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Abstract

In this contribution we focus on codes as a particular form of civil regulation that is adopted by non-state actors to regulate internal behaviors. Governments increasingly encourage codes and forms of civil regulation in order to protect or to advance governmental objectives in the public interest. We will argue that codes - and with it civil regulation – have better chances of serving the public interest if (1) government, private actors and stakeholders agree on the norms in the standard-setting process, (2) if the codes are binding and (3) there are mechanisms to enforce compliance.

1. Introduction

Codes may be defined in terms of the function they perform in society, in terms of their core elements, or in terms of what they mean to different actors in daily practice (cf. Black, 2002). There is no single definition, but most scholars agree on the observation that codes are written documents that lay down standards which communicate what behaviors are (morally) required (Schwartz, 1991; Pater and Van Gils, 2003). They are a prevalent regulatory instrument for ethical guidance or social responsibility to be found everywhere from single organizations, to professional and trade associations and to large multinationals (Wood and Rimmer, 2003). Codes still grow in number as governments, associations, and special interest groups increasingly call for the establishment of such codes (Schwartz, 2002: 27).[1]

Private organizations like multinationals and banks use codes as a particular instance of civil-to-business and business-to-business regulation. They may have different reasons

[1] To illustrate the prevalence of codes we quote Schwartz (2002: 27): “In the U.S., over ninety percent of large corporations have a code of ethics (Center for Business Ethics, 1992), while in Canada eighty-five percent have a code (KPMG, 2000). Of the largest European corporations, fifty-seven percent of U.K. companies have a code (Le Jeune and Webley, 1998), fiftyone percent of German companies have a code (Schlegelmilch and Langlois, 1990), and thirty percent of French companies have a code (Schlegelmilch and Langlois, 1990).” In a comparative study of corporate governance codes from 2002 the Internal Market Directorate General of the European Commission found 35 national corporate governance codes, one third of them in the United Kingdom.[1]

for doing so, such as the wish to (re)gain the trust of the public, to express their corporate social responsibility, to discourage free riders or to prevent government from imposing too strict legislation. The corporate governance codes of private organizations have inspired several national corporate governance codes. At the international level a harmonization of codes can be observed, for instance through the 'OECD Principles of Corporate Governance'. In a comparative study of corporate governance codes codes are said to be beneficial in a number of ways: “Codes stimulate discussion of corporate governance issues, they encourage companies to adopt widely-accepted governance standards, they help explain both governance-related legal requirements and common corporate governance practices to investors, they can be used to benchmark supervisory and management bodies and they may help prepare the ground for changes in securities regulation and company law, where such changes are deemed necessary”.[2] Codes increasingly are applied by civil actors in the non-profit and (semi-)public sectors, where they are adopted to communicate professional or organizational values, to regulate their integrity policy or for reasons of standardization. A particular instance are professional codes, which are viewed as the most visible and explicit enunciation of norms that embody the collective conscience of a profession (Frankel, 1989: 110).[3]

In this contribution we will discuss codes from three different perspectives: an organizational perspective, a governance perspective and a (public-private) hybrid perspective. The organizational perspective is concerned with codes drawn up by and for a single (private) organization. This type of codes is mainly discussed in business ethics literature and refers primarily to internal controls of behavior (codes of ethics and codes of conduct, see Oude Vrielink & Van Montfort, 2009) (section 3). The governance perspective deals with codes as a regulatory tool to achieve government objectives in the public interest. Governments increasingly stimulate or mandate (legally conditioned) self-regulation to serve public interest issues (section 4). In a final step we will argue that in order to arrive at a better understanding of the potential and pitfalls of codes as a new mode of governance requires a closer look at the hybrid nature of both the composition of codes and the coding process. We will distinguish three dimensions to determine to

[2] Comparative Study Of Corporate Governance Codes. Relevant to the European Union And Its Member States On behalf of the European Commission, Internal Market Directorate General. Final report & Annexes I-III. January 2002, p. 11.

[3] They may comprise one or more of three conceptual elements: ideals for which practitioners should strive, norms which can help in dealing with ethical problems and detailed rules to govern professional conduct and adjudicate grievances (Frankel, 1989: 110-111).

what extent codes can be characterized as either more public or more private. This allows us to depict codes as a typical combination of public and private components a code is comprised of and the typical combination of public and private actors involved in the preceding process of standard-setting. We are of the opinion that the hybrid perspective offers a more refined picture of the chances and risks involved in the use of codes as a new regulatory instrument to protect or advance public objectives. This approach provides a deeper understanding of what components help or hamper the adoption and actual operation of codes. In a final step we will try and work out what strengths and weakness are involved in the use of codes.

2. The concept of codes

In the most general sense the concept of a code refers to collections of rules and regulations, generally signifying a written set of action prescriptions (Kaptein & Schwartz, 2007).[4] Sometimes the set of rules and regulations are of a similar nature but referred to by different names, such as codes of ethics, codes of conduct, codes of practice, business codes, integrity codes, codes of honour, voluntary agreements, guidelines, and recommendations (Petrick and Quinn, 1997; Kaptein, 2004; Kaptein and Schwartz, 2007; Baarsma et al, 2003: 26; Huyse & Parmentier, 1990: 255). Most scholars treat them as synonyms, while others deliberately discern between the different meanings. They use different names to discriminate between more ethical and practical contents, between general and situational applicability, or to express a difference between general ideals and more concrete action prescriptions (e.g. Anheier & List, 2005; Wood & Rimmer, 2003; Baarsma et al, 2003: 26). The common denominator in the various definitions of codes is that they consist of rules and regulations that articulate action prescriptions with the intention of moral guidance. Codes are applied as regulatory tools by public or private actors that - individually or in concerted action - regulate what rules and regulations are to guide individual and collective action. Often codes comprise dispute management rules and provisions to sanction infringements (Huyse & Parmentier, 1990; Baarsma et al, 2003). As such, codes among other things deal with an organization's "social license to operate" (Kagan et al, 2003) which might explain why scandals usually invoke a sudden rise in popularity of codes. Codes are drawn up to visibly express corporate, sector or professional values in order to (re)gain public trust

[4] This focus on explicating behavioral standards on paper links the definition to the Latin origin of the term "code", which indicates wooden boards covered with wax used to write.

(cf. Wood & Rimmer, 2003). Codes thus assist organizations in their ongoing relationship with society by helping them to balance their pursuit of autonomy and the public's demand for accountability (Frankel, 1989; Higgs-Kleyn & Kapelianis, 1999).

Codes in principal are autonomous forms of regulation separate from statutory or international law. But since governments have recognized the limited possibilities of law they are looking for alternative forms of regulatory government the beyond law (Scott, 2009). Governments try to stimulate governance by non-governmental actors. Private standardization, certification (see the contribution of Tim Bartley in this volume, Bartley, 2011), ranking, voluntary agreements like covenants and also codes are popular tools of self- and co-regulation. The result is a complex mix of hard and soft law arrangements, like legally binding codes in some semi-public sectors. So codes are not necessarily a type of VAR (a voluntary approach to regulation, see Töller in this volume, Töller, 2011).

But codes do not only offer chances for serving public values, but also bear risks. Most codes have a strong normative profile. It is not always clear how those norms can and will be realized. Some codes do not go beyond the symbolic level. A lack of will, competence or agreement may be the cause. It is also possible that the code was set up only for the sake of appearances or to prevent government from lawmaking. The attention to the normative site of the code can be so high that the compliance site is a little bit neglected by the participants. In practice many codes face a lack of knowledge about the state of compliance and when it is measured a compliance deficit might be discovered.

Codes have inspired an extensive body of research in various literatures. In business ethics literature codes predominantly are studied as a device of ethical guidance within single (private) organizations. Topic areas commonly dealt with in business ethics literature are the content of codes and issues related to the effects of codes on behavior. Scholars of governance and of regulation or regulatory reform start from a somewhat different angle. They take an interest in codes as a particular mode or instrument of regulation that is applied in the context public policy objectives. It is part of a larger debate about new modes of regulation and the role of a government to preserve public interest issues. In past decades, governments of many advanced western countries encouraged self-regulation as a means to achieve public policy goals. Various terms are

in use to label the new regulatory modes.[5] They have in common that private rule-making at least to some extent is conditioned by the state, whereas their variation applies to how and to what extent the state intervenes in the self-regulatory practices.[6] A particular line of inquiry in this debate involves the study of codes as a regulatory tool to regulate the structures and processes of internal governance to serve public interest issues. Literature and research on this type of codes can be found in governance literature and mainly involves topics such as oversight, public accountability or stakeholderdialogues.

3. Codes from an organizational perspective

From an organizational perspective codes are used to communicate to both insiders and outsiders what norms ought to govern behavior. Modern organizations are regulated by government to prevent them from pursuing their own interest at the cost of the common good. The movement toward increased ethical guidance and government intervention is rooted in what is called the "corporate social contract". In return for legal accountability through organizational management to shareholders and the general public a corporation is given the right to pursue its stated objectives (Brooks, 1989: 117). This principle replaces the early industrial believe that "what is good for business is good for the country". In past decades unions and governments have both awakened to their power to influence or control corporations. Shareholders' rights no longer are looked upon as properly dominating the rights of all other stakeholders. Because of this new operating rationale for corporations in western, capitalistic societies companies nowadays face a dual test of legality and moral acceptability (Brooks, 1989), which lead them to perform beyond the law (cf. Kagan, Gunningham and Thornton, 2003). Frankel (1989: 109, 110) points to a similar movement toward increased ethical guidance in the context of professions; society's granting of power and privilege to the professions is premised on their willingness and ability to contribute to social well-being and to conduct their affairs in a manner consistent with broader social values. This relationship he refers to as the "society-profession nexus".

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[5] To name a few examples: coerced self-regulation (Black, 1996), mandated self-regulation (Rees, 1988), instigated self-regulation (Ukrow, 1999), enforced regulation (Brien, 1998), and co-regulation (Senden, 2005), smart regulation (Gunningham and Grabosky, 1998)

[6] In the late eighties, for instance, a trend to more formalized codes and an increasing reliance on statutory or administrative provisions could be observed (Baggott, 1989).

In business ethics literature conceptual and empirically oriented studies on codes can be divined into two main orientations, that is, content oriented research (what is or should be in the actual codes) and output oriented research (what effects on behavior they have or should have).[7] These lines of inquiry deal with different knowledge interests and bodies of knowledge on codes. Helin & Sandström (2007) reviewed 38 studies on corporate codes with an empirical content, published during the period of 1994 to mid-2005. The conclusion of their review is that most of these studies are content-oriented targeting what is in the actual codes (e.g. Lefebvre & Singh, 1996; Preble & Hoffman, 1999; Wood, 2000; Carasco & Singh, 2003; Singh, Carasco, Svensson, Wood & Callaghan, 2005), sometimes with an additional normative view of what it should be comprised of (e.g. Wood & Rimmer, 2003; cf. Boers & Van Montfort, 2006). They have witnessed a particular focus on mapping the content in terms of country- or non-country-specific characteristics. The overall view that results from content-oriented studies is that regardless of their geographical origin codes are similarly designed and basically share the same massage of moral behavior. Generally codes contain behavioral rules, rules concerning the endorsement of a code, the sanctioning of infringements, and rules of dispute management. This general pattern can be observed in national as well as cross-national studies, though the latter also reveals some differences. For instance, Australian codes rely less on internal and external watchdogs than American codes do, which is explained by differences in business culture.[8]

The second line of inquiry examines the effectiveness of codes in influencing actions towards "more ethical" behavior and key factors that might explain their effects. Studies dealing with this subject provide divergent and even conflicting conceptual views on the effectiveness of business codes, ranging from largely counterproductive or successful, a mixed view that is mirrored in results of empirical studies conducted in this field (Kaptein

[7] A third line of inquiry, which is still in its infancy, could be distinguished. It takes an interest in what obstacles organizations have to overcome and the mechanisms it should have in place in order to ensure a code is actually coming into practice. Studies adopting this perspective draw attention to issues such as the code's relevance and consistency, and procedures of consultations, communication, education, maintenance and reinforcement.

[8] Taking this perspective a bit further these differences may be explained by legal culture, in particular to differences in the degree of legalism and adversarialism. Legalism in this context refers to being formalistic, which "makes for precision, transparency, security and predictability, but at the cost of rigidity, bureaucracy, cumbersomeness and costliness" (Van Waarden, 2009: 200). Adversarialism refers to antagonistic relations and reliance on social systems structuring conflict by channeling it formally, for instance in court, in order to be able to control such conflict (Van Waarden, 2009:200). As we will show later on in this contribution, codes may vary on the dimension of legalism, and consequently differ in the risks and chances involved in their use as a means to achieve public objectives.

& Schwartz, 2007). In a similar vein, reviewing 79 empirical studies that examine the effectiveness of business codes, Kaptein & Schwartz (2007: 113) conclude that these studies present a mixed image: "35% of the studies have found that codes are effective, 16% have found that the relationship is weak, 33% have found that there is no significant relationship, and 14% have presented mixed results. Only one study has found that business codes could be counterproductive".[9]

To establish the potential of codes in terms of whether they are or could be effective a different research approach is required; contextual factors inside or outside the corporation should be taken into consideration (Helin & Sandström, 2007; Kaptein & Schwartz, 2007).

4. Codes from a governance perspective

The various currents in the literature discussed in this section are also engaged in regulating behavior within organizations but in a different way. The difference with business ethics codes in literature is that organizations or their representatives are invited by the government or entrusted to regulate themselves for the realization of a public interest. A second difference is that in the governance literature, codes as most often discussed as a certain type of regulation instead of being treated as an independent object of study. In the business ethics literature codes are frequently an isolated object of study.

In governance literature the growing interest in self-regulation indicates a shift from government to governance. In this literature on governance, codes are dealt with as a particular instance of self-regulatory mechanisms that replace or supplement direct state regulation. Self-regulation describes a horizontal extension of government as it includes private and societal actors in the regulatory process (Rhodes, 1997; Schmitter, 2001). State and society share a responsibility for the realization of public policy goals and consequently self-regulation is perceived of as a means to be applied in the public interest. At the vertical level government is extended by regulatory arrangements at the local, regional, national, supra- and international level. Consequently, the focus is on the

[9] Kaptein & Schwartz (2007) conceive of a ''business code'' as a code that is developed by and for a given company. Such codes are one of the layers of a whole range of codes for business consisting also professional, industrial, national and international codes.

interplay between multiple levels of control instead of on the national government (Latzer et al, 2003).

According to Baggott (1989: 435, 436) amongst political scientists at least three perspectives can be identified within the academic debate. Firstly, corporatists tend to see self-regulation as further evidence of a corporate state in which state authority is devolved to private organizations that in turn regulate their members (Schmitter 1985). Secondly, supporters of a minimal state consider self-regulation as a possible means of rolling back the state (Hughes, 1985). And thirdly, in a particular strand of public administration literature self-regulation is seen as a particular form of quasi-government, raising questions and problems of accountability and public control (Hood, 1978). In addition to this a fourth perspective could be discerned; that of the regulatory state (Majone, 1994; Braithwaite, 2000; Jordana & Levi-Faur, 2004). This line of inquiry deals with the gradual shift from (re)distributive policies to rule-making, taking a special interest in the rise and role of specialized, independent regulatory agencies (Latzer et al, 2003; Christensen and Lægreid, 2006). Self-regulation is presented as a particular type of regulatory reform next to deregulation, better regulation, re-regulation and meta-regulation. It represents a further step away from traditional, hierarchic state regulation towards less formalized means of regulation which are carried out by private or semi-private regulatory institutions.

In literature on regulation several scholars have addressed the use of self-regulatory mechanisms to help achieve public interest issues by various names such as “the remix of traditional and alternative regulation” (Latzer et al, 2003: 127), “decentralized regulation” (Black, 2002; cf. Scott, 2004), “industry self-regulation” (Gunningham and Rees, 1997) or “smart regulation” (Gunningam, Grabosky and Sinclair, 1998). They start from the premise that government regulation may perform better if it incorporates the benefits of self-regulation. The following potential advantages of self-regulation are perceived: compliance enhancement, flexibility, a quick and informed response, lesser public expenditures (Gunningham & Rees 1997; Abbott & Snidal 2000: 421; Cutler 2003: 23; Havinga 2006; Trubek & Trubek 2005; Trubek, Cottrell & Nance 2006; Abbot & Snidal 2009).

In sum, in the literature on regulation, regulatory reform and governance codes commonly are treated as a self-regulatory instrument and are discussed in the context of the broader trend to apply new modes of regulation to preserve public interest issues.

5. Codes from a hybrid perspective

From the organizational perspective the public interest is served in the specific content and output of codes and from the governance perspective the public interest is served in 'joining up' the regulatory process or by transferring the regulatory process to private actors. Both perspectives offer however a limited view on risks and chances for serving the public interest by codes. To better understand the strengths and weaknesses involved in the use of codes as a new mode of regulation we need to pay close attention to the question of what the regulation comprises and how the regulation is carried out. In this contribution we therefore argue that a code's potential in serving the public interest can be understood properly only by taking into account (a) its *hybrid composition* (b) and the hybrid character of the 'coding' process.

The content of codes and the process of coding are never pure public or pure private. In civil regulation in the shape of codes always both public and private interests, motives, incentives, effects and behavior play a role. That is why we called earlier codes and the coding process a 'practice between public and private'. Rather than through the state, civil regulation operates beside or around the state; it is based on 'soft law' rather than legally binding standards. It is rooted in traditional forms of self-regulation but goes beyond it to include second and/or third party regulation.[10] In this hybrid practice the public interest is guaranteed if responsiveness to needs, wishes and preferences of relevant public and private stakeholders is well served. Therefore in our opinion codes - and with it civil regulation - will serve the public interest better if (1) government, private parties and stakeholders agree on the norms, (2) the codes are binding and (3) there are mechanisms to enforce compliance. With regard to the regulatory process ('coding') to arrive at a code public interest is served best if the relevant public and private stakeholders and interests are involved in this process.

The hybrid composition of codes

The hybrid composition of codes appears on three levels:

[10] Following Levi-Faur (see introductory chapter, see also Van Waarden, 2011) we consider first third party regulation to mean forms of self-regulation in which the regulator is also the regulatee. Second party regulation denotes forms of regulation in which the regulator is independent and distinct from the regulatee. In third party regulation, the relations between the regulator and the regulatee are mediated by a third party that acts as independent or semi-independent regulatory-auditor.

- *The regulatory bodies:* who defines the normative content of a code (government, private parties and/or stakeholders)?
- *Legal status:* does the code refer to (legal and obligatory) regulation (is it binding from a legislative perspective) or is it a voluntary non-coercive agreement?
- *Compliance mechanism:* is there anyone who cares about compliance and if yes, who takes care, who can sanction non-compliance, do stakeholders have opportunities to complain?

The content (norms) of codes, for example, can be defined by private parties, but at the same time be established in law and enforceable by stakeholders. This strengthens the public character of the code. But in other cases the content of codes will be defined by or at least framed by the government (think of norms about integrity or wages), don't codes have a legal status are there no instruments for compliance.

The typology of codes in terms of hybridity provides us with a means to arrive at a more refined judgment of codes as a device to serve public interest issues. So to get a better understanding of codes as regulatory mechanism in the public context codes should be categorized according to their typical combination of components of public and private regulation. Using components derived from legislation ('public') means that non-compliance is regarded as behavior against the law and can be dealt with accordingly, whereas components of self-regulation ('private') leaves questions of ethics and discipline to private organizations or their associations (Brien, 1998). Starting from the premise that behavioral effects might occur from the combination of public and private rules identifying and proscribing what behavior is required on the one hand and regulatory provisions to deter or punish non-compliance on the other hand, codes to that effect may comprise components of legislation and self-regulation.

Huyse & Parmentier (1990: 261, 262) point out that all of the arguments for and against codes pertain to situations in which the codes are drafted unilaterally and function indigenously. In cases of other types of codes, such as joint codes or codes administered by a government office, different arguments apply. In the latter situation, for example, consumer organizations have more confidence in codes. They feel the code can set higher standards for consumer protection, can guarantee cheap and speedy methods of dispute settlement and can be (re)negotiated without undue delay. From this

example we learn that the relative dominance of public and private components of a code affects its (perceived) benefits or limitations. This not only holds true for codes, but other self-regulatory instruments as well. It thus should be possible to surmise what risks and chances the different types of codes involve based on the public-private profiles.

Hybridity of the regulatory process

Not only the norms, legal status or compliance mechanisms can vary in degree of 'publicness' (Bozeman, 1987), but also the process of regulation itself.

In recent decades codes increasingly are found in the realm of combined public and private normative orders. They have become prevalent self-regulatory mechanisms applied to help achieve public policy goals. From the early eighties of the previous century governments in the United States, Europe, and other advanced western economies strongly promoted the adoption of such codes. Codes and other instruments of self-regulation were hailed as a more flexible, effective and efficient alternative for direct state regulation. These new modes of regulation were inspired by various political and economic trends, such as growing protests against the expanding body of government regulation ("juridification"), an emergent awareness of the poor quality and ineffectiveness of state imposed regulation ("regulatory failure"), fiscal constraints inspiring a search for cost-effective regulatory controls. Furthermore, the experiments with self-regulation as an alternative for or supplement of legislation fitted the turn towards neo-liberal ideology entailing a trend to employ private sector management practices in the public sector, most typically reflected in New Public Management (NPM; see Hood 1991). This all has added to a situation in which codes increasingly can be found in the realm of hybrid regulation.

Different strands in socio-legal literatures (e.g. on new governance or the (post)regulatory state) have shown interest in regulatory hybridization as a strategy to improve rule compliance and social legitimacy of regulation (Ayres & Braithwaite 1992; Sinclair 1997: 529-559; Gunningham, Grabosky & Sinclair 1998; Scott, 2002; Lobel 2004: 343-470; Trubek 2006).[11] Hybridization in these contexts has three different meanings that overlap both in the empirical world and in scholarly discussion. To quote Halpern (2008: 85) on this subject regulatory hybridity "can refer to regulation that

[11] A similar interest could be witnessed among political scientists dealing with issues of self-regulation from a corporatist or quasi-govenment point of view (Schmitter, 1985; Hood, …)

combines governmental (public) and non-governmental (private) components. It can refer to oversight arrangements with multiple levels, joining centralized and regional or local features. It can refer to regulatory processes that engage a full range of participants, including professionals, divisions of government, public interest advocates, and representatives of groups being regulated".

Codes produced in the realm of hybrid regulation reveal a great variety in their typical combinations of state and non-state input at different regulatory levels and in the relative dominance of public and private components. We agree on Huyse & Parmentier's (1990: 256) claim that in order to value a code's potential it is important to have a clear understanding of the differences amongst codes. They can be categorized by means of various perspectives, each leading to the identification of certain types of codes. For instance, one way to classify codes applied by Huyse & Parmentier (1990: 257) is by looking at the number of parties involved in adopting a code to distinguish between unilateral, bilateral, and trilateral codes. Another perspective, focusing on means by which codes function once they are established, leads them to the differentiation between indigenous, joint, and administered codes (1990: 258). In this contribution we developed a typology of codes according to what we call their 'public-private profile', referring to the relative dominance of public and private regulatory components..

7. Conclusion

The use of codes as an instrument to help achieve public policy objectives is rather new. Traditionally organizations adopt codes to communicate what the organization stands for (e.g. mission statements), to govern individual and organizational conduct in situations of moral ambiguity or conflicts of interests, or to express their social responsibility. Regardless of whether a code is adopted to serve public policy objectives or organizational interests, it almost invariably combines public and private elements. This hybrid nature needs to be taken into account if we want a better understanding of a code's potential as a regulatory tool of civil regulation. The hybridization of codes refers to both the self-regulatory process of standard-setting, implementation and enforcement and the code as a product of this self-regulatory process. The regulatory bodies involved in this process and the nature of the norms and the compliance mechanisms thus can be public or private.

Codes are an expression of civil regulation, whether we take a look at codes of ethics or governance codes. In most cases this kind of civil regulation is not pure 'civil', but a mix of public and private elements. Both the norms, legal status, compliance mechanisms ánd the process of regulation show action and influence of the state as well as initiatives from 'below'. We argue that the degree of responsiveness to the needs, opinions and preferences of public and private stakeholders of both the codes as the coding processes (regulation) is crucial for serving the public interest. So the public-private mix that is the most responsive on both the codes as the coding processes (regulation) will guarantee the best the public interest that is involved in civil regulation by codes.

To conclude our contribution we will address the issue of the strengths and weaknesses of codes as a regulatory instrument to protect or advance the public interest. Since the codes are promoted as an alternative to direct command and control regulation we will describe them in terms of the potential advantages and disadvantages of self-regulation compared to direct regulation.

Codes are stimulated or even mandated by governments to deal with the weaknesses of command and control regulation. In the introductory chapter six shortcomings are emphasized: (a) expensive and ineffective regulatory strategies; (b) inflexible regulatory strategies that encourage adversarial enforcement; (c) legal constraints on the subjects, procedures, and scope of regulatory discretion; (d) *regulatees'* resentment, which leads to non-compliance or "creative compliance"; (e) strict regulation that often presents an obstacle to innovation; and (f) regulation that often serves to set a lowest common denominator for regulatees to follow rather than supplying incentives for improved standards.

Codes can have strengths compared to direct regulation, they can take away the shortcomings of direct regulation. But codes have their disadvantages too (see also Van Waarden about the strengths and weaknesses of third party regulation in this volume, Van Waarden, 2011).

According to the governance literature, regulation may perform better if the benefits of both, self-regulation and legislation, are incorporated into the regulatory system. Then regulation may benefit from the following potential advantages of self-regulation (Selznick 1992; Teubner, 1997; Gunningham & Rees 1997; Abbott & Snidal 2000: 421; Cutler 2003: 23; Havinga 2006; Trubek & Trubek 2005; Trubek, Cottrell & Nance 2006;

Trubek et al 2008; Abbot & Snidal 2009; Mascini & Wijk 2009; Dorbeck-Jung et al, 2010):

- Compliance enhancement: self-regulation is said to support the internalization of norms; it is expected that actors usually will accept the rules of conduct they agreed upon and follow them in regulatory practice.
- Responsiveness and flexibility: self-regulation seems to be able to respond to demands for frequent norm changes, diversity, space for multiple interpretations and experimentation to achieve optimal results according to social and technical development.
- Quick response: self-regulation is set up informally, which seems to speed up regulation.
- Informed response: self-regulation is based on domain expertise, which is said to be essential for effective regulation.
- Efficiency enhancement: if private organizations pay the costs of self-regulation, public expenditures can decrease.

In combinations of self-regulation with legislation, the additional advantages of legislation could be:

- Reliability: legislation is required to be clear, coherent, stable and predictable. A reliable framework for action is said to be essential for policy goals.
- Sanctions: legislation provides for sanctions; the effectiveness of regulation seems to be supported by credible threats of enforcement.
- Broad interest recognition: legislation is required to pursue public interests and to strike a balance between conflicting interests.

When legislation and self-regulation are combined to achieve public policy goals, however, the result may be to introduce not only the advantages of both regulatory tools, but also their deficiencies. In the case of self-regulation, the potential deficiencies are lack of reliability, transparency and binding sanctions, as well as biased interest recognition (Levin 1967; Gunningham 1995; Vogel 2009). Theoretically, legislation may be accompanied by the disadvantages of rigidity and lack of tailored control. Furthermore, when legislation and self-regulation are combined, tensions between the interests on which the two regulatory instruments are based (public versus private interest) may be counterproductive in regulatory practice (Gunningham et al. 1998: 28).

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