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Eijlander, Ph.

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POSSIBILITIES AND CONSTRAINTS IN THE USE OF SELF-REGULATION AND CO-REGULATION IN LEGISLATIVE POLICY: Experiences in the Netherlands - Lessons to Be Learned for the EU?

Philip Eijlander¹

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Abstract

A comparison between the use of self-regulation and co-regulation at the national level and that at the European level is not easy because of the different functions national legislation and European legislation have. On a national scale, the main function of legislation is to achieve uniformity and equality under the law. General rules have a different function in the European Union. The European Union exists thanks to its diversity. The issue of the quality of legislation in the European Union is not a problem of uniformity, but of handling diversity in a well-considered, legal way. In this article, the concepts of self-regulation and co-regulation are analysed, both at the national level (the Netherlands) and at the level of the European Union. Programmes of better law-making propose the use of self-regulation and co-regulation. What can we expect from these proposals?

1. Introduction

At the beginning of the 1990s, the Dutch government embarked on an active policy of improving the quality of legislation and the lawmaking process. In the white paper entitled *Zicht op wetgeving*, the government laid down its plan for the further development and implementation of a general policy on legislation with a view to improving the quality of legislation in terms of constitutional government and proper administration.² This document deals with the shortcomings in legislation, mentions the criteria for government action via legislation and contains various action points in general legislative policy.

One of the fundamental criteria is the principle of subsidiarity. The interaction between government and society is - according to *Zicht op wetgeving* - very important, also in

¹ Philip Eijlander is Professor of Legislative Studies and Administrative Law at the Faculty of Law of Tilburg University.

² *Kamerstukken II*, 1990/1991, 22 008, nos. 1-2. See also the English version *Legislation in Perspective* (The Hague: Netherlands Ministry of Justice, 1991).

the preparation and the structure of the legislation. In Dutch legislative policy, therefore, there is much attention for the concepts of self-regulation and co-regulation. The document states: 'The legislator can sometimes suffice with providing a framework and checking the outcome afterward. It is necessary to strike a proper balance between government regulation, as an expression of government responsibility, and self-regulation by the people and by social organisations within this framework: *legally structured and conditioned self-regulation*.'³

In 2003, the Interinstitutional Agreement on better law-making was published.⁴ This agreement concluded by the European Parliament, the Council and the European Commission aims to improve the quality of regulations in the European Union. Like the Dutch white paper *Zicht op wetgeving*, this European agreement on better law-making pays attention to alternative forms of regulation, such as self-regulation and co-regulation.

The main question addressed in this article is: What can we learn from the experiences in the Netherlands in connection with the European policy on improving the quality of legislation and the use of self-regulation? Can we compare European legislative policy with a national policy on this issue? First, I will go into the concept of self-regulation (section 2). Next, the motives and forms of self-regulation will be analysed and the situation in the Netherlands will be compared with the use of self-regulation in the European Union (section 3). In section 4, I will discuss the proposals of the better law-making programme. Finally, I will present some conclusions on the possibilities for and the constraints on the use of self-regulation in legislative policy (section 5).

2. The concept of self-regulation

Self-regulation can be seen as an alternative to so-called command-and-control regulation. The essence of command-and-control regulation is the exercise of influence by imposing standards backed by sanctions.⁵ The assumption that government can exercise influence and control over the behaviour of citizens and companies merely by setting up central rules and regulations is based on an overestimation of the position of government in our complex information society. Therefore, in legislative policy it is recognised that the responsibility of authorities does not imply per se that government bodies must always make all the rules and see to their implementation. More often than not it will be sufficient for the legislature to provide a framework for self-regulation by social organisations.

Self-regulation in its pure form can be defined as regulation by organisations or associations in a field of society; not only do they create the rules, but they also monitor compliance with these rules and enforce them against their own members. Thus, we can state three essential characteristics of self-regulation:

- It concerns the regulation and ordering of behaviour in a certain group of society.

³ *Legislation in Perspective*, p. 22.

⁴ OJ 2003, C 321/01.

⁵ See Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford: Oxford University Press, 1999), p. 35.

- It consists in rules which have been laid down for and work within the group.
- These rules can be enforced against the group members.

An example of self-regulation in this sense are the codes of conduct in groups of professionals which can be enforced by an association, for example in the fields of health care and insurances.

Self-regulation differs from related concepts such as deregulation and co-regulation in various ways. Deregulation means that the central rules from government are minimised, which results in more alternatives for citizens and enterprises. This does not need to result in the group or sector itself drawing up extra rules.

An essential aspect of co-regulation is the cooperation between the public and the private actors in the process of creating new rules. This fits into the concept of the network society, in which it is necessary to gather one's strength, also in the field of regulation. This cooperation in the field of regulation may, however, result in various forms, such as agreements, conventions and even regular legislation. In the last case, this government regulation is the result of a process of negotiating between the public and the private parties involved.

3. Motives for and types of self-regulation

Self-regulation is not necessarily related to public regulation; self-regulation may also be an alternative to legislation. In the latter case, public regulation is appropriate because of the expectation that with certain forms of self-regulation the same or better results can be achieved. However, self-regulation may also come into being without any threat of public regulation. In a particular sector or branch, the need for 'group rules' may arise in the interest of the group itself, such as the image of the group or for the sake of the clients' trust in the quality of the products or the service.

An Australian report on self-regulation in industry and business mentions the following motives for self-regulation:

- to raise industry standards;
- to use it as a marketing tool;
- to enhance the level of information;
- to avoid government regulation;
- to meet legislative requirements;
- a combination of the above factors.⁶

An essential aspect is the distinction between private and public motives for the use of self-regulation and the possible relation between these sorts of motives. In the field of economics, the public-interest and the private-interest approaches in regulation theory are well-known.⁷ The public-interest approach focuses on the regulation of markets to increase social welfare,

⁶ See <http://www.selfregulation.gov.au/Publications> (accessed July 2003).

⁷ See J.A.H. Maks, M. Faure and N. Philipsen, 'Zelfreguleren, marktwerking en mededinging', available through <http://www.minez.nl>.

while the private-interest approach is concerned with the study of the position of interest groups in the process of regulation. An element in the latter approach is the concern that the relationships between the regulators and the regulated may become too close and thus lead to *capture* - the pursuit of the regulated enterprises' interests rather than those of the public at large. A number of versions of the capture theory have been put forward.⁸

In practice, it is a challenge to make the connection between the private motives for the use of self-regulation and the public interests that are or can be at issue. In relation to this, we introduce the following three categories of self-regulation: free or pure self-regulation, substitute or alternative self-regulation and conditioned self-regulation.⁹ In the situation of pure self-regulation, the initiative is fully with the private parties in the relevant field; government is not involved and accepts the result as long as it is not against certain general rules such as those on fair competition. The substitute type of self-regulation concerns the situation in which the initiative is on the side of the private actors, but government watches the process in order to safeguard the public interest that may be at stake. This may be the case in the field of consumers rights. Conditioned self-regulation means that public and private rules are intertwined. Here, self-regulation is subject to a type of government structuring or oversight. Baldwin and Cave (1999) mention the following advantages of this conditioned or enforced self-regulation as compared to traditional command-and-control regulation:

- the high level of commitment of firms and associations to 'their own' rules;
- well-informed rule-making;
- low costs to government;
- a close fit between regulation and the standards firms accept as realistically attainable;
- greater effectiveness in detecting violations and in securing convictions where prosecution is necessary;
- the greater comprehensiveness of rules;
- the potential of self-regulatory rules for rapid adjustment to changing circumstances;
- more effective complaints procedures.¹⁰

On the other hand, there is also concern about the use of conditioned self-regulation:

- The costs to the public purse of approving self-regulatory rules may be considerable.
- The rules written by self-regulators may prove self-serving and may not be immune from the problems afflicting in command and control regimes.
- The procedures employed to produce rules may be subject to the objection that they lack openness, transparency, accountability and acceptability to the public and to consumers of services.
- Compliance units within firms may not always retain their independence and the public may not trust self-regulatory bodies to apply the rules in the public or consumer interest.
- Where self-regulatory regimes contain powers to make and enforce rules and to sanction transgressors, difficult doctrinal questions may arise as to their broader subjection to the principles of

⁸ See, e.g., B. Mitnick, *The Political Economy of Regulation: Creating, Designing, and Removing Regulatory Forms* (New York/Guildford: Columbia University Press, 1980).

⁹ Introduced by A. Geelhoed, 'Deregulering, herregulering en zelfregulering', in P. Eijlander, P.C. Gilhuis and J.A.F. Peters (eds.), *Overheid en zelfregulering. Alibi voor vrijblijvendheid of prikkel tot aktie?* (Zwolle: W.E.J. Tjeenk Willink, 1993), pp. 33-52.

¹⁰ Baldwin and Cave (1999), pp. 40 f.

administrative law.

- The public may demand that the government take responsibility for a sector or an issue.

Conditioned self-regulation can be functional in situations where combinations of regulatory strategies are employed.¹¹ An example in Dutch legislation concerns the regulation of the quality of health-care institutes and services. The *Kwaliteitswet zorginstellingen* (Care Institutions (Quality) Act) provides a general frame for the regulation of this field, and within this frame it is up to the actors in the sector to give interpretation to the general rules. In the last resort, the public *Inspectie voor de Gezondheidszorg* (Health-Care Inspectorate) monitors the acts of the institutes and personal services.¹²

Also in other sectors of public service in the Netherlands this type of self-regulation is and can be used;¹³ here, the differences between the public interest and the standards of the professionals in the field do not differ greatly.

4. Better regulation

During the last decade, more attention has been paid to improving the quality of European legislation within the framework of European governance. Since the Lisbon European Council in particular, good European legislation - which is mindful of the principles of subsidiarity and proportionality - has been perceived as an issue; see, for example, the Action plan 'Simplifying and improving the regulatory environment'.¹⁴ In this plan, the Commission mentions self-regulation as one of the appropriate legislative instruments. According to the Commission, self-regulation concerns a large number of practices, common rules, codes of conduct and voluntary agreements which economic actors, social players, NGOs and organised groups establish on a voluntary basis in order to regulate and organise their activities.¹⁵

Co-regulation enables actors to ensure that the objectives defined by the legislature can be achieved in the context of measures carried out by parties recognised within the field of regulation concerned. The Action plan provides a framework for the use of co-regulation:

- Co-regulation can be used on the basis of a legislative act.
- The co-regulation mechanism must be in the interest of the general public.
- The legislature establishes the essential aspects of the regulation.
- The legislature determines to what extent defining and implementing the measures can be left to the parties concerned.

¹¹ Ibid., p. 41.

¹² See P. Eijlander, 'Zelfregulering en wetgevingsbeleid', in Eijlander, Gilhuis and Peters (1993), pp. 129-140.

¹³ See P. Eijlander and R.G. Lauwerier, 'Regulering van het bestuur van de maatschappelijke dienstverlening. Eenheid in verscheidenheid?', <http://www.wrr.nl/publicatieinformatie.php?publicatieid=465>.

¹⁴ COM(2002) 278 final.

¹⁵ Ibid., p. 11.

- In cases where using the co-regulation mechanism has not produced the expected rules, the right is reserved to make a traditional legislative proposal.
- The principle of transparency of legislation applies to the co-regulation mechanism. Sectoral agreements and modalities for implementation must be made public.
- The parties concerned must be considered to be representative, organised and responsible.

In the report of the Working Group ‘Better Regulation’,¹⁶ the idea and approach of co-regulation is further developed. An essential aspect is the policy mix at the level of the European Union.

Co-regulation is an approach in which a mixture of instruments is brought to bear on a specific problem, typically involving both primary legislation and self-regulation or, if not self-regulation, at least some form of direct participation of bodies representing civil society in the rule-making process.¹⁷ It aims at combining the advantages of the predictability and binding nature of legislation on the one hand and the more flexible self-regulatory approach on the other. Co-regulation thus involves self-regulation and regulation working together, mutually reinforcing each other.¹⁸

The report mentions the so-called ‘New Approach’ regulation in the area of the free movement of goods as one of the best examples of co-regulation at EU level. The essential requirements are defined by law, while the stakeholders are invited to elaborate the technical, harmonised standards, which provides a ‘presumption of conformity’. The self-regulatory process is used in a well-defined manner in support of public law.

The report concludes that co-regulation requires two practical steps. The first implies increased use of framework legislation to lay down basic rights and obligations, but also the arrangements for secondary legislation and self-regulation to fill in the details. The second step is to ensure that self-regulation commitments, although voluntary, are binding once made.

In the aforementioned Interinstitutional Agreement on better law-making of 2003, the general framework and conditions for the use of self-regulation and co-regulation within the EU are elaborated. In this Agreement, self-regulation is defined as:

... the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements (point 22).

Point 18 of the Agreement defines co-regulation as:

... the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations).

¹⁶ White Paper on European Governance, Work Area no. 2, Handling the Process of Producing and Implementing Community Rules, Group 2c, May 2001.

¹⁷ Ibid., p. 6.

¹⁸ Ibid., p. 9.

The Agreement not only defines the concepts of self-regulation and co-regulation, but also provides the general rules and conditions for the use of these mechanisms (point 17):

The Commission will ensure that any use of co-regulation or self-regulation is always consistent with Community law and that it meets the criteria of transparency (in particular the publicising of agreements) and representativeness of the parties involved. It must also represent added value for the general interest. These mechanisms will not be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States. They must ensure swift and flexible regulation which does not affect the principles of competition or the unity of the internal market.

Also, some forms of control of the use of self-regulation and co-regulation are introduced. For example, the Commission is to forward draft voluntary agreements to the legislative authority, which it will have checked as to their compliance with Community law. In the case of self-regulation, the Commission must scrutinise whether the result of self-regulation complies with the provisions of the EC Treaty and it will also notify the European Parliament and the Council as to whether it regards the use to be compatible with the general criteria of representativeness and added value.

The conclusion can be drawn that the Interinstitutional Agreement on better law-making not only introduces the concepts of self-regulation en co-regulation into the EU, but also provides a normative framework for the use of these types of regulation.

5. Concluding remarks

What should be the conclusion of this analysis of the use of self-regulation and co-regulation in a national context and in the legal system of the European Union? First, we may conclude that the meaning of the concept of co-regulation in the Dutch national context differs from that in the European context. Co-regulation within the EU means that the framework of the rules is laid down in legislative acts of the European Union. Co-regulation is an implementing mechanism of these general rules. In fact, this is what we call 'conditioned self-regulation' at the national level. In the case of co-regulation, the central legislature determines what implementing measures can be left to the parties in the field or sector.

The comparison between the use of self-regulation and co-regulation at the national level on the one hand and the European level on the other is not very easy because of the different functions of national and European legislation. On a national scale, one of the traditional, essential functions of legislation is to achieve uniformity and equality under the law. The general rule in legislation is the starting point and creating the possibility for special rules in the field or sector is the exception.

The function of general rules in the European Union is not the same. The European Union exists thanks to its diversity. The problem of the quality of the legislation in the European Union is not a problem of uniformity, but of handling diversity in a well-considered

legal way.¹⁹

When we take this fundamental difference in function between national and European rules into consideration, it is not surprising that the use of self-regulation and co-regulation is also different. The use of co-regulation as it is described in the Interinstitutional Agreement is nearly inevitable in order to handle the dilemma of uniformity in diversity. The essential function of European legislative acts is to restrict and regulate the realisation of specific rules in the Member States. In other words, convergence is pursued rather than uniformity. It is the ordering of the goods made-to-measure and the central issue is how far we can go in limiting the diversity of rules at a lower level. In different areas of policy, we see that the traditional legislative instruments of the Community, regulations and directives, are replaced by non-binding standards and benchmarking, within the framework of so-called new methods of governance.²⁰

At the end of this article, I wish to raise the question what this conclusion means for the methodology of law research in the field of European law and legislative studies. What does it mean that in European governance convergence is pursued rather than uniformity? Van Gerven argued that what we need in this field of law research is a paradigmatic shift from a top-down to a bottom-up approach. He stated that focusing on legislation, rule-making and codification in the European context is not the right way. According to him, it is better to focus on the historic, cultural, political and legal roots in society and work together in research with social scientists.²¹

If that is so, we will have to conclude that the lessons to be learned for the European Union from the experiences in Dutch legislative policy on self-regulation are limited. Governance of the European Union differs fundamentally from that of a national state. Co-regulation within the European Union is not exceptional and alternative, but primary and general starting point in rule-making. Within the European Union the function of rule-making is to arrive at some uniformity within the diversity of the laws of the Member States.

¹⁹ Cf. the contribution of J.P.H. Donner, 'Kwaliteit van de Europese regels. Een voorbeschouwing', in *Kwaliteit van de Europese regels. Bijdragen aan het symposium 'De kwaliteit van de Europese regels in de praktijk van wetgeving, bestuur en rechtspraak'* (Den Haag: Raad van State, 2001), pp. 11 ff. and A.E. Kellerman et al. (eds.), *Improving the Quality of Legislation in Europe* (The Hague/Boston/London: Kluwer Law International, 1998).

²⁰ Cf. the paper presented by Walter van Gerven at the Saro Congress 2004, entitled 'Changing Methodologies under the Influence of Europeanisation and Internationalisation' (on file with the author) as well as Linda Senden's article 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?' in this special issue of EJCL.

²¹ Van Gerven (2004).