Covenants are sometimes – but rarely – used to implement Community law²¹², partly due to the Court of Justice decision in the English drinking water case²¹³ laying down the requirement that the *content* of self-regulatory agreements needs to be specified by a statutory framework, leaving little room for covenants. The *verpakkingencovenant*, used in the execution of Directive 94/62/EC is an exception, but this agreement is firmly embedded in the public law Regulation on Packaging and Packaging Waste²¹⁴, which in turn has a basis in the *Wm.*²¹⁵

II.6 Internet

The Internet is a (relatively) new area of law in which pure self-regulation has played an important part. It is one of the few areas in which self-regulation has been explicitly tested by the Dutch legislator to assess whether statutory provisions or governmental involvement would be necessary.

II.6.1 Standard-setting

The registration of Internet Domain Names

The registration of Internet domain names with the register ‘.nl’ has always been regulated on the basis of self-regulation. The parties involved founded an organisation called the ‘Foundation for the Registration of Internet Domains’ (*SIDN*²¹⁶). As a result of the growing importance of Internet in the Dutch society the public legislator decided to monitor the activities of the *SIDN* more closely.

In 1998 the Dutch government decided to (ex post) test the way in which regulation has thus far been implemented by the *SIDN*. The basis for the test was laid down in the ‘Governmental Regulations for the Electronic Highway Report’.²¹⁷ The evaluation of self-regulation by the *SIDN* took place in 2000; the test set for the evaluation included the following criteria:

²¹² The Guidelines for Covenants advise against this practice.

²¹³ Case C-340/96.

²¹⁴ *Regeling verpakking en verpakkingsafval*.

²¹⁵ Veltkamp (2000), p. 150.

²¹⁶ *Stichting Internet Domeinregistratie Nederland*.

²¹⁷ *Nota Wetgeving Elektronische Snelweg*.

- A. Which international developments are relevant? Eventual problems should be addressed on an international level.
- B. Are the criteria for self-regulation complied with?¹
 - 1. Is the organisational structure of the groups at stake sufficient?
 - 2. Are the several public interests taken into account on an equal base?
 - 3. Is there sufficient coherence between parties?
 - 4. Can enforcement of agreements be guaranteed?
- C. Is governmental legislation necessary?¹
 - 1. Do technological turbulence and the obstruction of traditional communication play a part?
 - 2. Governmental control should be as flexible, adequate and timely as possible.
 - 3. Are fundamental norms at stake? If this is the case governmental involvement is expedient.
 - 4. Governmental involvement is also necessary in cases in which the rights of third parties and the protection of geographical names are hindered.
 - 5. In cases in which a threat of scarcity of domain names and an inefficient distribution policy is present governmental legislation is necessary.

The evaluation of self-regulation by the *SIDN* was successful. One of the considerations of the Evaluation Commission to ameliorate the self-regulation as set by the *SIDN* is to improve the legitimacy of the *SIDN*, by securing the procedural participation of consumers' representatives in the organisation of the *SIDN*.

Critics state that consumers should also be qualified as having an interest in Internet matters. It is also contested that human rights do play an important part in Internet issues (reasoning that 'ideal organisations' must have the opportunity to be heard via a recognizable domain name). These critics do not endorse the assessment of the Evaluation Commission stating that self-regulation of the *SIDN* is a valid base for regulation. They plead (as well as those in favor of governmental regulation) for the revision of the Dutch 'Act on Telecommunication' (*WT*²¹⁸) to encompass legislation on the registration of Internet domain names.

E-commerce

Until 2001 no specific e-commerce legislation was in force. Before 2001 e-commerce was regulated by codes of conduct drawn up by the *ecp.nl* and *thuiswinkel.org*.

The Electronic Commerce Platform Foundation (*ECP*) is a national knowledge and coordination center for e-commerce. It is an alliance of participating²¹⁹ consumers, merchants, intermediaries, governmental departments of Ministries and the education board.

This platform introduced a Model Code of Conduct for electronic commerce, applicable to 'business to business transactions', 'business to consumer' and 'business to government' transactions. The code centers on transparency, confidence and reliability in electronic com-

²¹⁸ *Wet telecommunicate*.

²¹⁹ The regulatees are not members - since foundations are characterized by a prohibition of membership - but they can be qualified as participants to the foundation. Consult I.2.2 when illustrating the regulatory scope and regulatory relationship between foundations and their regulatees.

merce. The code provides for rules regarding the use of confidential information, electronic signatures and electronic communication. Businesses and companies that sign the code are bound to the rules by contract.²²⁰

Another self-regulatory organ that has drafted self-regulatory norms for electronic business transactions is the organisation ‘thuiswinkel.org (home shopping.org)’. ‘Thuiswinkel.org’ is an association for merchants in order to stimulate the reliability of consumers’ purchases (e.g. when buying on the Internet).²²¹ The association introduced a home-shopping ‘safeguard’²²², stating that the merchants that are granted such a ‘safeguard’ are bound by the ‘Thuiswinkel.org’ general conditions.

Since February 2001 several EU directives concerning e-commerce, consumers protection and e-signature have been implemented and incorporated in sections of the Dutch Civil Code dealing with the law of contract, consumer law and commerce law (Books 3, 6 and 7).²²³

The enforcement of e-commerce legislation is purely private (no public body responsible for enforcement of e-commerce rules). The government stimulates alternative dispute resolution linking up to the self-regulatory enforcement mechanisms. The articles in the Civil Code dealing with enforcement of e-commerce rules emphasize the importance of transparency and communication between parties and consider court proceedings as an *ultimum remedium*. When the Act on collective actions comes into force, the Ministry of Justice together with the Ministry of Economic Affairs will appoint a private law body to facilitate the organisation of such collective actions in e-commerce cases. It becomes clear that in the e-commerce sector the Dutch government aims to keep the sector ‘private’ making use of existing self-regulation in the sector.

The codes of conduct of the ECP and thuiswinkel.org are still in force alongside the Civil Code e-commerce rules. The legislator stimulates such codes of conduct because they improve the transparency of the sector.

E-documents and E-signature

Regulation in the e-documents and e-signature sector is aimed at the equal applicability of electronic and written documents as well as signatures. Because the Dutch rules on documentation and evidence in civil law cases (e.g. concluding contracts) were applicable to mainly written documents it was not clear whether electronic documents and signatures did (or could) have the same legal effects as legal documents. The European Directive on electronic trade strives to diminish this uncertainty by providing for legislation on the legal status of electronic documents. As stated above, the rules prescribed by this directive have been incorporated in the Dutch Civil Code. Since the rules codified in the Civil Code contain open standards such as ‘sufficiently safeguarded’ and ‘sufficiently *bonafide*’ and are only applicable to contracts (and not for authentication of documents) there is still a supplementary effect self-regulation can have in this field.²²⁴ Self-regulation can also have an effect on the test used by civil law judges if the interpretation given to open standards of the Civil Code is widely accepted by

²²⁰ Thole (2001), p. 49.

²²¹ Ibid, p. 50.

²²² A type of certification.

²²³ Thole (2001), 50.

²²⁴ Horrevorts (2003), p. 40. See comment on the ‘filling in of open standards’ in the Dutch Civil Code and the test used by civil courts to determine the ambit of the ‘duty of care’ in specific sectors in I.2.2.

the regulatees (see I.2.2). The judge can then employ the self-regulatory norms when assessing a specific case in which electronic documents or e-signatures play an important part.²²⁵

The Gala has also been adapted to facilitate government to citizen e-communication. Title 2.3 GALA stipulates the cases in which e-communication is accepted, as well as the criteria set for e-communication and the situations in which electronic documents are treated equal as written documents.²²⁶

The Model Code of Conduct for electronic commerce of the ECP is also of relevance for e-documents and signatures. Rule 2.2.2 stipulates the recognition of e-documents and – in cases in which a dispute arises – not to challenge the evidence of e-documents solely according to its (electronic) form. Rule 2.2.4 stipulates transparency in the acceptance of e-signatures. It needs to be clear to consumers under which circumstances (which criteria) a merchant accepts e-signatures.

SPAM

The term ‘spam’ is used for information sent to the receiver that is both not wished and sent in mass volume (bulk). A private initiative in trying to overcome spam problems is the ‘spamvrij.nl’ website. The initiative was aimed at categorizing all the Dutch companies spreading spam, in order to publicize the names of both the spammers as well as the facilitating providers. Because of its success (and authority) the foundation was accepted as the official consultation authority on spam issues. Because the foundation was primarily manned by volunteers and for financial reasons, the foundation decided to focus only on the tracking of spammers. The foundation as a legal person was dissolved in October 2004. The website is still active and the volunteers still track down Dutch spammers, but the foundation as such has stopped with the consultation tasks.

Since May 2004 however another form of spam supervision has been introduced. Spam is now prohibited by a statutory provision (The Act on Telecommunication) and breaches of this provision are monitored by the Independent Postal and Telecommunication Authority (*OPTA*²²⁷). On the 28 of December the *OPTA* for the first time fined two companies that spread spam throughout the Internet. The fines were set at 42.500 euros.

II.6.2 Enforcement and supervision

Several online and offline dispute resolution alternatives are at hand. Complaints in off-line cases can be brought before a civil law judge in summary proceedings, to a court of arbitration (e.g. the Dutch Arbitration Institute (*NAI*²²⁸) and the Foundation for Settlement of Disputes Resolution (*SGOA*²²⁹) or a complaint procedures commission. The dispute can also be settled through mediation (e.g. Foundation for Alternative Dispute Resolution of the Center for Trade (*ACB*²³⁰) or the mini-trials of the *SGOA* and the *NAI*).

The *SIDN* provides for dispute settlement arisen out of ‘domain name registration’ conflicts. At the beginning the *SIDN* restricted the registration of domain names by evaluating whether

²²⁵ Ibid, p. 41.

²²⁶ The Act on Public E-communication (*Wet op elektronisch bestuurlijk verkeer*).

²²⁷ *Onafhankelijke Post en Telecommunicatie Autoriteit*.

²²⁸ *Nederlandse Arbitrage Instituut*.

²²⁹ *Stichting Geschillenoplossing voor organisatie en automatisering*.

²³⁰ *Stichting ADR Centrum voor het Bedrijfsleven*.

the person registering the domain name, was doing this for the wrong reasons. This system was abandoned because of practical reasons (time, money etc.). The legitimacy of the registration can now be controlled ex post, by the *SIDN* itself (because of a complaint²³¹) or with judicial involvement (civil law judge). The civil law judge will assess whether the registration of the ‘.nl’ domain name by the registering party was unlawful.

Another form of control of self-regulation is the complaint procedure of the Commission of Complaints and Appeal of the *SIDN*. The Commission tests whether the registered name is in conflict with public morals or public order, and its decision is binding. If the commission feels that the registered name is inappropriate, the registration will be annulled and the party using the registered name should refrain from using that name. If the name is appropriate the party that registered the domain name can continue using this name. Scholars debate whether this test should also include a test on the objectiveness of the registration.²³² This analysis of the objectiveness is already incorporated in the Act on Telecommunication. The problem is that a foundation as such (such as the *SIDN*) does not have the authority to test activities on objectiveness. These powers can only be exercised by a public law body. Should the government opt for governmental Internet regulation, the ‘objectiveness test’ could be conducted by the Independent Postal and Telecommunication Authority.

In e-commerce conflicts a self-regulatory body monitoring the self-regulatory norms of the ‘thuiswinkel.org’ organisation is competent. The ‘thuiswinkel.org’ organisation has established a complaint procedure for consumers. In cases in which the consumer is not happy with the quality of the product purchased or the service provided by the merchant, the dispute is settled by the independent Thuiswinkel Dispute Commission.

Online dispute resolution is still in a preliminary phase. The Online Dispute Resolution project of the *ECP* (at *ECP.nl*) and the e-mediation, e-complaints and e-arbitration provided by ‘e-mediation.nl’ are examples of pilot projects aimed at introducing forms of online dispute resolution.²³³

²³¹ Van Hoek denotes this as ‘less than voluntary’ because one is forced to submit to arbitration. Van Hoek (2006), p. 13.

²³² Bakels (2002), p. 39.

²³³ Thole (2001), p. 50.

Table 3 – Overview of all sectors

Sector	Constitutional framework	Body	Legislative	Administrative	Style
Professions	Public: Article 134 Constitution enables the establishment of public regulatory bodies with private elements	Public: 'Article 134 bodies'	Public: Decree-making powers (public regulation) delegated to the board	Public: Judicial disciplinary bodies; Ministerial review; Supervisory Authorities (e.g. <i>BFT</i>)	Some pure self-regulation, some co-regulation, some public regulation, some public
	Private: Freedom of association Article 124 Constitution	Private: Associations Foundations	Private: Private regulatory authorities of the board and officials with rule-making powers (private regulation (private regulation (bye-laws, articles and resolutions))	Private: Non-judicial disciplinary bodies; Complaint procedures; Supervisory authorities	
Financial markets	Public: EC obligations	Public: GALA b-type (foundation)	Public: Legislator (after consultation market parties)	Public: Supervisory Authorities (<i>AFM and DNB</i>)	Self-regulation abandoned: public reregulation (command-and control legislation with consultation of the sector)
Sports	Freedom of Association Article 124 Constitution	Private: Associations Foundations	Private: Private regulatory authorities of the board and officials with rule-making powers (private regulation (bye-laws, articles and resolutions))	Private: Non-judicial disciplinary bodies	Pure self-regulation

Sector	Constitutional framework	Body	Legislative	Administrative	Style
Media	Freedom of expression Article 7 Constitution (and various public values)	Public: GALA a-type Private: Asso- ciations	Public: promotion self-regulation Private: (with 'meta-supervision' by state)	Public: promotion self-regulation Private: (with 'meta-supervision' by state)	Promoted self-regulation, sometimes boarding on 'mandatory'
Environment	Article 21 Constitution and Article 8 ECHR	Public: Legislator Private: industry	Public: Legislation Private: Covenants	Public: threat of public regulation in case of non-compliance	From command and con- trol legislation to co- regulation and promoted self-regulation ; some pure self-regulation
Internet	Freedom of expression Article 7 Constitution	Public: Legislator Private: Associations Foundations	Public: Legislation: implementa- tion of EU directives in Civil Code Private: Private regulatory authori- ties of the board and offi- cials with rule-making powers (private regulation bye-laws, articles and resolutions); i.c. codes of conduct	Public: Civil proceedings Supervisory authorities (OPTA) Private: Mediation; Arbitration; Civil proceedings; Com- plaint procedures	Pure self-regulation and governmental legislation (provisions in the Civil Code)

III Conclusion and outlook

To summarise the main elements of this chapter in a couple of sentences: in I.1 it has been made clear that the constitutional framework in the narrow sense is not determinative of the role of self-regulation in the Dutch *rechtsstaat*, apart from echoing a general sense of private autonomy and imposing the obligation to put into place certain preconditions for realization of fundamental freedoms on the state as well as on societal organisations ('horizontal effect'). The absence of a constitutional court and the constitutional prohibition of constitutional review of primary legislation mean that the delimitation of the powers of the legislator vis-à-vis private bodies is determined by academic doctrine rather than judicial doctrine.

If one adopts a broader conception of the constitutional framework so as to include all legal provisions constitutive of the functioning of the public sphere, the GALA comes into play (see I.2). In this general act regulating the public administration and its behaviour, some important choices have been made. Any private law body exercising public authority is deemed a public body for the purposes of the GALA. This has important consequences for the treatment by the courts of all regulatory activity of which the purely private nature can be questioned as well as for liability issues, such as the applicability of general principles of proper administration (see I.3). However the importance of the GALA should not be overstated, in particular not as far as rule-making is concerned (there are no provisions on participatory rights such as in the APA and general rules can not be subject to judicial review).

The overarching picture emerging from the Dutch legal system and in particular its case law is the persisting strong division between public law regulation (unilateral and therefore bound by constitutional norms) and self-regulation (assumed to be bilateral and therefore positioned in the realm of private law). The reality may be different, for 1) the emergence of more responsive and market-based styles of regulation may mean that public regulation gets input from different sides and 2) the entanglement of self-regulation in public structure makes voluntary adherence a characteristic only existing in theory. Furthermore the coexistence of two interacting legal orders (private and public) implies multilevel regulation, resulting in conflicts of laws and tensions between the functionality and autonomy of private law and the rather rigid public control.²³⁴

Even if this chapter emphasizes that self-regulation is no legally relevant category under Dutch law, it is possible to establish a link between the state of the art of self-regulation policy in the Netherlands and the legal structure it has to function within, for legal provisions - whether of a restrictive or facilitative nature - are an important factor in steering the use of self-regulation.

From a spontaneous phenomenon associated with private autonomy or 'subsidiarity' in the catholic sense, self-regulation has come to be looked upon as an instrument among many at the disposal of government, closely associated with deregulation. The trend to view self-regulation as an alternative to legislation was expressly encouraged in the government communication 'View on Legislation' (*Zicht op wetgeving*).²³⁵ Whereas in the early 1990's Balkenende, the future Prime Minister, still concluded in his academic writings that "there has been no willingness [in governmental policy] to stimulate a regulatory role for voluntary non-governmental organisations"²³⁶, nowadays a clear desire on the part of the Dutch Government

²³⁴ Van Hoek (2006), p. 12-14.

²³⁵ *Kamerstukken II* 1990/91, 22 008, nrs. 1-2.

²³⁶ Balkenende (1992), p. 311, cited by Koekkoek (1994), p. 246, note 18.

can be discerned to implement forms of co-regulation (often still called ‘self-regulation’).²³⁷ This trend is also visible in the case studies of this chapter (e.g. financial markets and professions). Whether the reasons behind this shift are connected to the constitutional obstacles identified in I.1.2 in particular the increasing attention for the legality principle, is uncertain but not entirely improbable. The decreasing public reliance on the self-steering capacities of sectors of self-regulation has also played a part in introducing market-based regulation and public meta-supervision through the governmental *MDW* project²³⁸ on market regulation, de-regulation and public regulation²³⁹.

Looking at what is in the policy pipeline however, the future might hold a move away from the state-centred approach to self-regulation. The active role of government in self-regulation is increasingly defined as providing incentives for self-regulatory solutions or as putting in place meta-regulation²⁴⁰, rather than forcing private parties to self-regulate by enacting statutory obligations.²⁴¹ For the moment this is merely a policy recommendation by the Scientific Council for Government Policy, but the second and third Balkenende governments generally endorsed this line of thinking. In a communication which is part of its ‘Different Government’ project, the previous government wrote that demanding more responsibility from citizens includes allowing them space to regulate themselves.²⁴² There is no reason to expect that the new Balkenende government (the fourth) will choose a different policy direction, especially because the 2007 coalition agreement confirms that dimishing administrative burdens is the main focus of Dutch regulatory policy.²⁴³ The council also recommends assessing existing forms of self-regulation and self-enforcement in terms of adequate legal protection, quality control, transparency and accountability, which in view of the results of this chapter would indeed be no luxury.²⁴⁴

In most cases of self-regulation described in this chapter, self-regulation has a public flavour, that is to say: the state is present somewhere in the back, even if it is at a far distance. Different varieties of governmental involvement can be observed, most of which could be placed under the heading of ‘co-regulation’, even if this term as such is not often used in the Netherlands.²⁴⁵ Self-regulation is increasingly perceived as a policy choice, a trend reflected in the explicit mentioning of self-regulation in the Guidelines for Legislative Drafting.²⁴⁶ This is so

²³⁷ Balkenende II Kabinet’s ‘Main Lines Agreement’ (*Hoofdlijnenakkoord*).

²³⁸ *Marktwerking, Deregulering en Wetgeving*.

²³⁹ Examples of the latter are market elements introduced in the Act on Advocacy (after the Cohen Commission’s evaluation in 1995) the new Notaries Act (1999), the new Usher’s Act, alterations in the Taxi-sector and the Financial Market’s sector.

²⁴⁰ See for instance the Government memo ‘*Bruikbare rechtsorde*’ (‘practical legal order’), *Kamerstukken II* 2003/4, 29279, nr. 9 in which meta-regulation is proposed as the way forward for self-regulation in less obvious policy areas too.

²⁴¹ *WRR* (2004), p. 264.

²⁴² *Kamerstukken II* 2003/04, 29362 (‘*Andere overheid*’), nr. 2, p. 2.

²⁴³ Coalition agreement (*regeerakkoord*) of 7 February 2007, available at <http://nos.nl/gfx/nosjournaal/documenten/regeerakkoord2007.pdf>.

²⁴⁴ *WRR* (2004).

²⁴⁵ Sometimes the literal Dutch translation ‘*coregulering*’ is used to denote a rather narrow form of private participation in standard- or agenda-setting. Apart from this the word is found in Dutch translations of EU documents.

²⁴⁶ This trend is mirrored in the EC context: the Impact Assessment Guidelines of the European Commission also instruct services to consider self-regulatory options when drawing up an impact assessment of a legislative or policy proposal, SEC(2005) 791.

even in cases in which self-regulation enjoys a long and powerful tradition; then the decision to leave the self-regulatory regime intact is also seen as a choice. Apart from the two situations mentioned above, there is no legal protection for self-regulatory regimes against governmental usurpation. When new issues catch the attention of government, such as food risks²⁴⁷, we typically witness the government welcoming the self-regulatory initiatives or embracing the existing self-regulation. However this is invariably accompanied by ‘threats’ to intervene if the self-regulation does not ‘deliver’. How the results of these self-regulatory initiatives are measured is unclear. Often the self-regulatory experiment is part of a negotiation and a publicity game, in which politicians and industry acknowledge that they need each other’s cooperation. Even if the self-regulation – allegedly – fails, the actors will continue to rely on each other, making co-regulation the proper compromise.

In the preference for ‘impure’ forms of self-regulation, the dynamics of the legal system, often drawing involvement of private structures in regulation into the public sphere for judicial review purposes, certainly plays a part. Liability for insufficient or inadequate regulation should be an incentive for good regulation in the public interest.²⁴⁸ As we have observed however Dutch liability case law for failure to regulate and supervise is scarce. Even if this means that the alternative dispute settling mechanisms in the sector are functioning properly, it gives reasons to believe, at least from the point of view of the public, that these sectors are rather self-protectorist than self-steering, paving a way for the introduction of public based regulation. This is certainly true for self-regulation concerning entry and tariffs. The competition authorities have lately turned to reviewing self-regulation for obstruction of competition and demanding private regulation to be altered (or to be turned into public or market based regulation) in order not to breach competition law.

Despite this ‘pull’ towards public law, still many occurrences of persisting pure self-regulation remain, i.e. cases in which the state keeps a certain distance. These occurrences can roughly be divided into two categories: self-regulation by associations (e.g. regulation by associations in the sport sector) and self-regulation in areas which are heavily protected by fundamental rights (e.g. Press Merger Code).

One consequence of a legal system centered on a rather rigid public-private divide is that it is clearly not designed to accommodate all specific problems caused by hybrid forms of regulation. This is not to say that self-regulation in the Netherlands is on the wrong track, but it is to observe that in the current legal structure the voluntary nature of many self-regulatory arrangements is not always protected or acknowledged. The lack of case law in the field cannot be taken as proof of the reverse, since it is largely due to the dynamics of the litigation structure (both in public and in private law) that dissatisfaction with self-regulation or co-regulation is not often expressed in court rooms.

²⁴⁷ In 2006 the Minister of Health announced the launch of a covenant aimed at reducing obesity, because he felt that attempts by the food industry to self-regulate by means of a code with the same purpose failed.

²⁴⁸ Hartlief (2005) regarding liability for insufficient or inadequate regulation.

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